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A DEALMAKER'S GUIDE TO NATIONAL SECURITY IMPLICATIONS OF FOREIGN INVESTMENT IN U.S. GOVERNMENT CONTRACTORS

By Joseph D. West, Judith A. Lee, Jose W. Fernandez, Andrea F. Farr, and Stephenie Gosnell Handler

Global merger and acquisition activity has surged in recent years, with U.S. inbound activity rising significantly—a trend that is expected to continue throughout the remainder of 2015.[1] It is the declared "policy of the U.S. Government to allow foreign investment consistent with the national security interests of the United States."[2] Yet, foreign investment in U.S. businesses presents complex challenges, particularly if there are national security implications for the proposed transaction. There are two separate but parallel processes to ensure foreign investment is consistent with U.S. national security interests. First, the Committee on Foreign Investment in the United States (CFIUS or the Committee) has broad authority under § 721 of the Defense Production Act of 1950,[3] as amended,[4] and as implemented by Executive Orders[5] and regulations[6] promulgated by the U.S. Department of the Treasury, to review transactions with potential national security risks. Second, potential transactions involving companies that conduct classified or other special access work require appropriate mitigation of any foreign ownership, control, or influence (FOCI) to safeguard the U.S. Government's national security interests pursuant to the requirements of the National Industrial Security Program (NISP).

In 2014, Thomson Reuters published a BRIEFING PAPER discussing in depth the laws and regulations governing the CFIUS review process, FOCI review under the NISP, the related economic sanctions and export control issues, and the rules governing

IN BRIEF

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conflicts of interest, assignments and novations, and name changes that must be addressed by U.S. Government contractors involved in a deal resulting in a change of control.[7] This Briefing Paper is intended as a complement to the 2014 Briefing Paper, with a specific focus on providing dealmakers the tools that they need to understand the CFIUS process and their role in achieving a successful outcome for their clients, and, for companies conducting classified or other special access work, how the FOCI mitigation process should be integrated into the deal cycle. Accordingly, this Briefing Paper provides an overview of the laws and regulations governing the CFIUS process, recent developments in CFIUS cases, FOCI review under the NISP, the relationship between the CFIUS and the Defense Security Service (DSS) FOCI mitigation processes, and how dealmakers can work with specialists to facilitate successful mitigation strategies for transactions that involve both CFIUS and the DSS.

Overview Of The CFIUS Process

■ Sources Of CFIUS Authority

In 1988, Congress passed the Exon-Florio amendment to the Omnibus Trade and Competitiveness Act of 1988, adding § 721 to the Defense Production Act of 1950.[8] The Exon-Florio amendment, as amended in 2007 by FINSA,[9] grants the President, acting through CFIUS, broad authority to review certain foreign acquisitions, mergers, takeovers, or investments that would give a foreign interest control of a company that is engaged in interstate commerce in the United States. Following the review, the President may suspend or prohibit the transaction if such control "threatens to impair the national security of the United States"[10] and that threat cannot be adequately addressed by other legislation (other than the International Emergency Economic Powers Act,[11] which gives the President authority to address any "unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States after first declaring a national emergency).[12]

Legislation and Executive Orders assign the task of reviewing foreign investment to the CFIUS interagency group,[13] which carries out its responsibilities in light of the open investment policy of the United States.[14] First created in 1975,[15] CFIUS' membership currently includes representatives from numerous U.S. Government departments and agencies, including the Departments of the Treasury (with the Secretary of the Treasury as the chairperson of CFIUS), Justice, Homeland Security, Commerce, Defense, State, and Energy, the Office of the U.S. Trade Representative, and the Office of Science and Technology Policy, as well as representatives from the Office of the Director of National Intelligence and the Department of Labor as nonvoting, ex officio members.[16] Representatives from the Office of Management and Budget, Council of Economic Advisors, National Security Council, National Economic Council, and Homeland Security Council also observe and, as appropriate, participate in CFIUS activities.[17]

■ Submission Of Voluntary CFIUS Notice

Submission of a CFIUS notice is voluntary. Any party to the transaction may—but is not required to—request a review of the transaction's national security implications.[18] However, the voluntary character of the filing is somewhat deceptive. In

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fact, if CFIUS believes a transaction is a covered transaction that may raise national security concerns, CFIUS may ask the parties to a covered transaction to file a notice.[19] In addition, any member agency of CFIUS may initiate a review by submitting an agency notice to CFIUS.[20] Such involuntary reviews are rare and disfavored, and, when they occur, may not put the parties in the best light with CFIUS. In the case of a transaction that is likely to present national security concerns, but for which the parties have not notified CFIUS, CFIUS is most likely to inquire informally and suggest that the parties file voluntarily, eliminating the need to initiate an involuntary review.

The benefit to filing a voluntary notice stems from the fact that once a transaction clears CFIUS review or the President has decided to allow it, the transaction may not be reinvestigated unless the initial review was based on materially incorrect or incomplete information, or a party to the transaction has "intentionally materially" breached a mitigation agreement or condition imposed by CFIUS.[21] A further benefit is that, generally, no CFIUS notice, review, or investigation can occur more than three years after the date of the transaction.[22] However, the Chairperson of CFIUS may, in consultation with other members, request an investigation after the three years have passed.[23] Thus, transactions for which CFIUS does not receive notice potentially remain forever open to scrutiny, while those that have proceeded successfully through the CFIUS process are granted "safe harbor."

■ Stages Of CFIUS Review

There are three stages to a CFIUS review after the voluntary filing:

(1) *30-day CFIUS Committee Review*. During this phase, committee members review the transaction for any possible national security implications.[24] The Committee, working through the chair, can request additional information from the parties.[25] The majority of CFIUS applications are approved during this 30-day review. If there are no national security concerns, CFIUS will notify the filing parties that the transaction is approved.[26] If there are minor concerns, CFIUS will work with the parties to develop a mitigation plan.[27] It is not uncommon for the Committee to ask a party to withdraw a filing, take mitigating measures, and refile to avoid the 45-day investigation.[28]

(2) *45-day CFIUS Committee Investigation*. If, at the end of the 30-day review, CFIUS determines that there might be national security implications, the Committee will send a letter to the parties stating that they intend to investigate the transaction.[29] The Committee also will investigate all foreign government-controlled covered transactions.[30] During the investigation, parties are usually required to submit additional information and documentation about the transaction. As with the review stage, a party can withdraw its filing during an investigation to take mitigating steps recommended by the Committee and then refile.[31] CFIUS must complete the investigation within 45 days.[32] At the end of the investigation, the Committee must either approve the transaction or send a formal report to the President for his decision.[33]

(3) *Presidential Decision*. The Committee sends a formal report to the President if it recommends that the President suspend or prohibit the transaction, if the Committee was unable to reach a unanimous decision, or if it determines that the President should make the final decision.[34] The President then has 15 days to approve, suspend, or prohibit the transaction.[35] According to the Congressional Research Service, the President made 12 decisions on voluntary filings from 1988–2005, and only prohibited the transaction in one of those 12 cases;[36] from 2008–2010, the President did not make a single decision on voluntary filings.[37]

