NEW INITIATIVE WOULD SET REQUIREMENTS FOR NATIONAL INTEREST DETERMINATIONS

A foreign-owned or controlled U.S. Government contractor may not receive a facility security clearance unless the contractor has agreed to mitigate "Foreign Ownership, Control, or Influence" (FOCI) in accordance with the National Industrial Security Program Operating Manual (NISPOM). The most common form of FOCI mitigation is the Special Security Agreement (SSA), which imposes various corporate governance constraints but allows the foreign owner direct representation on the board. Under the NISPOM, access to highly classified ("proscribed") information by companies operating under SSAs "may require" a National Interest Determination (NID).

Now the Information Security Oversight Office (ISOO), a branch of the National Archives and Records Administration (NARA), has proposed to amend Directive No. 1 of the National Industrial Security Program (NISP) to make clear that NIDs are required, not discretionary, before proscribed information can be released to contractors that are either cleared or in the process of being cleared under an SSA. Other changes are also discussed below. The proposal is open to public comment through January 29, 2010.

Under the proposed rule, when a contractor under an SSA enters into a new contract that would allow access to proscribed information or needs access to proscribed information before a contract issues, the Government Contracting Activity (GCA) would have the responsibility of writing an NID, as it does under the current rule. In acquisitions by foreign interests involving contractors with access to proscribed information, the Cognizant Security Office (CSO) would be required to advise the GCA to write an NID when it is expected that FOCI would be mitigated through an SSA. (The CSO manages industrial security for the Cognizant Security Authority (CSA), the government authority that owns or controls the majority of the proscribed information handled by the contractor.) Authorized CSAs include the Department of Defense, the Department of Energy, the Nuclear Regulatory Commission, and the CIA.

The proposed rule would also establish timelines for issuance of an NID, a new requirement. Briefly stated, the GCA would be required to produce an NID within 30 days if all of the proscribed information at issue is under the control of the GCA and the NID does not require interagency cooperation. If the classified information is not controlled by the GCA (*e.g.*, if it is classified as Communications Security, Sensitive Compartmented Information, or Restricted Data), the directive would allow an additional 30 days for the GCA to obtain the appropriate agency's consent for release of the information. In each case, a copy of the NID would be provided to the contractor. The interagency NID process, when required, would have to conclude within 60 days of the original NID request. If the GCA fails to issue the NID within the designated period, the directive would authorize the CSA to request a decision, provided that the contractor is given 30-day updates regarding the status of the pending NID.

The proposed rule also would not allow a CSA to delay approval of a pending SSA because of an unconcluded NID when there is no indication that the NID will be denied. The contractor would not be allowed to access proscribed information, however, until the NID issued. The proposed rule would also make clear that a CSO may not elevate an existing contractor's clearance under an SSA to Top Secret until an NID has been issued for Top Secret access.

Overall, the proposed amendments represent an improvement over the status quo. Although there may be some cases where agencies have bypassed the NID requirement, they are few and far between, so the concept of a mandatory NID is not new. A welcome development, however, is the requirement that the NID be provided to the contractor. Historically, there has been no clear guidance respecting the treatment of NIDs, once written, and clarity here is welcome. There is also reason to applaud the introduction of deadlines in the NID process. Currently, there are no deadlines. There is risk, however, that agencies may view the "30-day update" as license to roll past the deadlines by advising the contractor every 30 days that the NID is "pending." If retained in the final rule, the option to disregard the deadlines should be limited -- and strictly policed.

It is important to note that the proposal does not alter the current standard for issuing an NID. Under NISPOM 2-203(c)(2), an NID requires a finding that release of proscribed information "shall not harm the national security interests of the United States." This standard was first published in 2006. Previously, NIDs required an analysis of the rationale for awarding the contract to a foreign-owned contractor over available U.S.-controlled contractors, and an affirmative finding that release of the information would advance the national security interests of the United States. The NID process was tedious and time-consuming and discouraged many contractors and agencies from pursuing NIDs. Although agency adherence to the "do no harm" standard has been uneven, it is generally agreed that the 2006 standard has greatly simplified the NID process, with no discernible damage to the national security.

It is somewhat unsettling, therefore, that the proposed directive states that an NID requires an agency to assess "whether release of the proscribed information is consistent with the national security interests of the United States." (Emphasis supplied.) The underscored phrase is repeated in the definition of "National Interest Determination." Although likely intended only as a shorthand description of the NID standard, the phrase is new -- and, given the tortured history of the NID process, there is some risk that agencies may misread the proposal to require an affirmative finding that release of proscribed information is "consistent with the national security interests of the United States," reinvigorating the old standard. Using the "shall not harm" language of NISPOM 2-203 in the proposed amendment may be redundant, but it has the advantage of consistency, and opens no new questions.

If you have any questions concerning the proposal, please do not hesitate to contact any member of Kaye Scholer's National Security Practice Group.

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