OD/PH Module 1: Introduction to DCSA, FOCI, and FOCI Mitigating Agreements Student Guide

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OD/PH Baseline Training Introduction

FOCI ODs, PHs, VTs

Welcome to the Foreign Ownership, Control, or Influence (commonly referred to as FOCI) Outside Directors, Proxy Holders, and Voting Trustees Training.

As an Outside Director, Proxy Holder, or Voting Trustee, you play a critical role in the success of your company's industrial security program. You are expected to represent the national security interest of the United States. Your primary responsibility is to help ensure that the cleared company under FOCI Mitigation Agreement implements all needed procedures and organizational changes pertaining to the security and safeguarding of classified and export-controlled information.

This training is covered over six modules.

Modules

- Module 1 provides an introduction to the Defense Counterintelligence and Security Agency (DCSA), FOCI and the FOCI Mitigation Agreements;
- Module 2 discusses Administering the FOCI Agreement and Compliance;
- Module 3 discusses the Role and Responsibilities of the Government Security Committee (GSC);
- Module 4 will discuss some responsibilities unique to the Proxy Holder and Voting Trustee agreements;
- Module 5 discusses the Security Reviews and Best Practices at FOCI companies; and finally,
- Module 6 discusses what is expected during the Initial Meeting, the Annual Compliance Report, and the Annual Meetings.

Module 1 Introduction

Introduction to DCSA, FOCI, and FOCI Mitigating Agreements. Let's begin with the objectives of Module 1.

Objectives

In this Module, you will be given an introduction to DCSA. You will be given the definition of FOCI and an overview of the FOCI Factors that DCSA considers in the aggregate to determine how to best mitigate the FOCI.

You will be given a description of the FOCI Lifecycle followed by the FOCI Mitigation Agreements DCSA uses to protect classified and export-controlled information from foreign entities.

Please note that throughout this Module, the term "Affiliate" refers to both the foreign parent (foreign shareholder) and other companies owned by the foreign parent, including those located in the U.S.

DCSA Overview

The Under Secretary of Defense for Intelligence and Security (USD(I&S)) provides authority, direction, and control over DCSA. DCSA is an agency of the Department of Defense (DoD) headquartered in Virginia with field offices throughout the United States. DCSA provides the military services, defense agencies, at least 33 federal agencies, and approximately 12,500 cleared facilities with security support services.

DCSA serves as the primary interface between the Federal Government and industry, providing daily oversight, advice, and assistance to cleared companies and ultimately determining the ability of those companies to protect classified information. DCSA ensures the sensitive and classified U.S. Government and foreign government information, technologies, and material entrusted to cleared industry are properly protected.

FOCI Definition

According to the National Industrial Security Program Operating Manual (NISPOM), "A U.S. company is considered to be under FOCI when a foreign interest has power, direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts."

Refer to Course Resources link, Module 1 for more information.

Identify the FOCI Factors

FOCI factors are considered in the aggregate to determine whether a company is under FOCI. DCSA will analyze the factors to determine if there is FOCI and what the appropriate level of protection measures are needed to mitigate or negate the foreign risks and foreign interests at the applicant company.

Before FOCI Factors can be analyzed, they must be identified accurately and understood within the context of the organization's need for a Facility Security Clearance (FCL).

DCSA considers the following questions during the Analysis, Mitigation, and Adjudication phases:

Q1: Are there any known foreign risks that would jeopardize the classified programs or contracts?
Q2: Has the company previously demonstrated willingness to place controlled technologies at risk?
Q3: What information, assets, or resources required protection from foreign risk or control?
Q4: What level of foreign influence or control is involved and how does it impact the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?
Q5: Does the company operate a legitimate, lawful business in general, not just for technology transfer?
Q6: Are there industrial security agreements, declarations of principles, or other formal understandings in place with the foreign country?
Q7: Is your company subject to foreign government influence or control, and to what extent?
Q8: Are there any other factors that indicate or demonstrate a capability on the part of the foreign interests to control or influence the operations or management of the business organization concerned?

