

**MAY 7, 2020**

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Executive Order Restricts Foreign Supply to U.S. Bulk-Power System

Protecting the Energy Supply Chain from “Foreign Adversaries”

On May 1, 2020, President Donald J. Trump signed Executive Order 13920 declaring a national emergency regarding threats posed to the U.S. bulk-power system by electrical equipment supplied by “foreign adversaries.” (BPS EO) The President described the bulk-power system as providing “the electricity that supports our national defense, vital emergency services, critical infrastructure, economy, and way of life.” Energy Secretary Dan Brouillette stated, “[I]t is imperative our bulk-power system remains secure from exploitation and foreign threats.” The BPS EO is modeled on EO 13973 (May 2019), which is designed to protect the U.S. telecom supply chain from foreign adversary threats.

The BPS EO restricts individuals, entities, and assets subject to U.S. jurisdiction from acquiring, importing, transferring, or installing bulk-power system electric equipment or products designed, developed, manufactured, or supplied by government or private sector “foreign adversaries.” It applies broadly to equipment and products used in bulk-power system substations, control rooms, or power generating stations, including reactors, generators, turbines, transformers, metering equipment, and transformers. It does not name foreign adversaries, but the U.S. government has previously identified Russia and China (and Chinese telecom manufacturer Huawei) as threats to the bulk-power system.

The BPS EO applies to “transactions” initiated, pending, or completed after May 1, 2020. By September 28, 2020, the Department of Energy (DOE) must propose an interagency process to review transactions that pose undue risk, negotiate mitigation as a condition of approval, and initiate post-transaction mitigation. DOE also may “pre-qualify” equipment or vendors for future transactions and will chair a task force to consider updating federal energy infrastructure procurement policy and regulations.



The BPS EO creates market uncertainty because it is immediately effective and authorizes DOE to “mitigate” post-May 1 transactions involving equipment of concern, including removing installed equipment. Terms and processes are unlikely to be defined until DOE publishes rules. Parties should consult counsel and consider the BPS EO when identifying counterparties and sourcing equipment to be incorporated in the bulk-power system. In this interim period, the industry also should consider seeking clarity from the Administration regarding the scope and applicability of the BPS EO and developing strategies for pre-qualifying equipment and vendors.

SCOPE, APPLICABILITY, AND IMPLEMENTATION OF THE BPS EO

Navigating the Broad Language of the BPS EO

President Trump signed the BPS EO to protect the bulk-power system from “foreign adversaries” seeking to commit malicious acts against the United States. In general, the BPS EO restricts anyone subject to U.S. jurisdiction from undertaking certain transactions to acquire bulk-power system electric equipment from a foreign adversary. In particular:

- **To Which Parties Does the BPS EO Apply?** The BPS EO restricts “any person, or [with respect to] any property, subject to the jurisdiction of the United States” from undertaking certain transactions. According to the International Emergencies Economic Powers Act (IEEPA), the BPS EO’s underlying authority, the BPS EO applies to any individual person, entity, or assets that are subject to U.S. jurisdiction. This includes U.S. citizens and permanent residents (wherever located), entities organized under the laws of the United States or one of its states, and persons or assets physically present in the United States. The BPS EO also applies to U.S. territories (e.g., American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands).
- **To Which Activities Does the BPS EO Apply?** The BPS EO restricts anyone subject to U.S. jurisdiction from undertaking any acquisition, importation, transfer, or installation of any bulk-power system electric equipment designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary.
- **To Which Equipment Does the BPS EO Apply?** The BPS EO largely adopts the definition of “bulk-power system” in section 215 of the Federal Power Act: (1) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (2) electric energy from generation facilities needed to maintain transmission reliability. The BPS EO covers transmission lines rated at 69,000 volts (69 kV) or more but not facilities used in the local distribution of electric energy. The BPS EO broadly 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.”
- **To Which “Foreign Adversaries” Does the BPS EO Apply?** The BPS EO defines a “foreign adversary” as any foreign government or non-government person “engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or its allies or the security and safety of United States persons.” Because the BPS EO does not identify any such foreign adversaries, it is unclear which countries are subject to its restrictions. The Administration and Congress have expressed concerns about Chinese and Russian threats to the bulk-power system, but it is unclear at this time whether the BPS EO targets these countries. The BPS EO also applies to persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary. This contemplates that state-owned enterprises directed by a foreign adversary or private sector entities