The President's decision is not reviewable,[38] but an ongoing case is providing insight into the process due in the context of a presidential decision. In 2012, after the Chinese heavy machinery manufacturing company Sany Group had acquired wind farm projects in Oregon through its affiliate, Ralls Corporation, the Committee asked the Chinese firm to file a notice. The wind farm projects were located near a naval weapons training facility.[39] After a full investigation, CFIUS recommended that the President order a divestment of the transaction. President Obama issued the order on September 28, 2012.[40] The

Chinese investors sued in United States District Court, but the court held that the President has broad authority to take whatever action he deems appropriate, and for whatever length of time, in CFIUS proceedings.[41] Further, the court held that judicial review of the President's CFIUS decisions is beyond the court's jurisdiction[42] and that given the national security-based nature of Government review in this context, Ralls received sufficient process.[43] On July 15, 2014, the U.S. Court of Appeals for the District of Columbia Circuit overturned the lower court's decision, holding that the presidential order deprived Ralls of due process.[44] In so finding, the D.C. Circuit concluded that, while the statute prohibits courts from reviewing final actions taken by the President to suspend or prohibit covered transactions, it does not prohibit judicial review of a claim challenging the process itself.[45] In answering the question of what process was required, the D.C. Circuit concluded that due process required that Ralls (a) be informed of the official action, (b) have access to the unclassified evidence relied upon, and (c) be given the opportunity to rebut the evidence.[46] The D.C. Circuit remanded the case to the lower court with instructions to provide Ralls with this now-required process. The circuit court also reopened the merits challenge to the CFIUS order, leaving it to the lower court to address in the first instance.[47]

On remand, the district court ordered the Obama administration to provide Ralls with the unclassified materials underlying the Committee's recommendation and provided Ralls with opportunity to respond to the information. The district court also established a schedule for addressing unclassified materials withheld from disclosure based on an assertion of executive privilege.[48] On November 21, 2014, CFIUS produced 3,487 pages of unclassified documents to Ralls.[49] The Committee must consider the materials submitted by Ralls and issue an updated recommendation to the President by August 12, 2015.[50]

■ Trends In CFIUS Activity

Trends in CFIUS activity provide insight into the workings of the clearance process. In accordance with its statutory obligations,[51] CFIUS submitted its annual report to Congress in February 2015 summarizing its activities in calendar year 2013.[52] In it, the Committee highlighted trends and developments. In calendar year 2013, the number of notices filed dropped from its peak in 2012, but nevertheless represented an overall increase during the period of 2009 through 2013. The percentage of reviews that proceeded to investigation fluctuated between 36% and 39% from 2009–2012, but increased to 49% in 2013. [53]

In 2013, three notices were withdrawn during the review, and another five were withdrawn during the investigation phase. The number of notices withdrawn during investigation in 2013 represented a significant reduction from the 20 withdrawn during investigation in 2012 but is the same number of notices withdrawn during investigation in 2011. One of the eight notices withdrawn in 2013 was refiled in calendar year 2014.[54]

The Committee broke down the notice information into four business sectors: manufacturing; finance, information, and services; mining, utilities, and construction; and wholesale, retail, and transportation. The proportion of the notices in each of the four sectors in 2013 remained consistent with the overall trend from 2009–2013.

(1) *Manufacturing*. Within the manufacturing sector, just over a third of the notices applied to manufacturers of computer and electronic products. This is a reduction compared to 50% of manufacturing notices between 2009–2012, with growth in 2013 primarily in the machinery and transportation equipment manufacturing subsectors. The computer and electronic manufacturing subsector continued to be dominated by semiconductor and other electronic components manufacturing.[55]

(2) *Finance, Information, and Services*. The finance, information and services sector accounted for one third of the notices filed in 2013, with nearly half of the notices related to the professional, scientific, and technical services subsector in 2013. Of the notices submitted in the professional, scientific, and technical services subsector, the computers systems design and related services segment accounted for 39% of the notices during the period from 2011–2013 and just over half in 2013.[56]

(3) *Mining, Utilities, and Construction.* Of the notices filed in 2013, 21% were generated by the mining, utilities, and construction sector. Notices from the utilities subsector represented 60% of the notices filed in connection with mining, utilities, and construction manufacturing in 2013, representing a slight increase over the period from 2010–2012, but continued the overall pattern of dominance by the utilities-related notices. The overwhelming majority of the utilities-related notices came from the electric power generation, transmission, and distribution subsectors at 83% in 2013 and 71% for the period from 2010–2012.[57]

(4) *Wholesale Trade, Retail Trade, and Transportation Sector.* The wholesale trade, retail trade, and transportation sector accounted for 10% of the notices filed in 2013, representing a slight increase over the period from 2010–2012. In 2013, a majority of the sector's notices came from the support activities for transportation subsector, representing a slight increase over the period from 2010–2012.[58]

As in 2012 and consistent with overall trends for 2011 through 2013, the greatest number of covered transactions in 2013 involved acquirers from the Peoples Republic of China.[59] The second highest number of transactions involved acquirers from Japan in 2013, rather than from the United Kingdom, which had been the source for the second largest number of buyers in 2012 and the highest number of acquirers in 2011.[60] Canadian acquirers accounted for the third greatest number of transactions in 2013 and overall from 2011 through 2013 (in a tie with Japan).[61]

During the period from 2011 through 2013, transactions involving acquirers from China were concentrated in the manufacturing sector.[62] For UK acquirers, the greatest number of transactions was in the manufacturing sector, followed closely by the finance, information, and services sector.[63] Transactions involving Japanese acquirers were concentrated in the manufacturing sector.[64] For Canadian acquirers, the transactions focused on the mining, utilities, and construction sector.[65]

During 2013, mitigation measures were applied in 11% of the covered transactions.[66] Between 2011 and 2013, binding mitigation measures were imposed in 8% of the cases.[67] Mitigation measures included restrictions on access to technology and information; establishing procedures in connection with U.S. Government contracts, U.S. Government customers, and sensitive information; and providing the U.S. Government with the opportunity to review and object to certain business decisions.[68] Compliance may be monitored through mandatory reporting, onsite U.S. Government reviews, and third-party audits.[69] CFIUS agencies utilize staffing, report tracking, and internal procedures to manage the complexity of mitigation procedures.[70]

FOCI Mitigation Under The National Industrial Security Program

Distinct from, but closely connected to, the CFIUS process is the FOCI review process under the NISP. Executive Order 12829 established the NISP to protect classified information that is released to U.S. Government "contractors, licensees, and grantees."[71] Four Cognizant Security Agencies (CSAs) have been designated to establish industrial security programs: the U.S. Department of Defense (DOD), the U.S. Department of Energy (DOE), the Office of the Director of National Intelligence, and the U.S. Nuclear Regulatory Commission. "[T]he requirements, restrictions, and other safeguards to prevent unauthorized disclosure of classified information"[72] are set forth in the National Industrial Security Program Operating Manual (NISPOM). The DOD's DSS is tasked with providing industrial security services, including facility security clearances (FCLs), for the military services, Defense Agencies, and 30 other agencies.[73] Additional requirements and guidance are found in various DSS directives, industrial security letters, guidance, and, since 2014, regulations entitled "National Industrial Security Program" codified in Part 117 of Title 32 of the *Code of Federal Regulations*.[74] In addition, the DOE has established supplemental requirements through its Safeguards and Security Program (S&S Program) for the protection of DOE-specific assets, Restricted Data, Special Nuclear Material, and other security activities that are not covered under the NISPOM.[75]

As a guiding principle, the NISPOM provides that the FOCI policy of the U.S. Government for U.S. companies subject to an FCL is "to facilitate foreign investment by ensuring that foreign firms cannot undermine U.S. security and export controls to gain unauthorized access to critical technology, classified information, and special classes of classified information."[76] This principle provides important insight into the FOCI mitigation process.

