CDSE

Center for Development
of Security Excellence

Job Aid: Mergers, Acquisitions, Reorganizations, and Spin-offs/Splits (MARS)

Contents

Part 1: MARS Basics

MARS Transaction Types as Defined by DCSA

Merger/consolidation:

A merger is when two companies come together, and one ceases to exist. Entity A acquires Entity B, with Entity A as the surviving entity. Entity A assumes all assets and liabilities of Entity B. A consolidation occurs when two separate entities combine forces to create a new business entity.

Acquisition: An acquisition refers to the purchase of the majority of one entity's stock, or the purchase of one entity's assets by another.

- Acquisition - Stock Purchase: Entity A acquires a majority stake in Entity B, which becomes a subsidiary of Entity A.
- Acquisition - Asset Purchase: Entity A purchases certain assets (facilities, equipment, a business unit, etc.) from Entity B. Entity A could simply absorb the assets into its existing business or form a new legal entity to house the assets.

  Note: If Entity A sells its Secret-cleared Business Unit to Entity B, then Entity B must be cleared, novate contracts, and then administratively terminate Entity A, as Entity A was only cleared because of that business unit.

Reorganization/restructure: The act of reorganizing the legal, operational, ownership, or other structures of a business entity. For example:

- LLC converts to a corporation or vice versa.
- Wholly owned subsidiary becomes a branch office.

Spin-off: In a spin-off, a business area of an entity becomes an independent entity with assets, employees, intellectual property, technology, or existing products taken from the original entity.

Split: A single entity splits into two or more new entities.

Red Flags

More than one changed condition reported at the same time or in connection with the same change.

Change Conditions Affecting an Entity's Eligibility Determination, also referred to as a Facility Clearance, include:

- Ownership
- Legal Structure
- Address
- Key Management Personnel (KMP)

- Operating Name
- Foreign Ownership, Control, or Influence (FOCI)

Report of a CAGE code change. Legitimate CAGE code changes are very rare.

MARS Categories

Levels/criticality	Priority	Description	Risk
MARS Level 1	HIGH	Any MARS transaction in which an uncleared entity will ultimately have control of or influence over the performance of existing classified contracts.	• Uncleared entity controlling the performance of classified contracts • Uncleared entity accessing classified information • Work stoppage/interruption
MARS Level 2	Medium	Any MARS transaction involving novation of existing classified contracts to a different entity; Facility Clearance (FCL) action(s) or changed condition(s) needs to be processed with consideration to the novation process.	• Missing contractual link between the entity classified contracts are issued to and the entity working on the contracts • Contract holder dissolving prior to novation completion *Note: If the transaction is filed in CFIUS, it becomes an immediate MARS Level 1.*
MARS Level 3	Low	A MARS transaction resulting in a reportable changed condition with no new FCL required.	• Assuming MARS is properly categorized, risk is low and results from the inherent risk from any changed condition

Part 2: Roles and Responsibilities

Cleared Entity's Role

With numerous stakeholders having varying interests, coordinate meetings to ensure everyone is speaking the same language. Stakeholders include:

- Legal representatives of buyer and seller
- Senior Management Officials (SMOs) of all involved companies of buyer and seller
- Facility Security Officer (FSO) (should always be involved for security purposes)
- Corporate Administrative Contracting Officer / Administrative Contracting Officer (CACO/ACO)
- Defense Counterintelligence and Security Agency (DCSA)

Provide information/documentation/timelines on the upcoming change
Provide POCs representing all involved entities to whom DCSA may reach out
Key information that FSOs and SMOs provide DCSA on a MARS transaction:

- How ownership will change and legal documents related to the change

- When the change did/will occur and whether it will occur in phases
- The legal name and any fictitious or doing business as (dba) name(s)
- Whether the legal entity DCSA originally cleared will survive
- If novation of contracts to the new business that will be responsible for performance of the classified contracts is necessary, then identify the novation plan/timeline; who will work on the classified contract(s); and supporting contract documents
- Whether Government Contracting Activities (GCAs) have been notified of the MARS transaction and any resultant planned changes impacting the company's clearance and performance

Key Tips

If an anticipated MARS transaction will result in a new entity needing to be cleared, inform DCSA as soon as possible for streamlined processing to minimize the risk of an uncleared entity acquiring control of a classified contract(s).

