

International Trade Alert

Akin Gump
STRAUSS HAUER & FELD LLP

President Trump Establishes Framework to Ban the Use of Foreign-Sourced Equipment in the U.S. Electric Grid

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Key Points

- On May 1, 2020, President Trump issued an Executive Order (E.O.) aimed at curtailing the use of foreign-sourced electric equipment installed on the U.S. “bulk-power system,” which is commonly understood to mean the U.S. interconnected electric grid. It authorizes the Secretary of Energy to block transactions involving certain bulk-power system electric equipment with a nexus to designated foreign adversaries.
- Though no countries are singled out by name in the E.O., the policy focus is understood to be primarily aimed at limiting opportunities for China to exploit known and growing vulnerabilities of the U.S. electric grid. Foreign adversaries are to be designated in forthcoming implementing regulations.
- The E.O. appears to contemplate establishment of a new pre-approval licensing regime, which may provide more certainty but would also increase regulatory burdens associated with transactions. The E.O. also authorizes the publication of a “white list” of pre-qualified equipment and vendors.
- The E.O. also instructs the Secretary of Energy to identify the risks associated with already-installed bulk-power system electric equipment and to develop recommendations for addressing those risks, including replacement of such items.

Executive Order

On May 1, 2020, President Trump issued an **Executive Order** (E.O.) entitled “Securing the United States Bulk-Power System” pursuant to his authority under the International Emergency Economic Powers Act (IEEPA), in which he determined that the unrestricted foreign supply of bulk-power system electric equipment constitutes an “unusual and extraordinary threat to the national security, foreign policy, and economy of the United States” and declared a national emergency with respect to the U.S. “bulk-power system.” In construction, the E.O. is similar to **Executive Order 13873: Securing the Information and Communications Technology and Services Supply Chain** (the “Supply Chain Executive Order”), released on May 15, 2019, which applied to

Contact Information

If you have any questions about this alert, please contact:

Christian C. Davis

Partner

chdavis@akingump.com

Washington, D.C.

+1 202.887.4529

Shiva Aminian

Partner

saminian@akingump.com

Los Angeles

+1 310.552.6476

George (Chip) Cannon Jr.

Partner

ccannon@akingump.com

Washington, D.C.

+1 202.887.4527

John J. Marciano III

Partner

jmarciano@akingump.com

Washington, D.C.

+1 202.887.4450

Daniel Phillip Sinaiko

Partner

dsinaiko@akingump.com

Los Angeles

+1 213.254.1211

Katherine P. Padgett

Counsel

kpadgett@akingump.com

Washington, D.C.

+1 202.887.4079

Scott Daniel Johnson

Counsel

sdjohnson@akingump.com

Washington, D.C.

+1 202.887.4218

transactions involving “information and communications technology or services” (see our previous [alert](#)). Both are aimed at addressing the risks associated with the vulnerabilities of critical infrastructure and opportunities for backdoor exploitation and disruption that hardware and equipment connected to that infrastructure present.

Summary of Key Provisions

The E.O. prohibits persons subject to U.S. jurisdiction from initiating any transactions after May 1, 2020 to acquire, import, transfer, or install certain “bulk-power system electric equipment” where the transaction involves “any property in which any foreign country or a national thereof has any interest” and where the Secretary of Energy, in consultation with other agencies, determines: (1) that the transaction involves bulk-power system electric equipment that was “designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction of a foreign adversary,” and (2) that the 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;
- Poses an undue risk of catastrophic effects on the security or resiliency of U.S. critical infrastructure or the economy of the United States;¹ or
- Otherwise poses an unacceptable risk to the national security of the United States or the security and safety of U.S. persons.

In addition, the E.O. authorizes the Secretary of Energy to negotiate mitigation measures as a precondition for approving prohibited transactions and to identify “pre-qualified” equipment and vendors for future transactions (i.e., a “white list”). The E.O. directs the Department of Energy (DOE) to publish implementing rules and regulations by September 28, 2020 (i.e., within 150 days of the date of the E.O.). The E.O. also instructs the Secretary of Energy to identify the risks associated with already-installed bulk-power system electric equipment and to develop recommendations for addressing those risks, including replacement of such items.