■ Impact Of FOCI On Facility Security Clearances

The requirements for obtaining and maintaining a facility security clearance are set forth in the NISPOM. An FCL is an administrative determination that a U.S. company is eligible for access to classified information or the awarding of a classified contract.[77] A company is not permitted to access classified information in the performance of a U.S. Government contract or be awarded a classified contract without having an FCL authorized at the clearance level of such classified information.[78]

To be granted an FCL, a company must meet certain enumerated eligibility requirements.[79] One of those requirements is that "the company must not be under FOCI to such a degree that the granting of the FCL would be inconsistent with the national interest."[80] A U.S. company that is determined to be under FOCI is not eligible for an FCL "unless and until security measures have been put in place to negate or mitigate FOCI."[81] When applying for an FCL, companies must complete a Certificate Pertaining to Foreign Interests.[82] This form must be resubmitted when significant changes occur to information that was previously submitted.[83]

Yet submitting updates to this certificate is not the first step that will be taken concerning potential FOCI mitigation. Pursuant to the NISPOM, when a U.S. company with an FCL enters into negotiations for a merger with, or acquisition or takeover by, a foreign interest, it must notify the appropriate CSA that such negotiations have commenced.[84] Such notification must include (a) the type of transaction under negotiation, (b) the identity of the potential foreign investor, and (c) a plan to mitigate the FOCI.[85] In addition to the notification, the company must submit copies of the following: articles of incorporation; bylaws; partnership agreements; loan, purchase, and shareholder agreements; annual reports; and reports filed with other federal agencies.[86] In practice, this notification requirement often becomes a two-step process whereby initial notification is provided by the cleared company, and a subsequent submission meeting the aforementioned requirements is jointly prepared by the two parties.

A U.S. company will be deemed to be under FOCI "whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable . . . to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts."[87]

Pursuant to the NISPOM, certain factors will be considered to determine whether a U.S. Company is under FOCI, the eligibility of that company for an FCL, and the nature and extent of any protective measures to mitigate FOCI.[88] These factors—which will be considered in the aggregate—are:

(1) The record of economic and government espionage against U.S. targets;

(2) The record of enforcement and/or engagement in unauthorized technology transfer;

(3) The type and sensitivity of the information that will be accessed;

(4) The source, nature, and extent of FOCI, including whether the foreign interests hold a majority or substantial minority position in the company (defined as greater than 5% of the ownership interests or greater than 10% of the voting interest);

(5) The record of compliance with pertinent U.S. laws, regulations, and contracts;

(6) The nature of any pertinent bilateral and multilateral security and information exchanges agreements;

(7) Ownership or control, in whole or in part, by a foreign government; and

(8) Any other factor that indicates or demonstrates a capability on the part of the foreign interest to control or influence the management or operations of the business concerned.[89]

The FOCI mitigation process can be time consuming; typically the process takes several months, although it may take longer in certain instances such as when a National Interest Determination (NID), discussed below, is involved. Because of the lengthy nature of the process, it is important to involve specialists from the onset of negotiations. The parties can close prior to the execution of the final FOCI mitigation agreement with the DSS without jeopardizing the security clearance provided that a Commitment Letter is in place. The Commitment Letter includes the key elements of the FOCI mitigation, including the particular method as discussed below, as well as any interim security measures.[90]

■ FOCI Mitigation Methods

If it is determined that FOCI of the company will occur upon consummation of the transaction with the foreign interest, certain measures must be implemented to mitigate the risks associated with the FOCI for the company to maintain its FCL. These measures include:

(1) *Board Resolution.* A board resolution may be appropriate if the foreign interest will not own voting interests sufficient to elect a representative to the company's board, or is otherwise not entitled to representation on the board.[91] Under this method, the board adopts a resolution stipulating the following: (a) the identification of all foreign shareholders, including the type and number of foreign-owned shares; (b) acknowledgment of the company's obligation to comply with all industrial security program and export control requirements; and (c) certification that the foreign owner does not require, will not have, and can be effectively prevented from unauthorized access to all classified and export-controlled information entrusted to or held by the company.[92] In addition to the initial board resolution, the board must annually certify to the CSA that the resolution continues to be effective.[93] Copies of such resolutions must be distributed to all members of the board and key management, and the corporate records must reflect such distribution.[94]

(2) *Security Control Agreement.* A Security Control Agreement (SCA) may be appropriate if the foreign interest does not effectively own or control the U.S. company, but the foreign interest is entitled to representation on the board; for instance, if the foreign interest owns 25% of the voting stock of the U.S. company and is entitled to appoint one representative to the board.[95] Under an SCA, the company must appoint at least one outside director who has no prior relationship with the company or the foreign interest and is a U.S. citizen; the outside director must be approved by the DSS.[96] The DSS may also determine the need for more than one outside director, depending on the FOCI analysis and risk assessments.[97] The company must also establish a permanent board committee, the Government Security Committee (GSC), to provide oversight of classified and export controlled matters.[98] A company operating under an SCA does not have any limitations on the types of information that can be accessed.[99]

(3) *Special Security Agreement.* A Special Security Agreement (SSA) may be appropriate if the foreign interest effectively owns or controls the U.S. company.[100] A company operating under an SSA must appoint a minimum of three outside directors (who must be approved by the DSS), one or more representatives of the parent company (inside directors), and at least one cleared officer of the company.[101] The sum of the outside directors and cleared officer(s) must always be greater than the number of inside directors.[102] As with an SCA, a company operating under an SSA must establish a GSC.[103] Further, access to proscribed information[104] by a company that is cleared under an SSA may require that the appropriate Government contracting agency (the "Government Contracting Activity(GCA)") requiring access to the proscribed information complete a National Interest Determination (NID) to determine that the release of the proscribed information will not harm U.S. national security interests.[105] The FOCI mitigation plan

may be implemented before the NID process has completed provided that "there is no indication that a NID shall be denied."[106]

