

Alerts & Publications



President Trump Issues Executive Order on Securing the United States Bulk-Power System

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President Trump has issued an [Executive Order](#) imposing national security-driven restrictions on the foreign supply of electric equipment for US bulk-power systems. The Executive Order on Securing the United States Bulk-Power System (“Executive Order”), issued on May 1, 2020, follows a series of recent actions by the Trump Administration to protect US critical infrastructure described in our prior alerts, including the establishment of the [Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector](#), the creation of a national security review process for the information and communications technology supply chain, and the implementation of the Foreign Investment Risk Review Modernization Act’s (“FIRRMA”) expanded focus on investments in critical infrastructure.

The Executive Order empowers the Secretary of Energy, in coordination with other government officials, to prohibit transactions initiated after May 1, 2020 related to any bulk-power system electric equipment involving a foreign adversary where he determines the transaction poses an undue risk of sabotage or subversion of the bulk-power system, catastrophic effects to US critical infrastructure, or US national security.

The Secretary of Energy did not immediately identify any transactions that meet the criteria of the Executive Order, and he has until September 28, 2020 to issue implementing rules or regulations. However, as the Secretary of Energy could exercise the authority of the Executive Order at any time, companies in the electric energy sector, including those in the renewable energy space, should assess their needs for foreign bulk-power equipment to evaluate their potential exposure to any actions taken pursuant to the Executive Order.

Bulk-Power Systems and Equipment

“Bulk-power systems” are defined in the Executive Order 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 system reliability.” The definition of bulk-power systems “includes transmission lines rated at 69,000 volts (69 kV) or more, but does not include facilities used in the local distribution of electric energy.” This definition tracks the definition of “bulk-power systems” in the Federal Power Act (16 U.S.C. § 824o) except that the Federal Power Act does not include the 69 kV jurisdictional threshold.

“Bulk-power system electric equipment” is defined as “items used in bulk-power system substations, control rooms, or power generating stations” and includes a comprehensive list of the types of equipment that may be covered, 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.

Based on this scope, the Executive Order could affect electric utility companies constructing new (or replacing existing) high-voltage electric transmission facilities, such as transformers, with imported equipment. It also could affect companies constructing (or replacing existing) electric generating facilities, if the facilities will be interconnected at a transmission-level voltage and are large enough to meet the standard of being “needed to maintain transmission system reliability” (the definition of bulk electric system adopted by the North American Electric Reliability Corporation may provide useful guidance on the size threshold pending issuance of regulations by the Secretary of Energy).

Agency Actions Required by the Executive Order

The Executive Order applies to “any acquisition, importation, transfer, or installation of any bulk-power system electric equipment,” and empowers the Secretary of Energy, in coordination with other government officials, to prohibit transactions initiated after May 1, 2020 of any bulk-power system electric equipment where he determines that:

1. The transaction involves bulk-power system electric equipment designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and
2. The transaction:
 - A. 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;
 - B. Poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the economy of the United States; or
 - C. Otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.

In addition, the Executive Order authorizes the Secretary of Energy to establish “criteria for recognizing particular equipment and particular vendors in the bulk-power system electric equipment market as pre-qualified for future transactions” and to publish a list of pre-qualified equipment and vendors.

The Executive Order directs the Secretary of Energy to issue implementing rules or regulations within 150 days of issuance—September 28, 2020. The rules or regulations may articulate the particular countries or persons that are foreign adversaries, identify particular equipment or countries warranting particular scrutiny, establish procedures to license transactions, and identify a mechanism to negotiate agreements to mitigate national security concerns. The Secretary of Energy could also issue guidance or even take action to block a transaction in advance of the 150-day requirement.

Finally, the Executive Order creates a Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security to “protect the Nation from national security threats through the coordination of Federal Government procurement of energy infrastructure and the sharing of risk information and risk management practices to inform such procurement.” Among other duties, the Task Force will—in consultation with the Electricity Subsector Coordinating Council and the Oil and Natural Gas Subsector Coordinating Council—recommend a consistent set of energy infrastructure procurement policies and procedures for federal agencies; evaluate methods and criteria used to incorporate national security considerations into energy security and cybersecurity policymaking; and conduct any other studies or provide other recommendations as appropriate.

The Task Force must submit a report to the President with a summary of its progress, findings, and recommendations by May 1, 2021, and provide subsequent reports annually for as long as it exists.

Parallel Measures to Protect US Critical Infrastructure

The Executive Order follows a series of recent actions by the Trump Administration to protect US critical infrastructure. The authorities and criteria in the Executive Order are substantially similar to those of the May 15, 2019 Executive Order on Securing the Information and Communications Technology and Services Supply Chain (“Supply Chain Executive Order”). Both leverage the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*) to potentially prohibit transactions that meet similar criteria, including that the technology or equipment in question be “designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary.”

This foreign adversary concept is extraordinarily broad, encompassing more than just equipment provided by a foreign supplier. To date the Department of Commerce, which is responsible for issuing implementing the Supply Chain Executive Order, has not identified any foreign adversaries or further refined the scope of “foreign adversary.”

While it is possible that subsequent definitions of “foreign adversary” could be consistent across the two regimes, it is notable that the Executive Order empowers the Secretary of Energy to issue rules and regulations determining that “particular countries or persons are foreign adversaries *exclusively* for the

purposes of this order.” (Emphasis added). The telecommunications and energy sectors have different vulnerabilities and face different threats from foreign actors, which may result in different foreign adversary determinations and disparate actions under the two orders.

The Executive Order was followed by another national security-focused action relating to the power industry. On May 4, 2020, the Commerce Department announced the [initiation of an investigation](#) under Section 232 of the Trade Expansion Act into the import of electrical steel components of power transformers and related goods. The announcement noted that “[a]n assured domestic supply of these products enables the United States to respond to large power disruptions affecting civilian populations, critical infrastructure, and US defense industrial production capabilities.”

Separate from the acquisition of electric equipment and components, in connection with its issuance of regulations implementing FIRRMA, the Trump Administration expanded the jurisdiction of the Committee on Foreign Investment in the United States (“CFIUS”) to certain investments in bulk-power systems. US companies that own or operate systems for the generation, transmission, distribution, or storage of electric energy comprising the bulk-power system fall within the scope of “critical infrastructure” in the CFIUS regulations. As a result, certain minority foreign investments in such US companies are subject to CFIUS review and potentially a mandatory filing requirement.

Conclusion

The Executive Order is the most recent example of the Trump Administration taking significant and potentially sweeping actions to address perceived foreign threats to critical infrastructure and other systems and technology upon which Americans rely. As with other executive actions, the scope of the Executive Order is expansive, and its terms allow for a wide-range of potential actions. Whether this authority is used aggressively or results in the creation of a new security review process for the energy sector remains to be seen, but it is another example of the Trump Administration’s willingness to take aggressive national security actions that could have a significant impact on cross-border business.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Steve Bunnell, an O’Melveny partner licensed to practice law in the District of Columbia, Greta Lichtenbaum, an O’Melveny partner licensed to practice law in the District of Columbia, Lisa Monaco, an O’Melveny partner licensed to practice law in the District of Columbia and New York, Hugh E. Hilliard, an O’Melveny senior counsel licensed to practice law in the District of Columbia and Maryland, John Dermody, an O’Melveny



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