Finally, the E.O. establishes a Task Force to examine federal agencies’ energy infrastructure procurement policies and recommend changes to the Federal Acquisition Regulation (FAR). The Task Force will develop recommendations for energy infrastructure procurement policies for consideration by the FAR Council and to evaluate the incorporation of national security considerations into energy security and cybersecurity policymaking, among other responsibilities. Additionally, because “attacks on the bulk-power system can originate through the distribution system,” the E.O. instructs the Task Force to engage with distribution system industry groups.

Scope of the E.O. and Impact on Industry

What are the “bulk-power system” and “bulk-power system electric equipment”?

The E.O. defines “bulk-power system” 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 E.O. further notes that “this definition includes

Devin S. Sikes
Counsel
dsikes@akingump.com
Houston
+1 202.887.4336

Michael James Adame
Associate
madame@akingump.com
Washington, D.C.
+1 202.887.4079

Thor Petersen
Associate
tpetersen@akingump.com
Washington, D.C.
+1 202.887.4307

Cameron Peek
Associate
cpeek@akingump.com
Washington, D.C.
+1 202.887.4518

transmission lines rated at 69,000 volts (69 kV) or more, but does not include facilities used in the local distribution of electric energy.” In the electric energy sector, the bulk-power system is generally understood to refer to the U.S. interconnected electric grid, which includes generation and high-voltage transmission facilities, but excludes lower-voltage distribution facilities, the primary function of which is to deliver electricity to homes and businesses, and which are regulated at the state level.² Small-scale and “behind-the-meter” renewable energy generation projects are typically considered part of the distribution system and not the bulk-power system. Although it seems likely that the E.O. intended to adopt that general understanding by expressly excluding “facilities used in the local distribution of electric energy” from the definition of “bulk-power system,” it does not further explain what that carve-out means in practice. Similarly, although large-scale renewable resources are often considered part of the “bulk-power system,”³ the definition’s reference to “electric energy from generation facilities needed to maintain transmission system reliability” may call that conclusion into question.

The E.O. defines “bulk-power system electric equipment” 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 E.O. notes that “[i]tems not included in the preceding list and that have broader application of use beyond the bulk-power system are outside the scope of this order.” Excluded items could include, for example, solar photovoltaic panels and modules and/or inverters that are not “large generators,” which the E.O. does not define. Although the E.O. directs the implementing regulations to identify particular equipment and countries that will help in identifying those transactions warranting “particular scrutiny,” the ambiguity of what constitutes “bulk-power system electric equipment” leaves a lot of room for interpretation.

Who is a “foreign adversary”?

The policy motivation behind the E.O. is understood to be primarily aimed at limiting opportunities for China to exploit known and growing vulnerabilities in the U.S. electric grid. Specifically, the E.O. authorizes the Secretary of Energy to block transactions involving bulk-power system electric equipment that was “designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction of a foreign adversary.” Like the earlier Supply Chain Executive Order, however, this E.O., does not identify any specific country or person as a “foreign adversary,” defined as any foreign governments or persons “engaged in a long-term pattern or serious instances of conduct” adverse to U.S. national security, instead leaving that to the forthcoming DOE implementing regulations. The DOE⁴ and the intelligence community⁵ have previously identified China and Russia, among others, as threats actors who seek to target and exploit vulnerabilities in the U.S. electric grid. If China is identified as a “foreign adversary” for purposes of this E.O., it could impact any bulk-power system electric equipment manufactured in China or by any company owned or controlled by Chinese nationals regardless of where the equipment is manufactured.

Is pre-approval of relevant transactions required?

Certain provisions of the E.O. appear to contemplate a new licensing regime established through implementing regulations for transactions involving bulk-power system electric equipment manufactured in or connected with foreign adversaries, although it is not clear what form it would take. Specifically, section 2(b) of the E.O. authorizes DOE to use the implementing regulations to “establish procedures to license transactions otherwise prohibited” by the E.O. and to “identify a mechanism” for the negotiation of mitigation agreements. Section 1(b) of the E.O. authorizes the Secretary of Energy to negotiate mitigation measures, which “may serve as a precondition to the approval” of otherwise prohibited transactions. Those requirements are somewhat in tension with the fact that, technically, section 1(a) of the E.O. only purports to prohibit those transactions involving bulk-power system electric equipment that the Secretary of Energy has specifically determined are connected to an identified foreign adversary and that pose undue risks to the bulk-power system and U.S. national security. In other words, the determination standard of section 1(a) of the E.O. appears to call for a case-by-case review of transactions at the discretion of the Secretary of Energy, but elsewhere the E.O. appears to contemplate subjecting all possibly covered transactions to a comprehensive pre-approval scheme, including license requirements and a mechanism for negotiating mitigation agreements. It is not clear, therefore, whether industry should prepare itself for a new pre-screening mechanism or not. The implementing regulations will hopefully provide greater clarity on any specific framework for seeking clearance of transactions involving foreign bulk-power system electric equipment.

