



June 1, 2020

The Honorable Bruce Walker
Assistant Secretary, Office of Electricity
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Dear Assistant Secretary Walker,

On behalf of the [Business Council for Sustainable Energy](#) (BCSE), I respectfully request the opportunity to meet with you to discuss the status and scope of Executive Order 13,920 signed on May 1, 2020, *Securing the United States Bulk-Power System*.

As you know, BCSE is a coalition of companies and trade associations from the energy efficiency, natural gas and renewable energy sectors. Its members include investor-owned utilities, public power, independent power producers, project developers, equipment manufacturers, and environmental and energy market service providers. Established in 1992, the Council advocates for policies that expand the use of commercially available clean energy technologies, products and services to ensure a reliable, secure and sustainable energy system. Please see the BCSE's current membership list [here](#).

The Council appreciates the intent of the *Securing the United States Bulk-Power System Executive Order* and the federal government's national interest in maintaining a safe and secure bulk power system. In reviewing the Executive Order, there have been questions raised by BCSE members about its scope and implementation process. In its present form, the Executive Order is creating substantial uncertainty in the sector due to its potentially far-reaching implications. Without timely clarifications, it could result in delay or cancellation of equipment orders as well impeding investment in energy projects and infrastructure.

Please see the enclosed document that lists questions that BCSE members seek guidance on from the Department of Energy. BCSE will also submit these questions through the Department of Energy website.

In addition, BCSE members request the opportunity to meet with you to discuss the Executive Order at your earliest convenience. Please feel free to contact me via email or cell phone to schedule a meeting (ljacobson@bcse.org; cell phone number: 202.494.5133).

Thank you for your consideration.

Sincerely,

Lisa Jacobson
President

Business Council for Sustainable Energy

June 1, 2020

Questions for DOE Regarding the Executive Order on Securing the United States Bulk-Power System

The Business Council for Sustainable Energy has received the following questions from its members for the U.S. Department of Energy (“DOE”) with respect to Executive Order 13,920, *Securing the United States Bulk-Power System* (“EO” or “Order”):

Comparisons to Information & Communications Technology (ICT) Cybersecurity Executive Order

- Where does DOE see similarities and dissimilarities between the Bulk Power System EO and the implementation of the ICT EO?
- The proposed regulations implementing the ICT EO reference Section 1705 of the IEEPA and provide for civil penalties in accordance with those set out in the IEEPA (adjusted upward for inflation) but make no reference to criminal sanctions. They also provide that transactions completed on or after the date of the ICT EO and found to be prohibited under the regulations may be subject to mitigation or unwinding.
 - Does DOE expect that the same enforcement provisions to apply to this EO?
- Additionally, Title II of the Secure Technology Act created the Federal Acquisition Security Council (FASC) to, in part, coordinate the assessment and mitigation of supply chain risks to the U.S. supply chain. It is our understanding that the FASC will play a role in implementing the ICT EO. To what extent will the DOE and the Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security coordinate with the FASC on supply chain security matters to ensure consistency and to reduce duplication?

Issue Related to the Nexus to a Foreign Adversary that Could Lead to a Prohibited Transaction

Per the EO, the Secretary of Energy and cooperating agencies must identify specific foreign adversaries, which may be governments or persons, based on their pattern or serious instances of “conduct significantly adverse” to U.S. interests. To prohibit a transaction, the Secretary must further find that it involves bulk power system (BPS) equipment designed, developed, manufactured or supplied by persons owned by, controlled by, or subject to the jurisdiction of a foreign adversary. In addition to a foreign adversary nexus, to prohibit a transaction, the Secretary must find that it poses an undue risk of BPS “sabotage”, “subversion” or “catastrophic effects” on the US economy or critical infrastructure, or impacts on U.S. national or personal security.