FOCI Lifecycle

The FOCI process has five phases:

- Identification and Assessment
- Mitigation Negotiation
- Mitigation Implementation
- Mitigation Oversight, and
- Change Condition, Amendment, or Renewal

FOCI Lifecycle Phase 1

In the first phase, **Identification and Assessment,** the source of the FOCI is identified through the review of forms and documents provided by the company and open sources.
The process begins with the company submitting the SF 328, "The Certificate Pertaining to Foreign Interest" which is submitted by the company's Facility Security Officer (FSO) through the designated System of Record.

The SF 328 is a 10-question document designed to help identify the presence of FOCI in a company.

Refer to Course Resources link, Module 1 for more information.

FOCI Lifecycle Phase 2

In the second phase, **Mitigation Negotiation,** DCSA analyzes the information and determines what actions are necessary to address the FOCI.

DCSA decides the action plan that must be taken to prevent unauthorized access to classified information. DCSA reviews and negotiates the draft plan with the company.

Once the Agreement is decided upon, DCSA will request the nomination of Outside Directors, Proxy Holders, or Voting Trustees based on the type of Agreement.

FOCI Lifecycle Phase 3

In the third phase, the **Mitigation Implementation** process is where the final approvals for the selected Mitigation Agreement are finalized and signed by the company and DCSA.

This includes the following Mitigation Implementation Plans which may be included during the mitigation negotiation process: the Electronic Communication Plan (ECP), the Technology Control Plan (TCP), the Affiliated Operations Plan (AOP), the Facilities Location Plan (FLP), and the Visitation Plan.

In this phase the Outside Directors, Proxy Holders, or Voting Trustees are approved and the scheduling of the initial meeting will take place (the initial meeting will be discussed in Module 5).

When a company operates under any of the FOCI Mitigation Agreements as a Voting Trust, Proxy, Special Security, or Security Control Agreement they may be required to develop additional procedures to ensure their FOCI is effectively mitigated. This is where these plans come into the picture.

Electronic Communication Plan (ECP)

The Electronic Communication Plan (ECP) is a requirement for FOCI-mitigated companies to ensure effective oversight by the Government Security Committee (GSC) of electronic communications and networks between the cleared company and its Affiliates.

The GSC establishes written policies and procedures assuring electronic communication between the FOCI company and its subsidiaries and the Affiliates do not disclose classified information or export-controlled information without proper authorization. ECP ensures that the Affiliate cannot exert influence or control over the FOCI company's business or management in a manner that could adversely affect the performance of classified contracts.

Refer to Course Resources link, Module 1 for more information.

Technology Control Plan (TCP)

The Technology Control Plan (TCP) is based on facility-specific requirements for FOCI-mitigated companies to outline how they will provide protection to classified and export-controlled information.

The TCP establishes measures to assure that access by non-U.S. citizens and the foreign Affiliates is strictly limited to only the information for which appropriate Federal Government disclosure authorization has been obtained. This plan is approved by DCSA and shall be developed and implemented by those companies cleared under a Voting Trust Agreement (VTA), Proxy Agreement (PA), Special Security Agreement (SSA), or Security Control Agreements (SCA).

DCSA may also require a TCP be developed in other situations in its sole discretion.

Refer to Course Resources link, Module 1 for more information.

Affiliated Operations Plan (AOP)

The Affiliated Operations Plan (AOP) is a requirement for FOCI-mitigated companies when they enter into operational relationships with their Affiliates.

Business functions or teaming arrangements with Affiliates of a FOCI-mitigated company are not authorized unless approved by the Government Security Committee or GSC (GSC will be discussed later) and DCSA in advance. Instances when DCSA identifies an affiliated service occurring without approval may negatively impact a company’s security rating.

DCSA has developed a template AOP to assist industry in requesting DCSA review.

Refer to Course Resources link, Module 1 for more information.

Facilities Location Plan (FLP)

Facilities Location Plan (FLP) is a requirement when a FOCI-mitigated company is located within the proximity of an Affiliate that would reasonably inhibit the cleared company's ability to comply with the FOCI Agreement. Such scenarios may include being located in the same building, campus, or adjoined buildings with an Affiliate.

Unapproved FOCI collocation is not authorized, and DCSA will determine when a company is collocated in its sole discretion. When a company is located within close proximity to its Affiliate, a FLP must be approved by DCSA in advance.