(4) *Proxy Agreement and Voting Trust Agreement.* The most restrictive forms of FOCI mitigation are a Proxy Agreement (PA) or Voting Trust Agreement (VTA). Under a PA and VTA, the "foreign owner relinquishes most rights associated with ownership of the company to cleared U.S. citizens approved by the U.S. Government."[107] Under a PA, the foreign ownership rights are conveyed to proxy holders; under a VTA, the foreign owner transfers legal title in the company to the trustees.[108] The proxy holders and the trustees, who must be disinterested individuals, exercise all prerogatives of ownership, although they must obtain approval from the foreign owner for certain significant matters.[109] These requirements are intended to prevent the foreign owner from exhibiting any control over the management of the company. Accordingly, there are no restrictions on the company's eligibility to gain access to classified information or to compete for classified contracts.[110] A PA or VTA may be the appropriate FOCI mitigation instrument when a company is owned or controlled by a foreign interest and the DSS makes a determination that more restrictive measures are required to mitigate that FOCI.[111]

■ Additional Procedural Safeguards

Companies that must mitigate FOCI through one of the aforementioned mechanisms may also be required to develop additional procedural safeguards to ensure that FOCI is effectively mitigated. Such implementation procedures include: (a) an affiliated operations plan to restrict the sharing of certain business functions with affiliates of the company;[112] (b) an electronic communications plan to prevent unauthorized disclosure of classified or export controlled information in electronic communications between the company and any subsidiaries or affiliates;[113] (c) a facilities location plan to restrict collocation of the company in the same or adjoining building of an affiliate if doing so could reasonably impact the ability of the company to comply with its FOCI mitigation arrangement;[114] (d) a technology control plan that provides for all necessary technology control security measures to prevent unauthorized access to classified or export-controlled information;[115] and (e) a visitation plan that establishes the procedures for visitation between the company and its affiliates.[116] It may be possible to craft an affiliated operations plan that serves as a comprehensive statement of the procedural safeguards established to address each of the above-referenced concerns. Such a plan would systematically addresses each business function, identify the potential FOCI risks associated with that function, and then describe the procedures that will mitigate the risks.

■ National Interest Determination Process

Companies that mitigate FOCI by entering into an SSA must obtain NIDs to continue performance on contracts requiring access to proscribed information. A NID is a determination by the GCA, which is the Government agency responsible for awarding a classified contract, that the company's access to proscribed information is "consistent with the national security interests of the United States."[117] A NID is made on a case-by-case, program, or project-specific basis.[118] It does not authorize the disclosure of classified information to a foreign entity.[119] Pursuant to new policy effective in early 2015,[120] the DSS is tasked with proposing an initial NID to the GCA if the company will require access to proscribed information under an SSA.[121] The DSS and the GCA coordinate to confirm that release of the proscribed information to the company is consistent with U.S. national security interests.[122] The DSS is subsequently responsible for verifying with the applicable GCA program office that there is a valid access requirement and confirms that the company is eligible for a NID.[123] Once the DSS sends the formal proposed NID to the GCA, the GCA will have 30 days to (a) approve the proposed NID, (b) provide a written rationale for non-concurrence, or (c) request additional time for review of the proposed NID.[124]

Provided that the proposed NID does not require access to Communications Security (COMSEC), Sensitive Compartmented Information (SCI), or Restricted Data (RD), if no response is received from the GCA within the 30 days, the NID is deemed approved, and the company may access or continue to access the proscribed information.[125]

If the company requires access to COMSEC, SCI, or RD, the DSS must also contact the responsible U.S. Government control agency (USG Control Agency) (*e.g.*, the National Security Agency for COMSEC, the Director of National Intelligence for SCI, and the DOE for RD) to obtain information about validated requirements.[126] In such cases, the DSS cannot deem the NID approved until the responsible Government control agency has concurred,[127] which may extend the timeline beyond the 30 days.

■ Relationship Between CFIUS And FOCI Mitigation: Parallel But Separate Processes

The CFIUS review and the FOCI review are undertaken in "parallel but separate processes."[128] While there is overlap, each process is subject to independent authorities, with differing time constraints and considerations, as described above. While a CFIUS mitigation agreement will often be implemented in conjunction with a FOCI mitigation plan, it is important to note that "CFIUS may not mitigate national security risks that are adequately addressed by other provisions of law."[129]

When evaluating a proposed transaction, specialists will need to analyze both CFIUS and FOCI mitigation considerations (provided that the potential target has an FCL). In many situations, the best practice is to file a CFIUS notice if the proposed transaction will require FOCI mitigation. The NISPOM contemplates that if a CSA learns of a proposed transaction that "should be reviewed" by CFIUS, and a joint voluntary notice is not filed by the parties within a reasonable period of time, the CSA will initiate action to have CFIUS notified.[130]

In 2014, the DOD issued a FOCI rule that aims to align the CFIUS and DSS FOCI mitigation processes given that the CFIUS review and investigation process typically is 75 days in duration while the DSS process involves a much longer review period, particularly if a NID is involved. Pursuant to the rule, the DSS must "review, adjudicate, and mitigate FOCI on a priority basis" if the process has not commenced or has not been completed prior to the joint filing of a CFIUS notice.[131] The DSS also must provide specific information to designated CFIUS representatives along a designated timeline, including (a) basic information on the company, (b) FCL level, (c) identification of current classified contracts, (d) the nature and status of any discussions with the company or the foreign interest regarding proposed FOCI mitigation, (e) whether additional time is required beyond established timelines to make a determination of whether the proposed FOCI mitigation measures will adequately address risks within the DSS's purview, and (f) identify any known security issues.[132]

Parties may be able to minimize delay by coordinating the DSS process and the submission of the CFIUS voluntary notice. Obtaining the Commitment Letter prior to submitting the CFIUS voluntary notice may increase the chances that the CFIUS process can be completed during the review or without having to withdraw and refile the voluntary notice. In any event, given the complex relationship between the CFIUS and the FOCI mitigation processes, it is of critical importance to adopt a thoughtful strategy from the onset of negotiations.

Getting It Right, From The Start

■ Identify Potential Applicability Of CFIUS And/Or DSS FOCI Mitigation Processes

A determination should be made at the earliest stages whether a potential transaction may trigger CFIUS review and/or may require FOCI mitigation. Prompt recognition by the deal team of potential national security implications for a transaction will enable the early involvement of specialists, which in turn will facilitate the shaping of the negotiating strategy and draft agreement to appropriately address the significant concerns presented by both processes.

Failure to recognize and plan for possible CFIUS concerns risks delaying the transaction as the CFIUS review proceeds, with possible associated financial ramifications, or, if the transaction has already closed, the forced unwinding of the transaction. Incorporating CFIUS concerns into the negotiations and into the resulting agreement can minimize the disruption of the transaction, as well as consciously

distribute the burden and potential risk associated with a prolonged or complicated CFIUS process. The deal team, therefore, should be able to identify general characteristics that suggest that a transaction may be a covered transaction that is subject to CFIUS jurisdiction and enlist the assistance of specialists to fully evaluate CFIUS exposure and advise the deal team accordingly.

There are two key determinations that should be made at the earliest stages of the transaction: (1) whether there are potential national security implications, and (2) whether the potential transaction could result in foreign control. Certain transactions will have clear national security implications—if they involve cleared Government contractors, the defense industrial base, critical infrastructure, sensitive technologies, etc. However, even if a potential transaction does not have an obvious nexus to national security, as discussed further below, it is prudent for the deal team to conduct further diligence to determine whether a nexus exists.

