

Alert | Energy & Natural Resources



May 2020

Presidential Executive Order on U.S. Bulk Power System Equipment from ‘Foreign Adversaries’

On May 1, 2020, President Trump issued an **Executive Order** (EO) declaring a national emergency due to “foreign adversaries” that are “creating and exploiting vulnerabilities” in the U.S. bulk-power system (BPS). The EO prohibits “transactions initiated after May 1, 2020” for BPS electric equipment with voltages 69 kilovolt and above if the transaction would pose an undue risk to U.S. national security, grid security, and resiliency, or the economy. A “transaction” includes “any acquisition, importation, transfer, or installation” of BPS equipment. Because the EO focuses on “transactions” for “equipment,” it also applies to components within equipment, giving it a broad reach.

While not defined by the EO, prior designations of “foreign adversaries” suggest that China and Russia would make the list. Also left to be determined by the Secretary of Energy is whether transactions with a “foreign adversary” “or a national thereof” (and “including through an interest in a contract for the provision of the equipment”) would pose an undue risk of BPS “sabotage,” “subversion,” or “catastrophic effects.”

To that end, the EO directs the Secretary of Energy to coordinate with the Director of the Office of Management and Budget, the Secretary of Defense, the Secretary of Homeland Security, the Director of National Intelligence, and the heads of other executive departments and agencies “as appropriate” in making decisions as to whether a transaction should be prohibited or not.

What is “initiation” of a prohibited transaction after May 1 is also left undefined, raising questions of how the Secretary of Energy would approach the EO’s directive to take action on “the cessation of pending and future transactions” that are prohibited, including the EO’s application of the prohibition to transactions “notwithstanding any contract entered into or any license or permit granted prior to the date of this order.”

Furthermore, the EO also directs the Secretary of Energy to consult with Secretary of Defense, the Secretary of the Interior, the Secretary of Homeland Security, the Director of National Intelligence, the Board of Directors of the Tennessee Valley Authority, and the heads of other agencies in developing and publishing rules by Sept. 28, 2020, to identify BPS equipment “designed, developed, manufactured, or supplied” by foreign adversaries or their agents and to “develop recommendations on ways to identify, isolate, monitor, or replace such items as soon as practicable[.]” The latter provision suggests that existing equipment may ultimately require mitigation or even removal and replacement.

Though the full extent of the EO’s effect is not yet clear, those in the electric generation, electric transmission, and manufacturing sectors that supply BPS equipment containing foreign components may need to scrutinize their supply chains to establish the provenance of equipment and corporate parentage and identity of suppliers. Cabinet-level and other relevant agencies (including FERC and NERC, whose existing rules may conflict with the ultimate rules issued by the Secretary of Energy and other agencies) are beginning coordination on implementing the EO’s directives, including drafting rules.

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* Special thanks to Pablo Ortiz Mena for his valuable assistance in preparing this GT Alert.

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