Refer to Course Resources link, Module 1 for more information.

Visitation Plan

The Visitation Plan is a requirement for FOCI-mitigated companies to ensure visitation with the Affiliates is controlled as required by the FOCI Mitigation Agreement.

The FOCI Mitigation Agreements (SCA, SSA, Proxy, and VT) establish requirements for visitation between the FOCI company and their Affiliates. Any deviations from the requirements in the FOCI Mitigation Agreement must be approved prior to implementation by DCSA.

FOCI Lifecycle Phase 4

In phase four, **Mitigation Oversight,** the Annual Compliance Report is prepared and the Annual Meeting is conducted by DCSA with the company, the Outside Directors, Proxy Holders, or Voting

Trustees, and possibly a representative of the foreign parent.

During this phase, a Security Review may be conducted by the field office and Headquarters personnel. This will be covered in Module 5.

FOCI Lifecycle Phase 5

The last phase is the Change Condition, Amendment, or Renewal of the Agreement.
This phase is a result of any changes, amendments, and/or renewal of the existing Agreement.

FOCI Mitigation Agreements

There are two basic types, or categories, of Mitigation Agreements. They include the Minority Ownership/Control and the Majority Ownership/Control. These FOCI Mitigation Agreements are designed to provide a general overview and will vary on content based on the needs of each business entity.

Minority Ownership/Control

The Minority Ownership/Control category involves companies in which the foreign interest does not effectively own or control the company, but has a beneficial stake of five percent or more in the cleared company. Minority foreign ownership is usually mitigated with a Board Resolution (BR) or a Security Control Agreement (SCA), unless the foreign stakeholder has additional control that requires more stringent mitigation, such as veto power over the board decisions.

Board Resolution

A BR is a legally binding acknowledgment passed by the company's Board of Directors. The BR formally acknowledges the foreign investors and excludes them from access to classified or export-controlled information and has no involvement in the classified programs. The foreign shareholder does not sit on the board nor has the right to appoint a member to the board. The BR also formally acknowledges any indebtedness the company has with a foreign entity. Please note that the BR will not be discussed further in the training.

Refer to Course Resources link, Module 1 for samples of each of these agreements.

Security Control Agreement

An SCA preserves the foreign owner's voice in the business management of the company while denying unauthorized access to classified and export-controlled information. The foreign entity does not effectively own or control the cleared U.S. company, but it is entitled to representation on the board. If the foreign shareholder sits on the Board of Directors or has the right to appoint a representative, an SCA, along with at least one Outside Director, is usually sufficient to mitigate the FOCI.

Refer to Course Resources link, Module 1 for samples of each of these agreements.

Majority Ownership/Control

Majority Ownership/Control involves foreign interest that has direct or indirect majority ownership, or effective control, over the cleared U.S. company(s). The Mitigation Agreement used to mitigate the FOCI includes the Special Security Agreement, known as an SSA; a Proxy Agreement, known as a PA; or a Voting Trust Agreement, known as a VTA.

Special Security Agreement

An SSA is an Agreement imposing various industrial security measures denying unauthorized access to classified and export-controlled information while preserving the foreign owner's voice in the business management of the company. If the classified contracts require access to proscribed information, a National Interest Determination may be required.

Refer to Course Resources link, Module 1 for samples of each of these agreements.

Proxy Agreement

A PA is an Agreement whereby the foreign owner relinquishes most rights associated with ownership of the company by conveying voting rights to the Proxy Holders, who must be cleared U.S. citizens approved by the U.S. Government.

Refer to Course Resources link, Module 1 for samples of each of these agreements.

Voting Trust Agreement

A VTA is similar in effect to the PA, except under a VTA the foreign owner transfers legal title in the company to the cleared U.S. citizens ("Voting Trustees") approved by the U.S. Government.

Refer to Course Resources link, Module 1 for samples of each of these agreements.

Module 1 Conclusion

You have completed Module 1, which provided you with an overview of DCSA, definition of FOCI, a review of the FOCI factors, the FOCI lifecycle, and an explanation of the Mitigation Agreements.