Due to long novation timelines, a contractual relationship between the entity awarded the contract and the new entity doing the work must be established in the interim. The FAR 42.12 Novation and Change-of-Name Agreements section outlines novation and change-of-name-agreement processes. Novation is a contractual decision and is the responsibility of the GCA contracting officer.

MARS Transactions Involving FOCI

Committee for Foreign Investments in the United States (CFIUS) timelines are aggressive and must be strictly followed. If a MARS is filed in CFIUS, the FCL becomes an immediate high priority. If a MARS transaction results in a substantive change to FOCI, DCSA takes steps to mitigate risk. However, if an unmitigated FOCI exists or an entity does not provide information necessary to evaluate the transaction in a timely manner, invalidation procedures may ensue. Communication, early and often, between DCSA and the entities involved in the transaction is often the key to success when MARS involves FOCI.

Part 3: Key Documents in MARS Transactions

SMOs and FSOs must ensure the MARS transaction documents are available for DCSA review. Examples are:

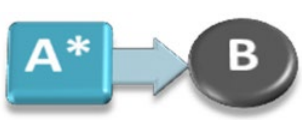
- ☑ Purchase Agreement/Merger Plan/Memorandum of Understanding (MOU)
- ☑ Commitment Letter (FOCI)
- ☑ Documentation for Trade Name, DBA, or Fictitious Name (certified by the Secretary of State)

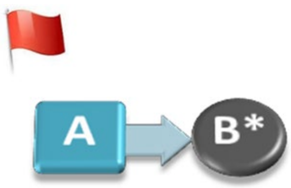
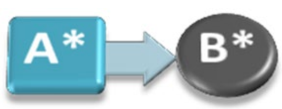
- ☑ Novation Agreement (see [FAR 42.12] for template)
- ☑ Authenticated copy of instrument effecting asset transfer (documentation submitted to or received from the Secretary of State—Bill of Sale/Certificate of Merger/Contract Deed/Court Decree, etc.)
- ☑ Certified copy of each resolution of each corporate party's stockholder meeting necessary to approve transfer of assets
- ☑ List of Classified Contracts affected
- ☑ New business entity business documents (see the *FCL Orientation Handbook*)

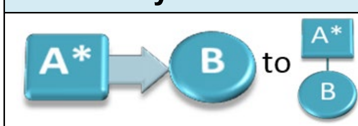
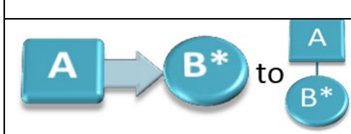
NOTE: Not all of these documents will apply.

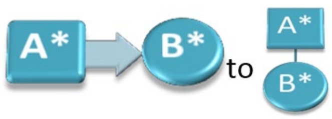
Part 4: MARS Scenarios

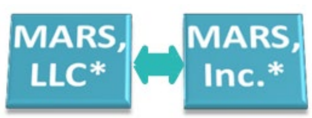
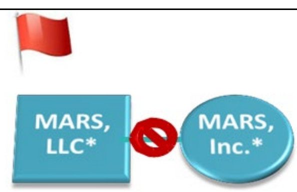
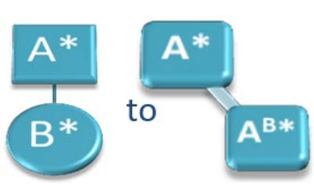
Asterisk (*) denotes a cleared entity.		***Gray indicates the entity does not survive the MARS transaction.***	
MERGER	**Description**	**Priority**	**Action**
	Entity C will have classified contracts. Entity A is cleared, while Entity B is not cleared.	**Medium**	Entity C must be processed for an FCL. In this scenario, Entity A is cleared with a classified contract, requiring novation to Entity C.

ACQUISITION **Asset Purchase**	**Description**	**Priority**	**Action**
 Scenario 1	Entity A is cleared and acquires uncleared Entity B.	**Low**	Entity A reports changed condition(s) resulting from acquisition, if applicable (e.g., KMP change, address change, SF-328 change).

