Trump Administration Pursues Restrictions to Secure US Electricity Grid

May 11, 2020

Overview

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On Friday, May 1, President Trump issued Executive Order (EO) 13920, "Securing the United States Bulk-Power System." In EO 13920, the president declared a national emergency under the International Emergency Economic Powers Act (IEEPA) with respect to the threat posed to the US bulk-power system (BPS) by equipment liable to exploitation by "foreign adversaries." The EO directs the secretary of energy, in coordination and consultation with other heads of agencies, to impose restrictions on transactions involving bulk power system electric equipment that could raise national security concerns.

Overview

EO 13920 is intended to protect the US bulk-power system – the US national, interconnected electricity network – from potential foreign exploitation through cyber or other means. The EO explains that the "unrestricted acquisition or use in the United States of bulk-power system electric equipment designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the ability of foreign adversaries to create and exploit vulnerabilities in bulk-power system electric equipment."

To address such concerns, the EO introduces a variety of restrictions on “transactions” involving BPS electric equipment, which is defined 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.

Items not included in the preceding list and which have broader application beyond the BPS are expressly excluded from the scope of the EO.

Restrictions Under EO 13920

As of May 1, any “acquisition, importation, transfer, or installation” of BPS electric equipment – which the executive order refers to as a “transaction” – by any person or with respect to any property subject to US jurisdiction, where the transaction involves any property in which any foreign country or a national thereof has any interest (including through an interest in a contract for the provision of the equipment), may be prohibited by the secretary of energy in certain circumstances to address US national security concerns.
Specifically, such transactions will be prohibited if the secretary of energy, in coordination with the director of the Office of Management and Budget and in consultation with the secretaries of defense and homeland security and the director of national intelligence, concludes that the transaction involves BPS 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

(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; or
(b) Poses an undue risk of catastrophic effects on the security or resiliency of US 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 US persons.

Although the EO covers transactions initiated after May 1, its terms apply “notwithstanding any contract entered into or any license or permit granted prior to the date of the order” (emphasis added). This appears to suggest the EO could impact transactions for which contracts were executed before May 1.

The EO also directs the secretary of energy, as soon as practicable, to develop recommendations for identifying, isolating, monitoring, or replacing BPS electric equipment that fits the above-described bases for exclusion from the US BPS. According to a press release published by the Department of Energy, this authority will enable the department to “[i]dentify any now-prohibited equipment already in use, allowing the government to develop strategies and work with asset owners to identify, isolate, monitor, and replace this equipment as appropriate.”

Mitigation

EO 13920 authorizes the secretary of energy to “design or negotiate measures to mitigate concerns” raised by transactions which would otherwise be prohibited pursuant to the EO, and specifies that such measures may “serve as a precondition to the approval by the Secretary of a transaction or of a class of transactions.”

The EO additionally authorizes the secretary of energy 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.”

Implementing Regulations

EO 13920 broadly delegates implementation authority to the secretary of energy, who is required to publish rules and regulations to implement the EO within 150 days, or by September 28.

The EO expressly contemplates that the Department of Energy may issue rules and regulations to “determine that particular countries or persons are foreign adversaries,” “identify persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries,” and “identify particular equipment or countries with respect to which transactions involving bulk-power system electric equipment warrant particular scrutiny.”

EO 13920 is a novel use of the president’s IEEPA authorities, which are normally used to impose economic sanctions. It is unclear from the EO, or from any relevant precedent, how the Department of Energy will implement the EO. A recent similar use of the president’s IEEPA authorities with respect to US telecommunications infrastructure[1] provides little implementation guidance, as the implementing agency (the Department of Commerce) has issued only very general parameters for implementation in a Notice of Proposed Rulemaking.

Among the many questions that industry will likely raise with the Department of Energy regarding implementation are:
• What is the scope of “BPS electric equipment?”
• Will some transactions regarding BPS power equipment in the United States now require mandatory review by the Department of Energy, similar to a US export controls licensing review?
• Will the Department of Energy develop a “voluntary” process – similar to the process used by the Committee on Foreign Investment in the United States – for receiving pre-approval in the form of a safe harbor from subsequent review?
• Which nations will be on the department’s list of “foreign adversaries” to whom the EO Applies?
• Will the department create a “blacklist,” analogous to those maintained for US sanctions and export controls purposes, of parties with whom BPS power equipment transactions will be prohibited?
• Will the department develop a process for approving, or licensing, transactions that would otherwise be prohibited?
• Will the department establish de minimis thresholds, or identify types of BPS power equipment that do not raise national security concerns regardless of their source?
• What steps, short of dealing only with US suppliers or entirely US-manufactured products, can a US BPS company take to ensure that its transactions will not be prohibited?
• Will the department design “mitigation” measures on a transaction-by-transaction basis or on a more general basis, or will the scheme vary depending on the type of transaction?
• Will the department develop an enforcement regime with penalties for non-compliance?

The Department of Energy has provided little guidance thus far on how it intends to implement the EO, but it has set up an email address – BulkPowerSystemsEO@hq.doe.gov – to which stakeholders can send questions.

The Task Force

In addition to introducing restrictions on transactions involving BPS electric equipment, the EO establishes a Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security (the Task Force), charged with coordinating federal government procurement of energy infrastructure and sharing risk information and risk management practices concerning such procurement. The Task Force is to be comprised of the heads of a number of executive branch agencies, and will, among other things, “develop a recommended consistent set of energy infrastructure procurement policies and procedures for agencies…to ensure that national security considerations are fully integrated across the Federal Government.”

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Steptoe will continue to monitor this issue closely and provide further updates. For more information about the new EO’s impact, contact a member of Steptoe’s Energy, Export Controls, or International Trade teams.


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