

National Security: President Trump Signs Executive Order on Securing the United States Bulk-Power System

May 6, 2020

International Trade, Public Policy and Government Affairs

Summary

On May 1, President Donald Trump signed an executive order on “Securing the United States Bulk-Power System” (the “Order”) that gives the Department of Energy new authorities to block or mitigate certain transactions involving bulk-power system electric equipment designed, developed, manufactured or supplied by a “foreign adversary” based on national security risks posed by the transactions. This order marks the second Executive Order focused on addressing supply chain risks to critical assets. As we [reported](#) last May, the President issued an Executive Order on “Securing the Information and Communications Technology and Services Supply Chain” (the “ICTS Order”), which conferred wide-ranging authority on the Department of Commerce to block or mitigate certain transactions involving information and communications technology and services based on consideration of national security risk. The recent Order closely resembles the substance of the ICTS Order, and taken together the two Executive Orders mark a potential new era in executive branch regulation of private sector procurement and trade.

As discussed further below, the Order specifically declares a national emergency with respect to “the unrestricted foreign supply of bulk-power system electric equipment” and delegates authority under the International Emergency Economic Powers Act (“IEEPA”) to the Secretary of Energy to prohibit certain transactions posing a risk to U.S. national security.

The Order asserts that foreign adversaries are creating or exploiting “vulnerabilities in bulk-power system electric equipment, with potentially catastrophic effects” and, in turn, the Order asserts federal oversight over private utility purchases of certain equipment from suppliers deemed to be controlled or influenced by foreign adversaries. Although the Order does not name specific “foreign adversaries,” the Administration’s concerns about the cybersecurity threat posed by China and Russia are commonly known.

The Order adds to a growing list of actions by the U.S. government to address perceived national security risks pertaining to commercial transactions including: the ICTS Order and the Department of Commerce’s proposed rule implementing that order (discussed in our [client alert](#)); enactment of the Foreign Investment Review Modernization Act (“FIRRMA”) and its implementing regulations, which transformed the authorities of the Committee on Foreign Investment in the United States (“CFIUS”) (see our series of reporting on “[The New CFIUS](#)”); the Export Control Reform Act (“ECRA”), which created a formal interagency process to identify

emerging and foundational technologies “essential to the U.S. national security” warranting export control (see our previous [client alert](#)); and Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (FY19 NDAA) and the Department of Defense’s interim rule prohibiting the use by the U.S. government of certain telecommunications and video surveillance services or equipment (see our prior [reporting](#)).

Principal Elements of the Executive Order

The Order prohibits “any acquisition, importation, transfer, or installation” of any “bulk-power system electric equipment” by any person or with respect to any property subject to U.S. jurisdiction where the transaction:

- (1) “involves bulk-power 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) “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 United States critical infrastructure or the economy of the United States;” or “otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.”

The Order directs that these determinations are to be made by the Secretary of Energy in consultation with the heads of other agencies including the Secretary of Defense, Secretary of Homeland Security, Director of National Intelligence, and others.

The Order also gives the Secretary of Energy the authority to “establish and publish criteria for recognizing particular equipment and particular vendors in the bulk-power system electric equipment market as pre-qualified for future transactions,” and the Secretary may also “apply these criteria to establish and publish a list of pre-qualified equipment and vendors.” Importantly, the Order also grants the Secretary of Energy the authority and discretion to “design or negotiate measures to mitigate concerns” related to transactions covered by the Order. These mitigation measures may function as preconditions for parties to secure approval for a transaction or class of transactions. The Order also directs the Secretary of Energy, through the interagency consultation process, to identify prohibited equipment already in use within the bulk-power system and work with asset owners to identify, isolate, monitor, and replace this equipment, as appropriate.

The Order directs the Secretary of Energy to publish rules or regulations implementing the new authorities within 150 days. These rules and regulations may, among other things:

- (1) identify specific countries or persons as “foreign adversaries;”
- (2) identify certain persons “owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries;”
- (3) identify specific equipment or countries that “warrant particular scrutiny;”

- (4) “establish procedures to license transactions otherwise prohibited” by the Order; and
- (5) “identify a mechanism and relevant factors for the negotiation of agreements to mitigate concerns” under the Order.

Finally, the Order establishes a Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security (the “Task Force”), which will coordinate U.S. government procurement related to energy infrastructure and share “risk information and risk management practices to inform such procurement.” The Secretary of Energy (or his designee) will chair the Task Force, which will also be composed of the following individuals (or their designees): the Secretary of Defense; the Secretary of the Interior; the Secretary of Commerce; the Secretary of Homeland Security; the Director of National Intelligence; the Director of the Office of Management and Budget; and the head of any other agency, as designated by the Secretary of Energy in consultation with the Secretaries of Defense and the Interior. The Task Force will:

- develop energy infrastructure procurement policies and procedures for U.S. government agencies and submit those recommendations to the Federal Acquisition Regulatory Council (which must consider the Task Force’s recommendations with 180 days);
- evaluate the methods and criteria used to incorporate national security considerations into energy security and cybersecurity policymaking;
- consult with the Electricity Subsector Coordinating Council and the Oil and Natural Gas Subsector Coordinating Council in developing the Task Force’s recommendations and evaluations;
- engage with electric distribution system industry groups; and
- conduct any other appropriate studies and develop any other appropriate recommendations for submission to the President.

Implications and Next Steps

As with the Administration’s earlier ICTS Order, the scope of the authority conferred on the Department of Energy is potentially quite broad, and the implications of the Order will not be fully known until the Secretary of Energy issues implementing regulations and begins to use the authority. However, we note that certain aspects of the Order are encouraging, including the possibility that certain equipment or vendors may be “pre-qualified,” and that the Department of Energy may establish a licensing process that would authorize otherwise prohibited transactions.

Regardless of how the U.S. government implements the Order, it is significant in that the Order represents the first broad attempt by the U.S. government to regulate the entire U.S. supply chain for the bulk-power system. As the Energy Department adopts and applies regulations, it will take time for the U.S. government to determine how to conduct effective oversight and balance security concerns against the potential economic and trade-related effects of the Order.

We will be closely following the regulations development process, and will keep our clients updated.

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We hope that you find this report useful. Please do not hesitate to contact the following Covington attorneys and advisors if you would like to discuss any aspect of the foregoing in further detail:

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