incorporated under the laws of a foreign adversary also could be subject to the BPS EO. The threshold for “control” likely is lower than 51% ownership; it may be more akin to the Treasury Department sanctions definition of “controlling the actions, policies, or personnel decisions of the entity” or the Committee on Foreign Investment in the United States (CFIUS) definition of “power, direct or indirect, whether or not exercised . . . to determine, direct, or decide important matters affecting an entity.”

IMPLEMENTATION TIMELINE AND KEY U.S. GOVERNMENT AGENCIES

DOE Rulemaking Process

The BPS EO requires DOE to publish rules by September 28, 2020, although it is not clear whether DOE will publish a proposed rule (i.e., not yet effective and open to comment) or an interim final rule (i.e., immediately effective but subject to comment and review). At minimum, and as soon as practicable, the BPS EO requires DOE – in consultation with the Department of Defense, Department of the Interior, Department of Homeland Security, Director of National Intelligence, and Board of Directors of the Tennessee Valley Authority – to:

- Identify transactions involving the following elements:
 - The acquisition, importation, transfer, or installation of bulk power system electric equipment involving any person, entity, or assets subject to U.S. jurisdiction that is initiated after May 1, 2020;
 - Bulk-power system electric equipment designed, developed, manufactured, or supplied by a foreign adversary or persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary; and
 - The transaction (1) 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, (2) poses an undue risk of catastrophic effects on the security or resiliency of U.S. critical infrastructure or the economy, or (3) otherwise poses an unacceptable risk to U.S. national security or U.S. persons’ safety and security.
- Recommend ways to identify, isolate, monitor, or replace such items as soon as practicable, taking into consideration overall risk to the bulk-power system.

DOE will establish an interagency process to (1) identify such transactions and make determinations regarding their risk level, and (2) identify such equipment already in the bulk-power system and work with asset owners to mitigate threats. The BPS EO does not indicate how to structure these processes, how to coordinate the interagency process, or timelines for making determinations. CFIUS reviews of foreign investment in the United States may provide a model: it also is an interagency review of inbound transactions involving foreign parties, which may provide a precedent for DOE’s review process. In particular, parties can voluntarily notify CFIUS of their proposed investments, which CFIUS can approve to provide a safe harbor against future government review. CFIUS reviews also are subject to strict statutorily-mandated timelines to reduce timing uncertainty.

The BPS EO anticipates that DOE rules also will cover the following issues, although it is unclear whether such issues will be addressed by September 28, 2020, as they are not subject to the same “as soon as practicable” language:

- Identify countries or persons as foreign adversaries;
- Identify persons owned, controlled by, or subject to the jurisdiction or direction of foreign adversaries;
- Identify particular bulk-power system electric equipment that warrants particular scrutiny;
- Establish procedures to authorize transactions otherwise prohibited by the BPS EO; and
- Create a mechanism to mitigate concerns posed by particular transactions.



The BPS EO authorizes – but does not require – DOE to establish criteria for “pre-qualifying” particular equipment and vendors for future transactions, although DOE retains the authority to prohibit or restrict any transaction involving such equipment or vendors. Nevertheless, a prequalification mechanism could be an important way to decrease market uncertainty.

Similar to the CFIUS process, the BPS EO authorizes DOE to negotiate mitigation restrictions as a precondition to approving a transaction, and also contemplates that DOE may negotiate types of mitigation for certain classes of transactions. In addition, DOE may license otherwise-prohibited transactions.

Although DOE must publish rules by September 28, 2020, it is unclear whether it will publish a fulsome rule or a baseline rule to meet the deadline. It also is unclear whether DOE plans to publish a proposed rule (i.e., not yet effective and open for comment) or an interim final rule (i.e., immediately effective but subject to comment). If DOE publishes a proposed rule, especially a minimal baseline proposed rule, it may not fully clarify the BPS EO’s terms and processes. It also is unclear when any rule would be made final – and therefore effective – if it is first published as a proposed rule.

Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security

The BPS EO establishes a new interagency Task Force, chaired by DOE and comprising the Department of Defense, Department of the Interior, Department of Commerce (DOC), Department of Homeland Security, and Office of Management and Budget. The Task Force will develop energy infrastructure procurement policies that reflect the BPS EO’s national security, energy security, and cybersecurity concerns, including:

- Recommending federal energy infrastructure procurement procedures to the Federal Acquisition Regulatory Council, which will determine whether to propose amendments to the Federal Acquisition Regulation (FAR);
- Evaluating the methods to incorporate national security into energy security and cybersecurity policymaking;
- Consulting with the Electricity Subsector Coordinating Council and the Oil and Natural Gas Subsector Coordinating Council in developing the foregoing recommendations and evaluations; and
- Engaging with distribution system energy groups to address concerns that attacks on the bulk-power system can originate through the distribution system.

COMPARISONS TO THE TELECOMMUNICATIONS SUPPLY CHAIN EXECUTIVE ORDER

On May 15, 2019, President Trump signed EO 13873, “Securing the Information and Communications Technology and Services Supply Chain.” (ICTS EO) The ICTS EO arose from similar policy concerns regarding foreign adversaries – especially China – undermining critical infrastructure supply chain security in the telecom industry, and many provisions of the BPS EO are the same as or similar to the ICTS EO. Therefore, it may be a helpful – albeit not definitive – guide to interpreting the BPS EO and anticipating its implementation through regulation.

IEEPA is the underlying authority for both EOs, and both EOs contain concepts drawn from IEEPA. For example, both EOs target items supplied by “persons owned by, controlled by, or subject to the jurisdiction or direction of” foreign adversaries, which is IEEPA language. DOC’s proposed rule to implement the ICTS EO states that it will assess ownership and control based on a variety of factors, including “the laws and practices of the foreign adversary; equity interest, access rights, seats on a board of directors or other governing body, contractual arrangements, voting rights, and control over design plans, operations, hiring decisions, or business plan development.” Similarly, both EOs cover transactions “initiated” after each EO’s effective date. DOC’s ICTS proposed rule clarifies that it will look to the date of the actual acquisition, importation, transfer, or installation, “regardless of when any contract applicable to the transaction was entered into, dated, or signed” and makes explicit that transactions involving certain ongoing activities (e.g., managed services, software updates, repairs) constitute transactions that occur after the ICTS EO effective date.



Both EOs also are linked to government procurement. Prior to the ICTS EO, Congress passed the FY 2019 National Defense Authorization Act (NDAA), which prohibits companies from serving as government contractors if they use certain Chinese or Russian manufacturers' telecom equipment, software, and services in their networks after August 2020. As a result, the NDAA had a chilling effect in the telecom industry with respect to sourcing equipment, software, and services from China or Russia even before the President issued the ICTS EO. The Task Force established by the BPS EO will consider similar issues for the bulk-power system and may propose amending federal energy infrastructure procurement regulations to reflect the BPS EO's restrictions.

DOC has not yet finalized its November 2019 ICTS proposed rule, which provides limited clarity regarding the ambiguities in the ICTS EO (the same types of ambiguities which also exist in the BPS EO). Specifically, the proposed rule does not identify foreign adversaries, nor does it describe the interagency review process. It is unclear when DOC will revise or finalize the proposed rule, which leaves lingering uncertainty for the telecom market and does not provide additional clarity regarding how DOE may interpret the same terms in the BPS EO.

ANTICIPATING POTENTIAL IMPACTS OF THE BPS EO

Energy companies subject to U.S. jurisdiction should consider the BPS EO when acquiring, importing, transferring, or installing bulk-power system electric equipment designed, developed, manufactured, or supplied by entities in countries that DOE is more likely to consider foreign adversaries, such as China or Russia. While all industry participants should be vigilant regarding DOE's forthcoming rules, the BPS EO gives DOE the authority to undertake enforcement action – including imposing restrictions or requiring removal of equipment – any time after May 1, 2020.