The second prong of determining whether the potential transaction may be covered under CFIUS is analyzing whether there would be foreign control. CFIUS review covers a broad range of acquisitions, mergers, and takeovers, *i.e.*, any transaction that could result in foreign "control" of entities engaged in interstate commerce in the United States,[133] so it is important to determine whether control has been transferred. The definition of "control" is functional and broad and is intended to be applied on a case-by-case basis.[134] "Control" is defined to mean "the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity."[135] The CFIUS regulations also list 10 exemplary factors that may be considered important matters affecting an entity, including the power to sell the entity or transfer its assets, to dissolve the U.S. entity, to approve major expenditures, to close or relocate any of its facilities, to terminate its contracts, and to appoint or dismiss officers.[136]

The CFIUS regulations do not define what level of ownership constitutes control. Control of an entity does not, therefore, turn merely on the percentage of ownership, but also on who has potential decisionmaking power after the transaction is completed. The amount of equity interest held by a foreign person and the right to elect board members to a U.S. business are important, but not determinative, factors in finding control. If a foreign person acquires 10% or less of the outstanding voting interest in a U.S. company solely for passive investment purposes, the transaction will not trigger CFIUS review.[137]

However, the acquisition of only a minority interest by the foreign entity does not immunize a transaction from CFIUS concern. CFIUS regulations suggest that conditions of the transactions may result in a foreign minority shareholder exercising control over a U.S. company for purposes of CFIUS review, notwithstanding the non-controlling interest, if the foreign minority shareholder could affect the material corporate decisions of the company. Clarifying examples are provided in the regulations.[138] Certain minority shareholder protection measures, however, such as the power to prevent the voluntary filing of bankruptcy or liquidation and the power to prevent the change of existing legal rights or preferences of a particular class of stock held by minority investors, do not confer control. CFIUS will consider whether a minority shareholder right confers control on a case-by-case basis. Although the regulations do not provide examples of minority shareholders' rights that do convey "control" under CFIUS, several important protections generally sought by minority investors, such as the power to prevent the company from adopting or modifying a business plan or entering into certain agreements, may result in a determination of control.[139] Thus, a shareholder negotiating supermajority protection rights may find that the more successful its negotiations, the more likely it is to come under the purview of CFIUS.

At the same time, the deal team should note the presence of a "U.S. business" and a "foreign person" in the transaction. A covered transaction that is subject to CFIUS review is a transaction that confers control of a U.S. business to a foreign person. The definition of a "covered transaction" focuses on "U.S. businesses" rather than "U.S.

persons."[140] The terms "U.S. business" and "foreign person" are defined broadly to bring some foreign–foreign and some U.S.–U.S. transactions within its scope. For example, the sale by a foreign entity of a U.S. business (*e.g.*, a subsidiary of the foreign parent) to another foreign entity would fall within the scope of covered transaction. The term "U.S. business" means "any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce."[141] The controlling investments in a business not organized as a legal entity (*e.g.*, assets sale or sale of a business unit) may still be subject to CFIUS review.[142]

A "foreign person" is any "foreign national, foreign government or foreign entity" or any "entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity."[143] Indicators may include sovereign wealth funds and state-owned enterprises. A "foreign entity" is an entity "organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges."[144] A sovereign wealth fund, pension fund, or social insurance fund may be foreign persons. However, if U.S. nationals own more than 50% of the entity, it will not be considered a foreign entity.[145] Therefore, a U.S. subsidiary of a foreign company can be both a "U.S. business" and a "foreign person." The determination of a "U.S. business" is not based on the nationality of the owners or the place of incorporation of an entity, but rather on whether the entity is engaged in interstate commerce in the United States.[146] The determination of a "foreign person," on the other hand, is based on whether an individual or entity is controlled by a foreign interest, not on where it does business. Therefore, both the acquisition of a foreign company's U.S. subsidiary by another foreign company and the acquisition of a U.S. company by the U.S. subsidiary of a foreign company may be subject to the CFIUS review. The deal team should be particularly alert when the potential acquirer has a complex ownership structure, such as a private equity firm or hedge fund, as the ultimate owner may be a foreign person.

The deal team should pay careful attention to the potential for foreign government control in the foreign party. Under the regulations, the Committee must initiate an investigation of any transaction in which control will transfer to a foreign government.[147] The regulations define a foreign government-controlled transaction as a "covered transaction that could result in control of a U.S. business by a foreign government or persons controlled by a foreign government."[148] The definition would appear to include transactions where the foreign party is a sovereign wealth, pension, or social insurance fund.

The process for determining whether there may be a CFIUS review is complex and will turn on the factors discussed above. In contrast, identification of DSS concerns is generally a more straightforward process. As an initial step, it should be determined whether the target company, including any of its subsidiaries, is a Government contractor, and specifically, whether it has an FCL. If the structure of the proposed transaction involves a foreign interest as the buyer, it is likely that the FOCI mitigation process will be triggered.

The NISPOM defines a "foreign interest" as "any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its territories, and any person who is not a citizen or national of the United States."[149] This definition differs from the equivalent definition for CFIUS; notably, if there is *any* foreign ownership, the parties should be prepared to commence the FOCI mitigation process.

While the definitions differ between the regulations governing CFIUS and the NISPOM, it is of paramount importance for the deal team to determine whether the potential acquirer has any foreign ownership—at any level—and the extent of such ownership. This information may affect the structuring of the transaction, both in terms of the rights afforded to foreign interests (*e.g.*, veto rights for minority shareholders) as well as whether the line(s) of business that would trigger CFIUS and/or DSS review are important to

retain in the proposed transaction. In addition, specialists will rely on this information to make determinations including whether it is prudent to file a voluntary notice with CFIUS and whether FOCI mitigation will be required for the DSS to maintain an FCL. If the parties are not able to identify a foreign owner or voting interest that would constitute 5% or more of the overall ownership, the DSS may determine that the company is not eligible for an FCL.[150] An example of when this situation may arise is when the potential acquirer is a private equity firm or hedge fund, where it may be more difficult to identify all investors that would own 5% or more of the company.

■ Coordination At The Onset Of Negotiations

Once the deal team determines that the proposed transaction may result in foreign ownership of the company, specialists should be notified as soon as practicable to assist the deal team. Early notification will enable internal coordination and the development and implementation of a strategy to effectively negotiate the proposed transaction as well as the CFIUS and FOCI mitigation processes.

Early involvement also enables specialists to have input on the due diligence request list submitted to the company. While the due diligence request list will need to be tailored to the proposed transaction, it is important that the potential acquirer fully understand the extent of the company's relationship with the U.S. Government. Specialists should ensure that the scope of their diligence extends to all subsidiaries and affiliates of the company. The potential acquirer must fully understand the volume and scope of any Government contracts, cleared facilities, personnel clearances, etc., and should structure the diligence request list accordingly. In addition to these obvious signs that the proposed transaction will result in CFIUS review and FOCI mitigation, specialists will need to ensure that less obvious aspects of the company's business will not trigger CFIUS review.

