NEW AMENDMENT STANDARDIZES FEDERAL REQUIREMENTS FOR NATIONAL INTEREST DETERMINATIONS

A foreign-owned or controlled U.S. Government contractor may not receive a facility security clearance unless its "Foreign Ownership, Control, or Influence" ("FOCI") is mitigated in accordance with the National Industrial Security Program Operating Manual ("NISPOM"). The most common form of FOCI mitigation for majority-owned companies is the Special Security Agreement ("SSA"), which imposes various corporate governance constraints but nevertheless allows the foreign owner direct representation on the board of the SSA company.

A company under an SSA may not have access to highly classified ("proscribed") information (i.e., Top Secret, Special Access Program, Sensitive Compartmented Information, Restricted Data and Communications Security information, other than classified keys used for data transfers) without a National Interest Determination ("NID"). Concerned that agencies were not uniformly seeking NIDs, the Information Security Oversight Office ("ISOO"), a branch of the National Archives and Records Administration, has now amended Directive No. 1 of the NISPOM to make clear that an NID is always required before a company cleared (or in process for clearance) under an SSA may have access to proscribed information. The directive makes other important changes to the NID process.

NIDs are required when a foreign investor acquires control of a government contractor with access to proscribed information. In such cases, the directive provides that the Cognizant Security Office ("CSO") must advise the Government Contracting Activity ("GCA") to write an NID if FOCI will be mitigated through an SSA. (The CSO manages industrial security for the Cognizant Security Agency ("CSA"), the agency that 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.

Deadlines are now imposed for NIDs. The new rule establishes timelines for issuing an NID: 30 days if all of the proscribed information at issue is under the control of the GCA; if it is not, an additional 30 days to obtain consent from the agencies that originated the information at issue. If the GCA fails to issue the NID within the designated period, it must notify the CSA of the reasons why — and provide the CSA with 30-day updates until the NID issues. When the NID issues, a copy must be provided to the contractor. (In comments to the ISOO, we argued that the original proposal was prone to abuse, since it provided only that NIDs would "ordinarily" issue in 30 days. The ISOO agreed, and struck the term "ordinarily." The change should make clear that the deadlines are not "advisory" — and increase agency accountability.)

NIDs should be approved when "access to proscribed information is consistent with the national security interests of the United States." This new language differs from the FOCI provisions of the NISPOM, which state that an NID may be approved if it is determined that access to proscribed information "shall not harm the national security interests of the United States." In our comment to the ISOO, we noted that the NISPOM's "do no harm" standard had been adopted in 2006 because the previous standard (which required a showing that access "advance[d] the national security interests of the United States") was unnecessarily burdensome. We expressed concern that the new guidance

could be read as a return to the cumbersome pre-2006 standard. The ISOO disagreed, arguing that the amended directive is consistent with the Executive Order on classified information. Indeed, in its notice approving the final directive, the ISOO criticized the current NISPOM standard as "extremely difficult or even impossible to substantiate," adding that the NISPOM guidance is under review and that the requirements for processing NID requests would be made consistent. We read this as a strong indication that the ISOO intends no endorsement of the pre-2006 standard — and as an invitation to watch for any notice of amendments.

If there is no indication that an NID will not be approved, a CSO may not delay implementation of an SSA pending completion of a GCA's NID processing. The directive notes that there are two situations when an NID is required — when a foreign interest acquires a government contractor with existing contracts that require access to proscribed information, and when a foreign-controlled entity is awarded a new contract that requires access to proscribed information (including pre-contract activities) — in each case, where the company is cleared under an SSA. The practical implication of the directive is to provide access to proscribed information under an existing contract with a pending NID by expediting approval of the SSA when it is clear that the NID will be approved. The clear purpose of the amendment is to avoid unnecessary disruption of ongoing defense contracts. For a new contract, however, even under an approved SSA, the contractor will not be permitted access to "additional proscribed information" until the NID is approved. Furthermore, a CSO may not upgrade an existing contractor clearance under an SSA to Top Secret unless an approved NID covering the prospective Top Secret access has been issued.

Overall, we see the amended directive as a step forward. It removes any doubt as to when an NID is required — establishes meaningful deadlines — and ensures that contractors will get a copy of the NID, once issued. All of this serves to make the NID process somewhat more manageable — a significant advancement.

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

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