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LEGAL UPDATES

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New Executive Order Prohibits Use of Equipment Produced by Foreign Adversaries in Bulk-Power Systems

On Friday, May 1, 2020, President Trump issued a new Executive Order (the Bulk-Power Order) to prohibit transactions within the U.S. for the acquisition or installation of certain “bulk-power system electric equipment” which is sourced from foreign adversaries. In the Bulk-Power Order, President Trump expressed a determination 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 threat to the United States bulk-power system.” Although the Bulk-Power Order takes effect immediately, several of its provisions are currently unclear and likely will not become clear until the U.S. Secretary of Energy (the “Energy Secretary”) provides additional guidance.

Overview of the Bulk-Power Order’s prohibitions

The Bulk-Power Order authorizes the Energy Secretary to prevent any acquisition, importation, transfer or installation of any “bulk-power system electric equipment” (the Bulk-Power Order refers to the aforementioned activities collectively as a “transaction”) undertaken by a U.S. person or otherwise involving property subject to U.S. jurisdiction:

Which is initiated after May 1, 2020;

Which involves property in which any foreign country or national thereof has any interest (which can include a contractual interest for the provision of the equipment); and

Which meets the following criteria, as determined by the Energy Secretary (in coordination and consultation with other federal officials):

The transaction involves “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”; and

The transaction: (i) poses an undue risk of sabotage to or subversion of the U.S. bulk-power system, (ii) poses an undue risk of catastrophic effects on the security or resiliency of U.S. critical infrastructure or the U.S. economy or (iii) poses an unacceptable risk to U.S. national security or the security and safety of U.S. persons.

In order to enforce its provisions, the Bulk-Power Order specifically authorizes the Energy Secretary to “take such actions, including directing the timing and manner of the cessation of pending and future transactions prohibited pursuant to [the Bulk-Power Order]” and to use any other powers granted to the President under the International Emergency Economic Powers Act.

How does the Bulk-Power Order apply to pending transactions?

The Bulk-Power Order states that its prohibitions apply “notwithstanding any contract entered into or any license or permit granted prior to [May 1, 2020].” Therefore, the Order does not provide any sort of savings clause or other grandfather provision to protect buyers who signed contracts to purchase prohibited “bulk-power system electric equipment” prior to May 1, 2020. On the contrary, because the Bulk-Power Order defines a “transaction” to include “any acquisition, importation, transfer or *installation* (emphasis added)” of prohibited equipment, the Order gives the Energy Secretary the prospective authority to prevent the installation of any prohibited equipment even if that equipment was purchased under a preexisting contract, fully paid for and successfully delivered to the job site prior to May 1, 2020.

What equipment is subject to the Bulk-Power Order?

The Bulk-Power Order’s definitions of “bulk-power system” and “bulk-power system electric equipment” are quite broad and will likely capture a variety of wind, solar, storage and transmission components. The Bulk-Power Order provides the following definition for the term “bulk-power system:”

The term “bulk-power system” means (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. For the purpose of

this order, this definition includes transmission lines rated at 69,000 volts (69 kV) or more, but does not include facilities used in the local distribution of electric energy.

It defines “bulk-power system electric equipment” as:

[I]tems 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.

However, equipment that is not included in the above list and which has “broader application of use beyond the bulk-power system” is exempt from the Bulk-Power Order. The Bulk-Power Order also gives the Energy Secretary the authority (but not the obligation) to publish a list of pre-qualified equipment and vendors which are exempt from the Order.

Who is a “foreign adversary” under the Bulk-Power Order?

It is currently unclear which specific countries or suppliers are “foreign adversaries” under the Bulk-Power Order. The Order provides an open-ended definition which defines a “foreign adversary” as “any foreign government or foreign 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.” It is widely anticipated that Russia and/or China could be designated as “foreign adversaries” based on a Worldwide Threat Assessment issued by the U.S. Director of National Intelligence on January 29, 2019, which observed that both Russia and China were capable of launching cyber-attacks to disrupt critical U.S. infrastructure. If China is designated as a “foreign adversary”, then that designation could also potentially apply to all Chinese suppliers because the Bulk-Power Order potentially prohibits transactions with any equipment producer that is “subject to the jurisdiction of” a “foreign adversary.”

Notably, the U.S. Department of Commerce is also in the process of publishing its own rules to restrict information and communications technology or services transactions (“ICTS transactions”) with countries and counterparties that the U.S. Secretary of Commerce determines qualify as “foreign adversaries.” However, the Bulk-Power Order was careful to clarify that any “foreign adversary” designation applied to a country or person pursuant to the Bulk-Power Order will exclusively apply for the purposes of the Bulk-Power Order. Therefore, “foreign adversary” designations by the Commerce Department under its forthcoming ICTS transaction rules will not affect the Energy Secretary’s enforcement under the Bulk-Power Order, and vice versa.

Forthcoming guidance for interpreting the Bulk-Power Order

The Bulk-Power Order requires the U.S. Secretary of Energy, in consultation with other authorities, to take the following actions “as soon as practicable:”

Identify specific “bulk-power system electric equipment” which can trigger the Bulk-Power Order’s prohibitions; and

Develop recommendations for identifying, isolating, monitoring or replacing such equipment.

Then, within 150 days following its issuance (i.e., no later than Monday, September 28, 2020), the Bulk-Power Order requires the Energy Secretary to publish rules or regulations to implement the Order. The U.S. Secretary of Energy is authorized (but not required) to take any of the following actions through those regulations:

Formally designate particular countries or persons as “foreign adversaries” or persons controlled by “foreign adversaries” for purposes of the Bulk-Power Order;

Identify particular countries or types of equipment that warrant particular scrutiny under the Bulk-Power Order; and/or

Establish procedures for licensing transactions that would otherwise be prohibited by the Bulk-Power Order.

As stated above, the Bulk-Power Order also gives the U.S. Energy Secretary the discretionary authority to publish a list of pre-qualified equipment and vendors; however the Order does not establish any required timeline for the publishing of any such list.

Notwithstanding this forthcoming guidance, it is important to understand that the Bulk-Power Order took effect immediately and that its prohibitions currently apply even in the absence of implementing rules or regulations. Therefore, until better guidance from the Energy Secretary becomes available, persons operating in the bulk-power sector are stuck in the difficult position of not knowing whether their currently pending acquisitions or installations of foreign-origin equipment might violate the Bulk-Power Order and expose them to potential enforcement actions by the Energy Secretary.

Creation of Procurement Task Force

The Bulk-Power Order also establishes a Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security (the “Task Force”) which shall be chaired by the Energy Secretary and which shall also include the U.S. Secretaries of Defense, the Interior, Commerce and Homeland Security and the Directors of National Intelligence and the Office of Management and

Budget. The Task Force will develop recommendations for U.S. Government energy infrastructure procurement policies and submit those recommendations to the Federal Acquisition Regulatory Council (the “FAR Council”). Within 180 days of receiving those recommendations, the FAR Council is then required to consider proposing and soliciting public comments for appropriate amendments to the Federal Acquisition Regulations to implement the Task Force’s recommendations.

Contact us

Husch Blackwell’s Energy & Natural Resources team will be carefully following the Bulk-Power Order and the forthcoming Department of Energy guidance and providing updates as they become available. If you have any questions concerning this topic in the meantime, please contact John Crossley, Cacki Jewart, Grant Leach or Chris Reeder.