- The EO does not define many critical terms, including “conduct significantly adverse” to U.S. national security when describing a foreign adversary, and BPS equipment “designed” or “developed” by a foreign adversary. Can DOE offer more specificity around the broad terms, or general scope, in Section 1?”
- Will DOE issue advisory opinions (either proactively or in response to vendor inquiries) that would identify the specific vendor actions that have come into question and corresponding recommendations on how a vendor could mitigate these concerns?
- The EO was issued under the International Emergency Economic Powers Act, and thus, its prohibitions are limited to transactions involving property in which a foreign country or national has an interest, or “persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary.”
 - Consequently, are transfers of equipment between U.S. entities that have no foreign interest therefore not impacted by the EO?

- If a US- or European-owned facility in China exports equipment to the U.S., could that be considered covered BPS equipment, and under what circumstances? Is the mere presence of a factory in China, considered “subject to the jurisdiction of” that adversary?
- If a company that provides BPS equipment is Chinese-owned is it presumed to be hostile? If so, what about Chinese suppliers that may provide components for larger systems manufactured in a non-adversarial country?
- Section 1(a) of EO applies to the “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 by foreign adversary that threatens national security.
 - Some entities may be surprised to find their transaction affected as the EO voltage floor for inclusion would include sub transmission facilities that fall below the usual 100kV threshold for FERC and NERC regulation.
 - NERC typically only regulates entities active in operating, maintaining or planning the grid. However, the EO focuses on equipment and transactions, not entity functions, conceivably affecting any entity from an importer of equipment or components to an installation contractor to a creditor who acquires equipment through bankruptcy or foreclosure. Can you offer any additional specific clarity on who the EO affects?
 - With respect to equipment types, the prohibition can apply to “items used in” virtually the entire range of facilities and equipment in bulk power generation and transmission. Is DOE going to issue specific guidance on how they’re interpreting the phrase “items used in”, and what those items are?
 - Will military bases or other federal facilities operating below the 69 kVA voltage level be subject to these same guidelines?
 - Are sales of projects into tax equity vehicles affected (*i.e.*, purchases of development rights to projects where a foreign adversary company has signed a contract to supply equipment or transfers in connection with establishing a tax equity partnership for renewable power transactions)?
- Section 1(b) of the EO states that DOE can design measures that would mitigate the national security concerns in order to let a potentially prohibited transaction move forward.
 - Does a transaction first need to be proposed to be prohibited before a company can ask DOE how it can mitigate risk with respect to the transaction?
- Section 1(c) of the EO states that it applies “notwithstanding any contract entered into or any license or permit granted prior to the date of this order,” while Section 1(a) limits transactions “where the transaction was initiated after the date of this order.”
 - This suggests that new purchase orders placed under master supply contracts that are already signed and downstream sales of projects incorporating prohibited equipment already installed could both be blocked. Is that correct?
 - EXAMPLE: For power plant-level transformers intended for use at wind projects where 1) the MPT is manufactured in China, 2) there is no known connection between the manufacturer and the Chinese government, and 3) the contract is already signed and the equipment expected for delivery later this year, is the intention of the EO to block that equipment from import and use?
- Noting a recent E&E article, can DOE share the information that led to the evaluation of the Jiangsu Huapeng Transformer Company? Is the company a likely candidate for attention under the EO and if so, why?

Pre-Qualification Process

- Section 1(d) of the EO states that DOE can establish and publish criteria for recognizing particular equipment and vendors in the bulk-power system electric equipment market as pre-qualified for future transactions (i.e., not prohibited).
 - What is the likely timing on publication of this criteria and how can BCSE member industries engage in this process prior to the criteria being published?
 - Will there be any semblance of risk assessment as it pertains to products subject to the pre-qualification list?
 - A process can be envisioned that is less resource intensive for low-risk applications and more resource intensive for high-risk applications.
 - Can the DOE confirm that the prequalification list will be based upon objective, measurable criteria?
 - Will the DOE leverage demonstrated conformance to existing international standards (e.g., IEC 62443 suite of standards for industrial automation cybersecurity) as a basis for qualification decisions?
 - To what extent will manufacturers be able to demonstrate either self-certification or existing third-party certification regarding the cybersecurity of a given product as a factor in the pre-qualification process?
 - The Department of Defense has stated that their Cybersecurity Maturity Model Certification (CMMC) will evolve from a data-focused certification to a product-focused certification in 2021. Although details are still unclear, industry has recommended that this product-focused version of the CMMC rely on existing Federal guidance in this space (e.g., NISTIR: 8259 - Recommendations for IoT Device Manufacturers: Foundational Activities and Core Device Cybersecurity Capability Baseline) and/or existing international standards (e.g., IEC 62443 suite of standards). To what extent does the DOE plan to provide reciprocity between the pre-qualification list and the soon to be product-focused CMMC certification?