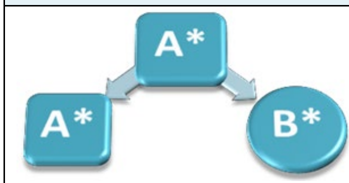
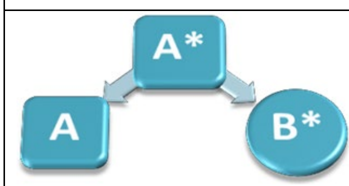
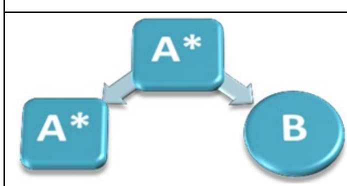
Acquisition **Asset Purchase**	**Description**	**Priority**	**Action**
 Scenario 2	Entity A (the acquiring Entity) is not cleared. Entity B (the acquired Entity that is ultimately terminated) is cleared. *Note: Companies involved in scenario 2 often think they have acquired the FCL as an asset.*	**HIGH**	*This scenario is possibly the most critical MARS type.* Entity B provides DCSA with their formal or informal acquisition plan as early and often as possible. Entity A must be cleared prior to the dissolution of Entity B. If this cannot be accomplished, or Entity A does not meet FCL process deadlines, the FCL for Entity B may be affected.
 Scenario 3	Both Entity A (the acquiring entity) and Entity B (the acquired entity that is ultimately terminated) are cleared at the appropriate level.	**Medium**	Entity A reports changed condition(s) resulting from acquisition, if applicable (e.g., KMP change, address change, SF-328 change). Entity B reports the impending legal structure change and FCL termination as early as practicable. If classified contracts issued to Entity B will be novated to Entity A, both FCLs must remain active until novation is complete. Both entities should keep DCSA updated on the novation process.

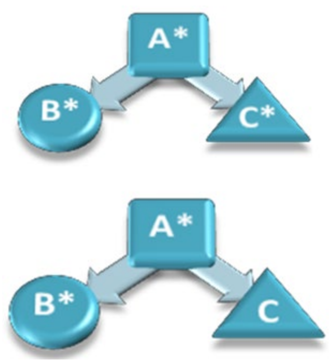
Acquisition **Subsidiary**	**Description**	**Priority**	**Action**
 Scenario 1	Entity A is cleared and acquires an uncleared entity, Entity B.	**Low**	Entity A reports changed condition(s) resulting from acquisition, if applicable (e.g., KMP change, address change, SF-328 change, etc.).
 Scenario 2	Entity A is not cleared and acquires Entity B, which is cleared and has classified contracts.	**Medium**	Entity B reports the legal structure change and any other resulting changed conditions. Entity A is processed for an FCL or exclusion (standard priority) per the Industrial Security Representative's

Acquisition **Subsidiary**	**Description**	**Priority**	**Action**
			(ISR's) evaluation of control and influence.
 Scenario 3	Entity A is cleared and acquires Entity B, which is also cleared.	Low	Entity A reports changed condition(s) resulting from acquisition, if applicable. (e.g., KMP change, address change, SF-328 change).

Reorganization / Restructure	**Description**	**Priority**	**Action**
 Scenario 1	An LLC converts to a corporation or a corporation converts to an LLC.	Low	In a true conversion, the entity must provide the Certificate of Conversion from the Secretary of State. The entity would then need to provide DCSA with all documentation applicable to the new structure. Such documentation must identify daily operational control (managers, directors, Board of Directors, and Board Chairman) (see the *FCL Orientation Handbook* for documentation and timelines).
 Scenario 2	Companies state they have converted when they have actually created a new entity.	HIGH	If there is no conversion documentation and both entities are registered with the appropriate Secretary of State, a new entity has been formed. If the goal is to have the new entity work on classified contracts, the new entity will need to be sponsored for an FCL. The contracts will need to be novated to the new entity, which must be completed prior to termination of the existing FCL.
 Scenario 3	A wholly owned subsidiary becomes a branch office.	Medium	Entity A reports changed condition(s) resulting from acquisition, if applicable (e.g., KMP change, address change, SF-328 change). Entity B reports the impending legal structure change and FCL termination as early as practicable. New documentation

Reorganization / Restructure	**Description**	**Priority**	**Action**
			must identify daily operational control (managers, directors, Board of Directors, Chairman of the Board). If classified contracts issued to Entity B will be novated to Entity A, both FCLs must remain active until novation is complete. Both entities should keep DCSA updated on the novation process.