- **Broad Definition of “Transaction”:** Bulk-power system electric equipment purchased months ago nevertheless may be subject to the BPS EO's restrictions and DOE mitigation if imported or installed in the United States after May 1, 2020. In deciding whether to use or install such equipment, companies should consider national security concerns about the supplier and evaluate whether DOE is likely to view the transaction as creating undue risk that requires mitigation. Stakeholders should be mindful of DOE's authority to recommend ways to identify, isolate, monitor and replace electric equipment after it is installed, as DOE could require companies to “rip and replace” such equipment. Current projects already under construction will need to balance the cost of making changes – potentially at advanced stages – against the risk of enforcement under the BPS EO.
- **Impact Across Industry:** A broad spectrum of the energy industry could be affected by the BPS EO, including: (1) conventional power generation, including fossil fuels and nuclear; (2) renewable generation (solar, wind, biomass, hydroelectric, geothermal, ocean) and energy storage, transmission interconnection, and metering facilities; (3) bulk power transmission and interconnection owners and operators, including electric utilities and independent transmission companies; (4) independent system operators, regional transmission organizations, balancing authorities, and control area operators; (5) reliability coordinators; (6) contractors, subcontractors, vendors, and service companies; (7) industrial and commercial facilities that rely on backup generators; and (8) manufacturers located in potential foreign adversary jurisdictions.
- **Government Contracts:** The new Task Force will recommend federal energy infrastructure procurement policies to the Federal Acquisition Regulatory Council, which will determine whether to propose amendments to the FAR. Such activity could have a chilling effect in the energy market for existing or potential government contractors, similar to how the NDAA caused the telecom sector to reduce Chinese and Russian equipment purchases and rip-and-replace existing equipment to maintain their government contracting eligibility.



OPPORTUNITIES FOR THE MITIGATION OF POTENTIAL IMPACTS

The energy industry should carefully assess the implications of the BPS EO on current and future projects and consider potential risk mitigation strategies, including:

- **Contracts:** Parties should keep the BPS EO in mind when reviewing contracts for transactions being undertaken for current projects, as well as when drafting agreements and structuring transactions for new projects. Parties should plan ahead for uncertainties caused by the BPS EO and the future DOE rules.
- **Procurement De-Risking:** In a procurement process where all things are equal and the buyer can choose not to procure bulk power system electric equipment from countries or entities that DOE is more likely to consider foreign adversaries, a buyer could reasonably choose not to do so.
- **Pre-Qualification:** The BPS EO authorizes the DOE to “pre-qualify” certain equipment or vendors. This provision did not exist in the ICTS EO and may be an example of the Administration heeding comments from industry offered in response to the ICTS proposed rules. This addition may provide an opportunity for bulk-power system electric equipment manufacturers and purchasers to achieve comfort that certain equipment and vendors are unlikely to be subject to enforcement action, which would be of great value to an industry accustomed to pre-qualifying potential vendors to respond to requests for proposals.
- **Rulemaking Engagement:** The language of the BPS EO is broad, leaving considerable room for interpretation. Therefore, it will be important for the energy industry to articulate its concerns to the regulators to ensure that terms and processes are clearly defined and conform to accepted industry usage. DOE is unlikely to alter its draft regulations in a way that would hamper the Administration’s national security and energy infrastructure supply chain security policy goals, but it may be receptive to proposals that avert unintended consequences.

TAKEAWAYS

Despite uncertainty regarding the BPS EO’s broad scope and the regulatory timeline, one thing is clear: the BPS EO presents traps for the unwary. Parties who enlist counsel, assess the BPS EO’s implications for their current and future projects, and engage with the regulators in the development of the regulations and pre-qualification efforts will grapple with less uncertainty than those who wait, hoping for questions to be answered in a future rulemaking. With its global footprint, substantial energy industry experience, and a deep bench of former trade and national security government officials, King & Spalding’s International Trade and Energy and Infrastructure practices are uniquely positioned to counsel companies on the potential current and future impacts of the BPS EO.



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