EO Scope

- Section 2(d) of the EO states that, as soon as practicable, DOE shall identify bulk-power system electric equipment subject to the control of another country and that poses these risks.
 - Will DOE create this list prior to proposing the rule?
- At this time, does DOE view any equipment in utility-scale wind generation, solar generation, energy storage, or microgrid solutions as critical for ensuring cybersecurity and, therefore, likely subject to the EO and any implementing rules?
 - If so, what equipment?
 - What is the likely timing for when there will be future guidance or clarification on this?
 - While distributed facilities are excluded from the EO, is storage included?
- Section 2(d)(ii) of the EO instructs DOE to “develop recommendations on ways to identify, isolate, monitor, or replace” targeted equipment, suggesting that, depending on the scope and nature of forthcoming regulations, projects that have incorporated target equipment could have to replace such equipment in the future.
 - Do companies need to start thinking about these potential implications when negotiating contracts with counterparties to appropriately allocate risk of future replacement (and costs and delays associated with such replacement)?

Exemptions

- The prohibition applies to transactions “initiated” after May 1, 2020. However, the EO does not say what constitutes “initiation.”

- EXAMPLE: Is equipment importation “initiated” by contract execution? Departure from the country of origin? Arrival in the U.S.? Clearance of customs? Passage of title?

Vendor Mitigation of Risk

- In the context of mitigating risk, the DOE FAQ document issued referenced that additional funding may be needed for “supply chain testing and evaluation.”
 - Can the DOE elaborate on what this might look like?
 - Who would do the testing and what safeguards would be put in place to protect vendors against liability concerns for things found during an inspection that are not germane to the EO?
 - Would the government potentially investigate a vendor's entire supply chain or simply that of a specific product?
 - How would the government handle a supply chain that is leveraged for products sold to commercial and government customers?

Implementation, Coordination and Future Actions

- What structures will DOE establish to involve industry to develop the draft requirements and how will industry representatives be considered for those positions? Specifically, grid equipment manufacturers are not party to the Electricity Subsector Coordinating Council or the Oil and Gas Subsector Coordinating Council, which are specifically called out in the EO as bodies that will be consulted as part of implementation of the EO. How will DOE provide a formal mechanism for manufacturers and other parties to provide continuous feedback throughout this process?
- Will DOE prioritize certain sites on the BPS for the purpose of review of BPS equipment transactions? If so, will DOE implement a process to proactively communicate that prioritization to grid operators and managers of transmission-interconnected assets at those sites?
 - Is DOE planning to harmonize its priorities with sites DOE has identified previously pursuant to FPA Section 215A?
- Is the DOE working with NERC to ensure that there are no regulatory differences or conflicts between the EO and NERC regulations?
 - Is DOE carefully considering the interplay between the EO, the anticipated rules and regulations and those NERC reliability standards like CIP-13 that seek to protect the supply chain of NERC registered entities?
 - Will DOE implement a process for entities to seek regulatory guidance on inconsistent or conflicting directives between the EO and NERC regulations?
- Does DOE see a nexus with NERC CIP 14 substations/control rooms in the sense that these would be included as part of DOE’s primary focus in light of DOE comments about undertaking a “strategic” and “surgical” review?
- Are there future plans to take similar executive action to secure natural gas infrastructure? If so, do you plan to coordinate and collaborate with the Oil and Natural Gas Subsector Coordinating Council or similar industry groups to ensure effective EO language and roll out?