SPIN-OFF	**Description**	**Priority**	**Action**
 Scenario 1	Entity B spins-off from Entity A, which is cleared. Both entities will require FCLs and have classified contracts.	**Medium**	Entity B is processed for an FCL. This could be initiated by DCSA, Entity A, or GCA. Contracts following Entity B are novated. While novation occurs, Entity A may subcontract to Entity B.
 Scenario 2	Entity A, which is cleared, spins-off its classified efforts to Entity B. Entity A will no longer require an FCL.	**Medium**	Entity B is processed for an FCL. This could be initiated by DCSA, Entity A, or GCA. Contracts following Entity B are novated. While novation occurs, Entity A may subcontract to Entity B. Only after novation is confirmed will the FCL for Entity A be terminated.
 Scenario 3	Entity B spins-off from Entity A, which is cleared. Entity A will maintain all classified work. Entity B will not support any classified contracts.	**None**	These transactions must be promptly reported to the DCSA.

Split	Description	Priority	Action
	Entity A splits into Entities B and C. One or both of these new companies will be working on the classified contract(s).	**Medium**	Entity A provides DCSA with their formal or informal MARS plan as early and often as possible. Entity B and/or C will be cleared. This may be initiated by DCSA, Entity A, or GCA. Entity A should not be terminated until Entity B/C is cleared and contract novation is complete. ** If a cleared entity reports this split after the fact and Entity A has already been terminated OR Entity B/C is already performing on the classified contracts, the existing FCL will almost certainly be affected, resulting in a MARS Level 1 High Priority.*

Part 5: Glossary

ACRONYM	DEFINITION
ACO	The Administrative Contracting Officer (ACO) administers the performance of a contract.
CACO	The Corporate Administrative Contracting Officer (CACO) is assigned to a corporation with more than one location with resident ACOs to perform contract administrative functions on a corporate-wide basis.
CFIUS	The Committee for Foreign Investments in the United States (CFIUS) is an interagency committee chaired by the Treasury Department that conducts reviews of proposed mergers or acquisitions of U.S. persons by foreign interests.
DBA	Doing Business As (DBA) refers to a name a company can legally use in doing business.
FCL	Issued by Defense Counterintelligence and Security Agency (DCSA), a Facility Clearance (FCL) allows a company to perform cleared Government contract work on behalf of a Government Contracting Activity (GCA) or another contractor.

FOCI	A company is considered under Foreign Ownership, Control, or Influence (FOCI) if a foreign entity has control, direct or indirect and whether or not exercised, over decisions affecting the management or operation of the organization.
FSO	A Facility Security Officer (FSO) is a U.S. citizen employee appointed by a contractor who supervises and directs security measures necessary for implementing the National Industrial Security Operating Manual (NISPOM) and other federal requirements for classified information.
KMP	Key Management Personnel (KMP) are company personnel who make key management decisions (generally personnel listed within corporate documents), including but not limited to board of directors, officers, executive personnel, partners, regents, trustees, senior management officials, and other officials as determined by the Defense Counterintelligence and Security Agency (DCSA).
MARS	Mergers, Acquisitions, Reorganizations, and Spin-offs/Splits (MARS) describes corporate finance, management, and strategy associated with the purchase and/or joining of companies.
Novation	Novation is an agreement in which a contracting party accepts a new party in place of the prior party (relieving the prior party of any further obligations).
Novation Agreement	A legal instrument (1) Executed by the: (i) Contractor (transferor) (ii) Successor in interest (transferee) (iii) Government (2) By which, among other things, the transferor guarantees performance of a contract; the transferee assumes all obligations under the contract; and the Government recognizes the transfer of the contract and related assets.
SMO	The Senior Management Official, a contractor's senior most official at the facility.
VTU	The Verification and Triage Unit (VTR) administers and oversees the approval or rejection process of a sponsored facility's FCL.