When does the E.O. take effect?

Although DOE is directed to issue the implementing regulations within 150 days after the E.O. is published, i.e., September 28, 2020, the E.O. purports to apply to any relevant transaction “initiated after the date of this order.” Accordingly, it is possible that the Secretary of Energy could begin blocking pending transactions prior to September 28, 2020. This is similar in construction to the Supply Chain Executive Order, which was released on May 15, 2019. While the proposed regulations implementing the E.O. were released on November 26, 2019, they were similarly applied retroactively to allow for review of transactions entered into since the date the Supply Chain Executive Order was released.

What Does This Action Mean for Business?

The E.O.’s authorization to block certain transactions and possibly establish a new licensing regime and/or pre-approval mechanism will create significant compliance challenges for companies involved in industries dealing with bulk-power system electric equipment. Implementation of the E.O., including potential disallowance of certain transactions, could result in delays or significant cost increases to obtain certain equipment included in the design of bulk-power system projects already under development, or an inability to obtain such equipment. It could also require redesigning projects in less advanced stages of development. The regulatory burden will be even more complex for cases that overlap with existing review processes such as the export control and CFIUS regimes by possibly adding another pre-approval screening requirement.

Based on the lack of clarity regarding the E.O.'s ultimate scope and impact on affected industries, companies that engage in any transactions involving possibly-impacted bulk-power system electric equipment should begin assessing the potential impact of this new regime with respect to current and planned transactions and consider engaging with DOE and other stakeholders as this regime develops further.

¹ "Resiliency" is a characteristic that is typically associated with nuclear and coal-fired electric generating facilities.

² The definition of "bulk-power system" in the E.O. generally tracks the definition in Section 215 of the Federal Power Act (FPA), added by the Energy Policy Act of 2005 ("EPAct 2005"), which gave the Federal Energy Regulatory Commission (FERC) the primary responsibility for ensuring the reliability of the "bulk-power system." Specifically, Section 215 defines "Bulk-Power System" as those "facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and . . . electric energy from generating facilities needed to maintain transmission system reliability." 16 U.S.C. § 824o(a)(1) (2012). The term does not include facilities used in the local distribution of electric energy. *Id.* FERC has not adopted a more granular, definitive definition of "bulk-power system," despite indicating that it might do so in a future proceeding and noting its "concern[] about the need to address the potential for gaps in coverage of facilities." *Mandatory Reliability Standards for the Bulk-Power Sys.*, Order No. 693, 118 FERC ¶ 61,218, at P 77, order on reh'g, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

³ Congressional Research Service, *Maintaining Electric Reliability with Wind and Solar Sources: Background and Issues for Congress* (June 10, 2019), <https://fas.org/sgp/crs/misc/R45764.pdf> ("Under the current regulatory framework, the federal government oversees reliability for the generation and transmission systems of the electric power sector. **These components comprise the bulk power system and include large-scale wind and solar sources.** [EPAct 2005] authorized [FERC and the North American Electric Reliability Corporation, as the U.S. national Electric Reliability Organization,] to develop and enforce mandatory reliability standards for the bulk power system. Small-scale wind and solar sources, such as rooftop solar photovoltaic (PV) panels, are connected to the distribution system which is localized and under state jurisdiction. Federal mandatory reliability standards do not apply to the distribution system.") (emphasis added).

⁴ <https://www.energy.gov/sites/prod/files/2017/01/f34/Cyber%20Threat%20and%20Vulnerability%20Analysis%20of%20the%20U.S.%20Electric%20Sector.pdf>.

⁵ <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf>.

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