An assessment of CFIUS exposure requires consideration of the evolving understanding of the Committee's approach to national security risk and the United States' critical infrastructure. The Critical Infrastructures Protection Act of 2001,[151] passed as part USA PATRIOT Act, defined "critical infrastructure" as:[152]

> systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

Critical physical and information infrastructure sectors include telecommunications, energy, financial services, water, and transportation,[153] as well as cyber and physical infrastructure services.[154]

The Homeland Security Act of 2002,[155] which established the Department of Homeland Security, incorporated by reference the PATRIOT Act's language regarding critical infrastructure.[156] The 2013 Presidential Policy Directive (PPD) regarding critical infrastructure security and resilience identified 16 infrastructure sectors.[157] Accordingly, a proposed transaction that could result in foreign control of a U.S. business in a listed sector should be reviewed to determine whether submission of a voluntary notice is warranted. Note, however, that the PPD list should not be considered exhaustive for purposes of Exon-Florio.

Moreover, the Committee's approach to critical infrastructure and national security risk has expanded beyond the transfer of critical infrastructure control. The Committee has found national security risk when an asset in the transaction is located near critical infrastructure.[158] Accordingly, when assessing CFIUS risk and the possible submission of a voluntary notice, parties should consider the proximity to critical infrastructure of assets over which control will be transferred under the proposed transaction.

In contrast to the assessment of potential CFIUS exposure, the DSS analysis will be considerably more straightforward: if the company does not have an FCL, it is unlikely that FOCI mitigation will be required.[159]

The deal team should get a sense early on as to whether or not it is desirable for the acquirer to retain the line(s) of business that would necessitate a review of the proposed transaction by the DSS and CFIUS. In some instances, it may

not make financial sense to retain the line of business that requires an FCL, as the mitigation measures imposed by the DSS and/or CFIUS may cost more to maintain than that line of business produces.

The deal team, including specialists, should also seek to understand the nature of foreign ownership early in the process. This holds for the deal team representing the acquirer as well as the team representing the seller (the company), as the latter will make initial contact with the DSS to notify the DSS of negotiations; such notification must include the identity of the potential foreign investor.[160] In addition, Standard Form (SF) 328, Certificate Pertaining to Foreign Interests (SF 328), which requires detailed information on foreign persons, will need to be submitted to the DSS by either the cleared company or its parent in conjunction with the FOCI mitigation process.[161] Ultimately, if a CFIUS notice is filed, the parties will need to include detailed information on foreign ownership, including the nature and extent of foreign ownership, identification of any foreign government involvement, and detailed information on the board and officers of the acquiring foreign person (to include foreign government and foreign military service).[162]

A further reason for the deal team to notify specialists promptly concerning the proposed transaction is to enable specialists to coordinate with the company regarding the required initial notification to the DSS. A cleared company must notify the DSS when it "enters into negotiations" for the proposed transaction that it has commenced such negotiations.[163] This notification should include the type of transaction under negotiation (merger, stock purchase, asset purchase, etc.), the identity of the potential foreign interest investor, and a proposed FOCI mitigation plan.[164] In addition, the company will be required to submit copies of loan, purchase and shareholder agreements, annual reports, bylaws, articles of incorporation, partnership agreements, and reports filed with other federal agencies.[165]

Although not required, the parties should consider whether it is helpful to give notice to CFIUS of the proposed transaction in advance of filing the notice, thereby commencing dialogue with CFIUS representatives as well as those from the DSS. CFIUS regulations allow for pre-notice consultation and pre-filing review by CFIUS of a draft notice. The consultation and submission of the draft notice should take place at least five business days prior to a formal filing.[166] Opening the lines of communication early with CFIUS may be particularly helpful as the DSS must initiate action to have CFIUS notified if it becomes aware of a proposed transaction that should be reviewed by CFIUS if the parties do not file a notice within a reasonable time.[167]

■ Integration Of CFIUS And DSS FOCI Mitigation Processes Into Deal Negotiations

While it is of utmost importance for the deal team to involve specialists at the early stages of the transaction, it is equally important that the CFIUS and FOCI mitigation processes not be viewed as separate workstreams from the deal negotiations. The foundation for successful and efficient navigation of these processes can be laid in the transaction agreement and in the overall negotiations and diligence process. The deal team will primarily interact with specialists on two fronts: provisions governing the filing of any CFIUS notice and FOCI mitigation plan and determining the optimal structure of the post-transaction entity.

■ Decisionmaking Authority And Strategy

The transaction agreement should clearly establish how the decisionmaking process will be handled for both CFIUS and the DSS. This includes the extent to which one party has sole authority to make determinations on matters including whether or not a voluntary notice shall be filed with CFIUS. The transaction agreement should further specify whether one party will have the authority to determine the strategy for the CFIUS review and FOCI mitigation process, whether there will be joint decisionmaking, or some combination thereof. This is particularly important for the CFIUS process regarding authority to determine how the decision on whether to submit voluntary notice will be made, as well as any decision to withdraw and re-file the submission. Relatedly, it may be in the interest of the parties to stipulate as closing conditions the

conclusion of the CFIUS process and approval by the DSS of the FOCI mitigation plan.

In addition, the parties should establish a timeline for determining whether or not a CFIUS notice should be filed (*e.g.*, within two weeks of signing), for filing the CFIUS notice, and for submitting the proposed FOCI action plan to the DSS (including whether the Commitment Letter should be finalized prior to submission of the CFIUS notice). It is frequently helpful if there is clarification regarding which party is responsible for which portions of the CFIUS notice and the various requirements in the FOCI mitigation process.

Moreover, it is often helpful for the transaction agreement to specifically address whether the parties may independently contact CFIUS and DSS representatives to discuss substantive matters of mutual interest or whether they must notify the other party and provide them the opportunity to participate in any discussions.

Further, the deal team, in careful consultation with specialists, should determine if it is appropriate to incorporate termination fees into the transaction agreement. Such fees could provide protections should the deal fail to consummate on account of an inability to successfully mitigate national security concerns through the CFIUS process or maintain an FCL through an approved FOCI mitigation plan.

Preparation of the CFIUS notice and DSS requirements should commence simultaneously with the due diligence review and drafting of the transaction agreement, particularly if the parties seek to close as soon as practicable following signing. Note that if there are other closing conditions, such as regulatory approvals, that are expected to take longer than either the CFIUS review or the FOCI mitigation process, time may not be as much of a priority. However, in any case, the parties should be prepared for the significant data collection requirements involved in filing a CFIUS notice or FOCI mitigation plan. In particular, the acquirer with the foreign ownership should be given advance notice of the requirements to provide detailed ownership information in conjunction with the filings.[168]

As discussed earlier, the DSS must be notified early in the negotiation process. Establishing a positive working relationship with DSS (and CFIUS) representatives is essential for ensuring open and constructive communications throughout the process. Typically after signing, the parties will arrange for an initial meeting with the DSS. Determining the focus of the meeting and the key participants to attend is another tactical decision that will implicate the overall FOCI mitigation strategy. It is important to understand that the DSS is principally concerned with the safeguarding of classified information, and is responsible for "taking whatever interim action is necessary" to safeguard such classified information once it has been determined that the company is under FOCI.[169] In making its determination as to whether a company is under FOCI, the DSS will consider the information that the company or its parent provides on SF 328, as well as other relevant information.[170] Such information may include reports filed with the Securities and Exchange Commission (if the company is publicly traded), articles of incorporation, bylaws, loan agreements, shareholder agreements, and other publicly available information about the company.[171]

While there is not the same regulatory requirement to notify CFIUS at the onset of negotiations, it is equally beneficial to establish a constructive working relationship and the parties should determine the appropriate time to schedule an informal initial discussion with CFIUS representatives. Establishing which party has decisionmaking responsibility—and the extent of such authority—should facilitate more effective communications with CFIUS. The parties should also consider how the joint notice itself should be drafted, and determine how drafts will be reviewed and modified.

