

ALERT

Defense Security Service Issues New Interim Rule Concerning Foreign Ownership, Control or Influence

April 11, 2014

The United States Defense Security Service (DSS) recently issued an interim final rule concerning contractors under foreign ownership, control, or influence (FOCI) who seek facility security clearances (FCL) and access to classified government information. See 79 Fed. Reg. 19467 (Apr. 9, 2014). DSS indicated that the new rule was issued in order to “ensure maximum uniformity and effectiveness” in regard to the mitigation of FOCI issues.

The DSS has developed structural mechanisms for dealing with FOCI issues. The level of intrusiveness of the control structures has traditionally depended principally on: (1) the extent of FOCI; and (2) the sensitivity of the information underlying the classified contracts. In the event that foreign shareholders have the power to appoint one or more foreign nationals to the board, DSS will likely require that the company take significant measures in order to remain eligible for classified contracts. There are three basic options: (1) board resolutions; (2) a special security agreement; or (3) a voting trust/proxy agreement.

The interim rule “updates policy and procedures for industry that are more than 20 years old.” The rule also addresses recent negative attention garnered by the National Interest Determination (NID) procedure. This attention has been as a result of delays in issuing NID’s which are required for contractors who are under a Special Security Agreement (SSA) to access “proscribed” classified information. The interim rule contains provisions related to the issuance of NIDs that impose reporting requirements for those NIDs that are not issued within 30-days of DSS’ notice of the necessity of an

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Curiously, as part of its FOCI assessment, DSS may now request and consider “counterintelligence (CI) and technology transfer risk assessments and any available intelligence” from all appropriate government sources. Presumably DSS cannot initiate collection activities. This provision is not surprising considering that cleared contractors will have access to classified information and is reflective of a general trend toward increased scrutiny of contractors under FOCI. However, given recent current events involving the compromise of classified information, contractors and companies admitted to the NISP should expect a higher level of DSS scrutiny, even when FOCI issues are not present.

Comments on this rule are due June 9, 2014.