

Trump administration issues Executive Order imposing broad new restrictions on foreign supply of equipment for the U.S. bulk-power system

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On 1 May 2020 President Trump issued an "[Executive Order on Securing the United States Bulk-Power System](#)" (the Bulk-Power System EO), which establishes a framework for imposing broad new restrictions on the acquisition, importation, transfer, or installation of bulk-power system equipment from foreign adversaries. While certain key terms and criteria are undefined in the Bulk-Power System EO, the U.S. Department of Energy (DOE) has been tasked with implementing the Bulk-Power System EO and will publish draft regulations in the coming months. The Bulk-Power System EO bears similarities to the 2019 [Executive Order on "Securing the Information and Communication Technology and Services Supply Chain"](#) (the ICTS EO), which imposed similar restrictions on the acquisition, importation, transfer, or installation of foreign-supplied information technology and telecommunications equipment.

The Bulk-Power System EO invokes the International Emergency Economic Powers Act to find that the "unrestricted foreign supply of bulk-power system electrical equipment" is a threat to U.S. national security and declares this threat to be a national emergency pursuant to the National Emergencies Act. While the text of the Bulk-Power System EO makes clear that certain transactions related to bulk power systems will be prohibited or mitigated, it does not provide much detail as to what inputs and transactions will be covered in its final scope. Rather, it requires DOE and other executive agencies to draft and publish implementing regulations within 150 days (i.e., by 28 September 2020).

Notably, while the term "foreign adversary" is defined in the Bulk-Power System EO, no specific countries or entities have been identified to date. Much like the ICTS EO, this issue will likely be addressed as part of a future rule-making. Similarly, the Bulk-Power Systems EO requires DOE to promulgate regulations establishing procedures to license transactions, as well as a mechanism for the negotiation of agreements to mitigate concerns raised in connection with this EO.

Covered transactions

Broadly speaking, the Bulk-Power System EO prohibits federal agencies and U.S. persons from acquiring, importing, transferring, or installing bulk power system equipment in which any foreign country or foreign national has any interest, including through an interest in a contract for the provision of equipment, where the transaction was initiated after 1 May 2020, and where the transaction meets the following criteria:

- i. The transaction involves bulk-power system electric equipment designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction of a foreign adversary, and
- ii. 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 U.S. critical infrastructure or the U.S. economy; or
 - c) Otherwise poses an unacceptable risk to the national security of the United States or the security and safety of U.S. persons.

Notably, the scope of the Bulk-Power System EO appears to be narrower than that of the ICTS EO in one key respect – while the ICTS EO explicitly applies to any transaction that "was initiated, is pending, or will be completed" as of the date of the ICTS EO, the Bulk-Power System EO's restrictions appear to only apply to transactions initiated after the date of the Bulk-Power System EO. However, without further guidance from DOE, it is not clear what constitutes an "initiated" transaction and whether DOE will provide a grace period for companies between now and when it issues implementing regulations.

In addition, section 1(d) of the Bulk-Power System EO specifies that DOE may establish and publish criteria for recognizing particular equipment and particular vendors in the bulk-power system electric equipment market as prequalified for future transactions; and may apply these criteria to establish and publish a list of prequalified equipment and vendors. However, this section also does not limit DOE's authority to prohibit or otherwise regulate any transaction involving prequalified equipment or vendors. This language was not included in the ICTS EO and appears to address certain industry concerns raised in [numerous public comments](#) to the ICTS EO rule-making.

Bulk-power systems

The Bulk-Power System EO requires DOE to, as soon as practicable, identify bulk-power system electric equipment designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction of a foreign adversary, and that pose the kinds of risks discussed above. DOE is also required to develop recommendations on ways to identify, isolate, monitor, or replace such items as soon as practicable, taking into consideration overall risk to the bulk-power system.

The term "bulk-power system" is defined to include:

- i. Facilities and control system 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.

This definition includes transmission lines rated at 69,000 volts (69 kilo volts (kV)) or more, but does not include facilities used in the local distribution of electric energy. This definition is taken verbatim from Section 215 of the Federal Power Act (16 U.S.C. § 824o). That section authorizes the Federal Energy Regulatory Commission (FERC) to regulate the reliability of the bulk power system. FERC has implemented that authority by authorizing the North American Electric Corporation (NERC) to act as the Electric Reliability Organization to develop and enforce electric reliability requirements.

The term "bulk-power system electric equipment" is defined to include:

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.

Items not included in this list and that have broader application of use beyond the bulk-power system are outside the scope of the Bulk-Power System EO.

This definition does not prescribe which inputs are covered by the EO. However, NERC has developed [a definition of "bulk electric system,"](#) which includes inverter-based generation facilities and energy storage facilities if they meet certain minimum standards (20 mega volt amps (MVA) for generators or 75 MVA for aggregated dispersed resources (including storage resources), in either case connected to the grid at 100 kV or higher). DOE is not bound by this definition, but we expect DOE's draft regulations to take into account how NERC has chosen the specific facilities covered.

Conclusion

Companies, particularly utilities and those in the infrastructure sector, should consider the potential implications of the Bulk-Power System EO on their planned future activities and should also consider any topics they may want to address in comments to the forthcoming DOE rule-making.

If you have any questions, please contact the Hogan Lovells lawyers listed below.

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