

# CLIENT ALERT

## President Declares Threat to Electric Power Grid a National Emergency

May 4, 2020

On May 1, 2020, the President signed a new [Executive Order](#) (EO) declaring a national emergency regarding certain threats to the U.S. bulk-power system and broadly prohibiting acquisition, importation, transfer, or installation of any “bulk-power system electric equipment” where the transaction, by any person, involves property in which any foreign country or national thereof has an interest. Depending on how it is implemented, the EO has the potential to significantly disrupt the supply chain for electrical equipment for U.S. bulk-power systems, which include items used in electric generation projects and transmission systems. In order to prohibit a transaction, the Secretary of the Department of Energy, in consultation with other agencies, must determine that the transaction involves bulk-power system electric equipment “designed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary” and find that the transaction poses undue risks of sabotage or subversion of the bulk-power system, catastrophic effects to the security or resiliency of U.S. critical infrastructure or the U.S. economy, or otherwise presents an unacceptable risk to U.S. national security.

The Secretary has immediate authority to take actions to implement the EO, including directing the timing and manner of cessation of pending and future transactions. While the Secretary may be able to act in some respects immediately, he has until September 27, 2020 (150 days) to issue regulations to fully implement the authorities delegated to him under the EO. The issues pertaining to those authorities include the following:

- *Scope:* The EO defines “bulk-power system” and “bulk-power system electrical equipment” subject to the EO, and extends to transactions involving any *property* supplied directly or indirectly by a foreign adversary or in which a foreign adversary has an interest (including an interest in a contract for the provision of bulk power system electrical equipment or, possibly even a “financial interest” apart from in the equipment itself). A foreign adversary is a foreign government or foreign person engaged in a long-term pattern or serious instances of conduct significantly adverse to the security of the U.S. or its allies or to the safety of U.S. persons. A foreign adversary could be any company from a specific country identified as an adversary, in which case all covered transactions undertaken by such companies (potentially together with classes of transactions) are prohibited under the EO, resulting in outright bans such as those that currently apply to Huawei in the telecommunications sector or Kaspersky products in government systems. And, as in these other areas, the threats to be assessed will include identified software and network system vulnerabilities.
- *Good List | Bad List:* The EO calls for identification of particular countries and equipment that warrant particular scrutiny, but also contemplates publication of a list of pre-qualified equipment and vendors. Companies manufacturing, selling or utilizing bulk-power system electrical equipment in the United States and possibly abroad would be well-advised to begin now to identify equipment and companies that likely will or should be included on this list and the impact on their supply chains should this occur.
- *Licensing & Mitigation:* The EO contemplates that the government may create a licensing regime for covered transactions involving bulk-power system electrical equipment and may enter into “mitigation agreements” to address national security concerns and permit transactions that might otherwise be objectionable. Combined with the EO’s formation of a multi-agency Task Force to establish federal energy infrastructure procurement policies, this provision

may evoke use of a Team Telecom type approach currently used to evaluate national security risks of foreign investment in telecommunications.

- *Rip & Replace*: The EO further contemplates the Secretary (in consultation with Defense, Interior, Homeland Security and the Director of National Intelligence) will identify bulk-power system electrical equipment of concern that is already in service and develop recommendations on ways to “identify, isolate, monitor, or replace such items as soon as practicable.”

Finally, the multi-agency Task Force is required to develop a consistent set of energy infrastructure procurement policies for government agencies to ensure national security considerations are fully integrated across the government. Within 180 days after receipt of such recommendations, the Federal Acquisition Regulation (FAR) Council shall consider proposing, for notice and comment, applicable revisions to the FAR implementing such recommendations. The EO directs the Task Force to consult distribution system industry groups; contractors involved in Energy Savings Performance Contracts should also consider actively participating in both the development of the recommendations and any subsequent implementation.

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