Throughout, the CFIUS and FOCI mitigation processes should be closely coordinated, with the deal team and specialists working together as well as representatives from both parties. This approach should continue after submission of the initial CFIUS notice or FOCI mitigation plan, including in response to any questions as well as in the negotiation of any mitigation agreements. Clarification of each party's roles and responsibilities

in the transaction agreement will facilitate an efficient, and effective, approach at all steps of the proposed transaction.

■ Post-Transaction Structure

Aside from these considerations, the deal team should work closely with specialists when determining the structure of the post-transaction entity. When the foreign investor would be a minority shareholder of the post-transaction entity, the deal team should take into consideration the implications of having a foreign investor of a cleared company. For instance, they should consider the impact of granting strong minority rights, such as veto rights, in the shareholder agreement.

Also, as mentioned earlier, if the line(s) of business that necessitates CFIUS review and/or cleared facilities is not deemed to be profitable enough or integral enough to the company to retain post-transaction given the costs of developing and implementing FOCI mitigation, it may be appropriate to engage in related negotiations to sell or spin-off the line(s) of business.

GUIDELINES

These *Guidelines* suggest some general considerations for the parties to a transaction in which there is foreign investment and a U.S. business. They are not, however, a substitute for professional representation in any specific situation.

1. If the acquiring entity has any foreign connection whatsoever, including using funds from foreign investors, consult your specialists before even getting to a term sheet.

2. If there is foreign involvement on the buyer's side, ensure that diligence includes national security issues.

3. Diligence should include export and sanctions compliance policies and procedures.

4. Be prepared to make the notice to the DSS when negotiations begin; the DSS does not like to be blindsided or rushed.

5. Advise the deal team that the DSS process cannot be completed prior to closing (and therefore cannot be a condition to closing). Corporate lawyers are accustomed to resolving all issues prior to closing; however, because the DSS ultimately evaluates the post-closing structure, the most that can be achieved prior to closing is a Commitment Letter.

6. Anytime a DSS process is implicated, evaluate whether to file a CFIUS notice. It is highly likely that the best course of action will be to make a voluntary CFIUS filing.

7. Identify potential alternative CFIUS scenarios and deal implications.

8. Identify in the agreement the party that will have responsibility/authority with respect to preparation of DSS and CFIUS submissions.

9. Include language in the agreement obligating all parties to use best efforts to provide information needed to secure DSS and CFIUS clearance.

10. Consider whether to include a break-up payment in the agreement. The payment would be triggered in the event that DSS or CFIUS clearance cannot be obtained, or cannot be obtained without intolerable mitigation.

11. If the target has an FCL, make sure that the target's Facility Security Officer is identified and brought inside the tent early in the process.

12. If you represent a target with an FCL, be prepared to evaluate various courses of action to mitigate FOCI. Depending on feasibility of mitigation, it may be prudent to consider spinning off the cleared business.

13. Consider submitting the CFIUS voluntary notice after securing the Commitment Letter.

14. Be reasonable in what you suggest to the DSS in the first instance as a mitigation plan; remember, they've done this dance before.

15. Consider whether to implement required FOCI mitigation procedural safeguards through a comprehensive affiliated operations plan rather than through a series of risk-specific plans.

16. To the extent possible, endeavor to work with the Committee's proposed mitigation plan rather than pursuing an alternative.

17. If you represent a private equity or hedge fund investor, you might be required by the DSS to disclose the names of all foreign investors in your fund. Accordingly, advise your investors of this possibility in advance of attempting to acquire a cleared company so that you can avoid the possibility of having to withdraw your bid if your investors decide not to disclose their identities.

18. Similarly, CFIUS may request detailed information concerning the ownership structure of the foreign party to the transaction. Note that it may be possible to submit such information to CFIUS confidentially, so that it is not made available to any other party to the transaction.

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82/ NISPOM ¶ 2-302.

83/ NISPOM ¶ 2-302.

84/ NISPOM ¶ 2-302.b.

85/ NISPOM ¶ 2-302.b.

86/ NISPOM ¶ 2-302.b.

87/ NISPOM ¶ 2-300.a.

88/ NISPOM ¶ 2-301.

89/ NISPOM ¶2-301.a–.g; 32 C.F.R. § 117.56(b)(3)(A)–(H).

90/ A standard Commitment Letter is available from the DSS. Defense Security Serv., U.S. Dep't of Defense, FOCI Mitigation for Cleared Companies Undergoing a Foreign Acquisition or Restructure Resulting in Foreign Ownership, http://www.dss.mil/isp/foci/foreign-acquisitions.html.

91/ NISPOM ¶ 2-303.a; 32 C.F.R. § 117.56(b)(4)(iii)(A).

92/ NISPOM ¶ 2-303.a; 32 C.F.R. § 117.56(b)(4)(iii)(A).

93/ NISPOM ¶ 2-303.a.

94/ NISPOM ¶ 2-303.a; 32 C.F.R. § 117.56(b)(4)(iii)(A).

95/ 32 C.F.R. § 117.56(b)(4)(iii)(B).

96/ Defense Security Serv., U.S. Dep't of Defense, FOCI Mitigation Instruments, Security Control Agreement, http://www.dss.mil/documents/foci/2009_security_control_agree.doc; 32 C.F.R. § 117.56(b)(4)(iii)(B).

97/ NISPOM ¶2-303.c(1); 32 C.F.R. § 117.56(b)(4)(iii)(B).

98/ NISPOM ¶ 2-303.c.

99/ NISPOM ¶ 2-303.c(1).

100/ NISPOM ¶2-303.c(2); 32 C.F.R. § 117.56(b)(4)(iii)(C).

101/ Defense Security Serv., U.S. Dep't of Defense, FOCI Mitigation Instruments, Special Security Agreement, http://www.dss.mil/documents/foci/SpecialSecurityAgreement-3-5-09.doc; 32 C.F.R. § 117.56(b)(4)(iii)(C).

102/ Defense Security Serv., U.S. Dep't of Defense, FOCI Mitigation Instruments, Special Security Agreement, http://www.dss.mil/documents/foci/SpecialSecurity-Agreement-3-5-09.doc.

103/ NISPOM ¶ 2-303.c.

104/ "Proscribed information" includes information classified as top secret; communications security material, excluding controlled cryptographic items when unkeyed and utilized with unclassified keys; restricted data; special access programs; and sensitive compartmented information. 32 C.F.R. § 117.56(b)(4)(iii)(C)(2).

