

## **DSS Ends the “7 Day Rule” for Advance Notice of Visits**

On Wednesday, February 23, 2011, the Defense Security Service (“DSS”) announced a significant change to the visitation procedures policy for companies operating under a Special Security Agreement (“SSA”) or Proxy Agreement (“PA”). Previously, DSS generally required a seven day advance notice for Outside Director or Proxy Holder visitation approvals unless proper notice was prevented by unforeseen events. Now DSS will defer to the Government Security Committee (“GSC”) to determine the appropriate advance notice required. There is no longer any requirement for any precise number of days of advance notice. The only requirement is that the visits be approved in advance. The GSC must formalize the advance notice period in writing and notify DSS of its decision, but the DSS February 23 notice includes no requirement that DSS approve the GSC decision.

DSS is the Department of Defense agency in charge of evaluating the foreign ownership, control or influence (“FOCI”) of foreign owners of companies that are cleared or seeking clearances. Two common types of mitigation for FOCI are the SSA and the PA. Under these mitigation arrangements, visits to a cleared company by all personnel who represent the foreign owner or any of its affiliates must generally be approved in advance by the Outside Director or Proxy Holder designated by the GSC. The GSC is a permanent committee of the cleared company’s board consisting of all Outside Directors or Proxy Holders, as the case may be, and the Officer/Directors. The GSC maintains policies and procedures to safeguard classified information and controlled unclassified information entrusted to the cleared company and to ensure that the cleared company complies with the mitigation agreement.

Historically, the SSA and PA have required seven days advance notice for visitation approvals submitted to the designated Outside Director or Proxy Holder. The policy was implemented before e-mail was in widespread use, and was intended to allow time for submission of the approval requests via regular mail. Most agreements currently in place contain this provision. Exceptions are very rare and required DSS approval.

The DSS change in policy now grants the GSC the discretion to determine the appropriate number of days required for advance notice, even for cleared companies with mitigation agreements that contain the seven day clause. The change recognizes that the GSC are in the best position to determine how much advance notice is required to allow for proper evaluation of visit requests, given such factors as the anticipated number of visits and the need for prompt decision-making. The GSC, of course, remains free to retain the seven day requirement. Further, even if the advance notice requirement is reduced, an Outside Director is under no compulsion to approve a visit, and can insist upon additional time to collect information.

*Kaye Scholer’s National Security Practice Group advises U.S. and foreign clients on foreign acquisitions in the U.S. defense and national security sector, as well as all matters concerning export*

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