

Trump Administration Moves to Restrict Bulk-Power Systems from “Foreign Adversaries”

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On May 1, 2020, the White House issued an executive order that could result in restrictions on transactions involving non-U.S. bulk-power system electric equipment. The order raises more questions than it answers, but could potentially have significant impacts on utilities and the power and renewables industries. Ultimately, the impact of the order will depend on rules to be promulgated by the U.S. Department of Energy (“DOE”) – which could look to last year’s executive order on information and communications technology and services, and related rules promulgated by the Department of Commerce (“DOC”), as a guide.

Background

The [Executive Order on Securing the United States Bulk-Power System](#) (“Executive Order”) requires that by September 28, 2020 (150 days) DOE publish rules to prohibit any “acquisition, importation, transfer, or installation,” by a U.S. person or within the United States, of any “bulk-power system electric equipment” with a certain nexus to a “foreign adversary” that poses, e.g., an “unacceptable risk to the national security of the United States.” Though this initiative’s outcome is uncertain, given the Trump administration’s focus on countering cyber risks, it would appear aimed principally at China and Russia and companies tied to those countries.

What Qualifies as a Transaction

A “transaction” can be “any acquisition, importation, transfer, or installation” of bulk-power system electric equipment that is “initiated” after May 1. However, that does not necessarily mean that all activities associated with a contract formalized prior to May 1 could not also be affected by the restrictions. Ongoing or future activities associated with the contract, such as managed services, software updates or repairs, etc., could be viewed as new or separate transactions occurring after the Executive Order’s effective date.

What Constitutes Bulk-Power System Electric Equipment

“Bulk-power system” is defined as:

(i) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (ii) electric energy from generation facilities needed to maintain transmission reliability.

The definition includes transmission lines rated at 69,000 volts (69 kV or more), but does not include facilities used in the local distribution of energy.

“Bulk-power system electric equipment” is defined as:

items used in bulk-power system substations, control rooms, or power generating stations, including reactors, capacitors, substation transformers, current coupling capacitors, large generators, backup generators, substation voltage regulators, shunt capacitor equipment, automatic circuit reclosers, instrument transformers, coupling capacity voltage transformers, protective relaying, metering equipment, high voltage circuit breakers, generation turbines, industrial control systems, distributed control systems, and safety instrumented systems.

The Executive Order provides that items not included in the preceding list and that have broader application of use beyond the bulk-power system are outside the scope of the Executive Order.

Who Is a Foreign Adversary

The Executive Order restricts such transactions of such equipment “designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of” a “foreign adversary.” A “foreign adversary” could be

either a specific individual, a particular company or an entire country, any of which DOE may designate. It is defined as:

any foreign government or foreign non-government person engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or its allies or the security and safety of United States persons.

Though the Executive Order did not actually identify any foreign adversary, a recent [Director of National Intelligence Report](#) identified China and Russia, as well as Iran and North Korea (though they are already subject to comprehensive U.S. sanctions), as the countries currently engaging in activity to undermine U.S. critical infrastructure, indicating where DOE may focus its attention.

What Is Considered an Unacceptable Risk to U.S. National Security

The Executive Order focuses on situations where a transaction “poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of the bulk-power system in the United States,” or “poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the economy of the United States.” However, by also authorizing a transaction be restricted if it “otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons,” the Executive Order confers on DOE wide discretion.

A Possible Case-by-Case Approach

The Executive Order provides that DOE will adopt rules and regulations, e.g., “to establish procedures to license transactions” and “identify a mechanism and relevant factors for the negotiation of agreements to mitigate concerns.” DOE could end up devising a list of pre-qualified vendors or equipment, or that identifies parties, countries, equipment or transactions that meet the Executive Order’s criteria. It could also undertake a transaction-specific approach.

Doing so would follow what the Trump administration has proposed in a similar action one year ago: the [May 15, 2019, Executive Order on Information and Communications](#)

[Technology and Services](#). Pursuant to that Executive Order, the DOC issued [proposed rules](#) providing that DOC would notify parties it is reviewing a transaction and has questions or concerns. The parties could then seek to dispute, clarify or mitigate before DOC decides to unwind or reject the transaction, or approve it in whole or in part with or without requiring mitigation measures. Under the approach proposed by DOC, which itself is not finalized, there is no mechanism for parties to seek to obtain pre-clearance for a transaction in advance.

Details on the approach DOE may decide to take will become available in the coming months.

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