105/ NISPOM ¶2-303.c(2); 32 C.F.R. § 117.56(b)(4)(iii)(C).

106/ NISPOM ¶ 2-303.c(2)(b).

107/ NISPOM ¶ 2-303.b.

108/ NISPOM ¶ 2-303.b.

109/ These matters include: (a) the sale or disposal of the company's assets; (b) pledges, mortgages, or other encumbrances on the company's assets, capital stock, or ownership interests; (c) mergers, consolidations, or reorganizations; (d) dissolution; and (e) filing of a bankruptcy petition. NISPOM ¶ 2-303.b(1).

110/ NISPOM ¶ 2-303.b.

111/ NISPOM ¶ 2-303.b; 32 C.F.R. § 117.56(b)(4)(iii)(D).

112/ See Defense Security Serv., U.S. Dep't of Defense, Affiliated Operations Plan, http://www.dss.mil/isp/foci/affiliated-operations-plan.html.

113/ See Defense Security Serv., U.S. Dep't of Defense, Electronic Communications Plan, http://www.dss.mil/isp/foci/elec_com.html.

114/ See Defense Security Serv., U.S. Dep't of Defense, Facilities Location Plan, http://www.dss.mil/isp/foci/foci_collocation.html.

115/ See Defense Security Serv., U.S. Dep't of Defense, Technology Control Plan, http://www.dss.mil/isp/foci/technology-control-plan.html.

116/ See Defense Security Serv., U.S. Dep't of Defense, Visitation Plan, http://www.dss.mil/isp/foci/visitation.html.

117/ 32 C.F.R. § 2004.22(c).

118/ 32 C.F.R. § 2004.22(c)(3).

119/ 32 C.F.R. § 117.56(b)(5).

120/ Under Secretary of Defense, Directive Type Memorandum 15-002, Policy Guidance for the Processing of National Interest Determinations (NIDs) in Connection With Foreign Ownership, Control, or Influence (Feb. 11, 2015), available at http://www.dtic.mil/whs/directives/corres/pdf/DTM15002.pdf (DTM-15-002).

121/ DTM-15-002, attach. 2, ¶ 2.b. Note that formerly, GCAs drafted and approved NIDs themselves.

122/ DTM-15-002, attach. 2, ¶ 2.c.

123/ DTM-15-002, attach. 2, ¶ 2.d(1)–(3).

124/ 32 C.F.R. § 2204.22(c)(4); DTM-15-002, attach. 2, ¶ 2.d(4).

125/ DTM-15-002, attach. 2, ¶ 2.d(4).

126/ DTM-15-002, attach. 2, ¶ 2.d(5).

127/ DTM-15-002, attach. 2, ¶ 2.d(5)(a).

128/ NISPOM ¶ 2-310.b.

129/ 32 C.F.R. § 117.56(b)(14)(iii).

130/ NISPOM ¶ 2-310.d.

131/ 32 C.F.R. § 117.56(b)(14)(iv).

132/ 32 C.F.R. § 117.56(b)(14)(iv)(B)(1)–(6).

133/ 31 C.F.R. § 800.207.

134/ See 73 Fed. Reg. 70,702, 70,704 (Nov. 21, 2008).

135/ 31 C.F.R. § 800.204.

136/ 31 C.F.R. § 800.204(a) provides the following exemplary factors: "(1) The sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business; (2) The reorganization, merger, or dissolution of the entity; (3) The closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity; (4) Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity; (5) The selection of new business lines or ventures that the entity will pursue; (6) The entry into, termination, or nonfulfillment by the entity of significant contracts; (7) The policies or procedures of the entity governing the treatment of nonpublic technical, financial, or other proprietary information of the entity; (8) The appointment or dismissal of officers or senior managers; (9) The appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or (10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described in paragraphs (a)(1) through (9)."

137/ 31 C.F.R. § 800.302(b).

138/ See examples provided in 31 C.F.R. § 800.302(b).

139/ See 73 Fed. Reg. 70,702, 70,707 (Nov. 21, 2008).

140/ 31 C.F.R. § 800.301.

141/ 31 C.F.R. § 800.226.

142/ See 73 Fed. Reg. 70,702 70,705 (Nov. 21, 2008).

143/ 31 C.F.R. § 800.216.

144/ 31 C.F.R. § 800.212(a).

145/ 31 C.F.R. § 800.212(b).

146/ 31 C.F.R. § 800.226.

147/ 31 C.F.R. § 800.503(b)(1).

148/ 31 C.F.R. § 800.214.

149/ NISPOM app. C, Definitions, at C-3.

150/ 32 C.F.R. § 117.56(b)(3)(v).

151/ 42 U.S.C.A. § 5195c.

152/ 42 U.S.C.A. § 5195c (e).

153/ See 42 U.S.C.A. § 5105c (b)(2).

154/ See 42 U.S.C.A. § 5195c (b)(3).

155/ Pub. L. No. 107-296, 116 Stat. 2135 (2002).

156/ 6 U.S.C.A. § 101.

157/ The sectors are (1) chemical; (2) commercial facilities; (3) communications; (4) critical manufacturing; (5) dams; (6) defense industrial base; (7) emergency services; (8) energy; (9) financial services; (10) food and agriculture; (11) government facilities; (12) healthcare and public health; (13) information technology; (14) nuclear reactors, materials, and waste; (15) transportation systems; (16) water and wastewater systems. Presidential Policy Directive—Critical Infrastructure Security and Resilience, PPD-21 (Feb. 12, 2013), https://www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.

158/ For example, Chinese governmentcontrolled Northwest NonFerrous International Investment Company Limited abandoned its efforts to acquire a 51% interest in Firstgold Corp. after the Committee recommended that the President block the transaction because of the proximity of Firstgold properties to Naval Air Station Fallon. See "Northwest Backs Out of Firstgold Purchase," Mining Industry (Dec. 24, 2009), http://www.mininginc.net/mining-news/northwest-backs-out-of-firstgold-purchase.html. Similarly, the proximity of wind farms to a Navy base was the basis for President Obama's order requiring a Chinese entity to divest its interest in the projects. See Order of September 28, 2012 Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Oct. 3, 2012).

159/ See generally NISPOM ¶ 2-300.

160/ NISPOM ¶ 2-302.b.

161/ See Standard Form 328, Certificate Pertaining to Foreign Interests, available at http://www.dss.mil/documents/foci/sf328.pdf.

162/ See 31 C.F.R. § 800.207(c)(6)(vi)(B).

163/ NISPOM ¶ 2-302.b.

164/ NISPOM ¶ 2-302.b.

165/ NISPOM ¶ 2-302.b.

166/ 31 C.F.R. § 800.401(f).

167/ NISPOM ¶ 2-310.d.

168/ 31 C.F.R. § 800.402(c)(1)(v).

169/ 32 C.F.R. § 117.56(b)(2)(iii).

170/ 32 C.F.R. § 117.56(b)(2)(ii).

171/ 32 C.F.R. § 117.56(b)(ii).

BRIEFING PAPERS