Student Guide

Foreign Ownership, Control, or Influence (FOCI) Short

Foreign Ownership, Control, or Influence (FOCI) Information

Objectives

- Identify the FOCI Factors used to determine whether a company is considered to be under FOCI
- Identify the types of mitigation agreements required to protect classified and export-control information from unauthorized access by foreign entities and interests

Estimated completion time: 15 min

Welcome

Foreign investment can play an important role in maintaining the vitality of the U.S. economy and the U.S. industrial base. This is why the U.S. Government not only allows, but encourages foreign investment consistent with the national security interest of the United States.

However, the U.S. Government must also protect the U.S. against National Security threats. The National Industrial Security Program Operating Manual (NISPOM) provides specific requirements, restrictions, and safeguards for industry to prevent unauthorized disclosure of U.S. classified and export-controlled information or technology to foreign interests. DoDM 5220.22, Volume 3, National Industrial Security Program: Procedures for Government Activities Relating to Foreign Ownership, Control, or Influence, provides guidance to the government activities.

U.S. companies in the NISP must properly identify any foreign ownership, control, or influence (FOCI) and must take appropriate security measures to protect against it.

What Is FOCI?

Foreign ownership, control or influence (FOCI) is a state that may affect a company's ability to qualify for or maintain a Facility Security Clearance (FCL). As defined in the NISPOM and the DoDM 5220.22, Volume 3, a company is considered to be under FOCI if it is owned, controlled, or significantly influenced by a foreign interest.

Why is this important to you? Because being under FOCI can have various effects on your facility's clearance status.

U.S. companies determined to be under FOCI are not eligible for an FCL unless security measures are put in place to mitigate the effect of the foreign ownership, control, or influence. If a company is seeking an FCL, then any FOCI must be mitigated before the company can be granted an FCL. If a company already has an FCL and is negotiating an acceptable FOCI mitigation instrument, then the company can continue to access classified information as long as there is no indication of risk of compromise. Finally, if a company is unable or unwilling to mitigate the FOCI, then the existing FCL will be terminated.

Determining FOCI

The process of determining FOCI begins when a company submits Standard Form (SF) 328, the Certificate Pertaining to Foreign Interest, which is a 10-question document designed to help identify the presence of FOCI in an organization. Submitted electronically using the online Electronic Facility Clearance (e-FCL) system, the SF 328 provides a basis for the FOCI analysis. Each of the 10 questions requires a yes or no answer, and any yes answer requires that additional information or documentation be included with the form.

The Instructions For Completion of the Certificate Pertaining to Foreign Interests lists additional information or documentation that must be submitted for each question. In addition, ISL 2009-03, Standard Form 328, further clarifies FOCI reportable material changes.

You can find printable copies of these documents on the Short Resources page.

FOCI Factors

The Defense Security Service (DSS), uses seven factors to analyze the nature and extent of FOCI. DSS considers these factors in aggregate to determine whether a company is under FOCI and what level of protective measures is needed to mitigate or negate the foreign risks and foreign interests of the company.

Before the FOCI factors can be analyzed, they must be accurately identified and understood within the context of the organization's need for an FCL.

In addition to these specific factors, DSS also assesses companies for any other factors that may indicate or demonstrate a capability on the part of foreign interests to control or influence the company's operations or management.

Take a moment to review the FOCI factors listed here:

- Record of economic and government espionage against U.S. targets

- Record of enforcement and/or engagement in unauthorized technology transfer
- The type and sensitivity of the information that shall be accessed
- The source, nature, and extent of FOCI
- Record of compliance with pertinent U.S. laws, regulations and contracts
- The nature of any applicable bilateral and multilateral security and information exchange agreements
- Ownership or control, in whole or in part, by a foreign government
- *Any other indications of a foreign interests' capability to control or influence the company's operations or management*

In the Review Activity that follows, you'll have an opportunity to interpret these factors and see what questions DSS uses to assess them.

Review Activity

Activity 1

DSS uses specific questions in considering a company's FOCI. For each FOCI Factor, select the question that best addresses it. Check your answers in the Answer Key at the end of this Student Guide.

Question 1 of 7: Which of the questions listed below best addresses the FOCI factor "Record of economic and government espionage against U.S. targets"?

- ○ Has the company previously demonstrated willingness to place controlled technologies at risk?
- ○ What level of foreign influence or control is involved and how does it affect the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?
- ○ Are there any known foreign risks that would jeopardize the classified programs or contracts?
- ○ Is your company subject to foreign government influence or control, and to what extent?

Question 2 of 7: Which of the questions listed below best addresses the FOCI factor "Record of enforcement and/or engagement in unauthorized technology transfer"?

- ○ Has the company previously demonstrated willingness to place controlled technologies at risk?
- ○ What level of foreign influence or control is involved and how does it affect the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?
- ○ Is your company subject to foreign government influence or control, and to what extent?
- ○ Does the company operate a legitimate, lawful business in general, and not just for technology transfer?

Question 3 of 7: Which of the questions listed below best addresses the FOCI factor "The type and sensitivity of the information that shall be accessed"?

- Is your company subject to foreign government influence or control, and to what extent?
- Does the company operate a legitimate, lawful business in general, and not just for technology transfer?
- What information, assets, or resources require protection from foreign risk or control?
- Are there industrial security agreements, declarations of principles, or other formal understandings in place with the foreign country?

Question 4 of 7: Which of the questions listed below best addresses the FOCI factor "The source, nature, and extent of FOCI"?

- What level of foreign influence or control is involved and how does it affect the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?
- Are there any known foreign risks that would jeopardize the classified programs or contracts?
- Is your company subject to foreign government influence or control, and to what extent?
- Does the company operate a legitimate, lawful business in general, and not just for technology transfer?

Question 5 of 7: Which of the questions listed below best addresses the FOCI factor "Record of compliance with U.S. laws, regulations, and contracts"?

- What level of foreign influence or control is involved and how does it affect the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?
- Are there any known foreign risks that would jeopardize the classified programs or contracts?
- Is your company subject to foreign government influence or control, and to what extent?
- Does the company operate a legitimate, lawful business in general, and not just for technology transfer?

Question 6 of 7: Which of the questions listed below best addresses the FOCI factor "The nature of any bilateral and multilateral security and information exchange agreements that may pertain"?

- ○ Is your company subject to foreign government influence or control, and to what extent?
- ○ Does the company operate a legitimate, lawful business in general, and not just for technology transfer?
- ○ What information, assets, or resources require protection from foreign risk or control?
- ○ Are there industrial security agreements, declarations of principles, or other formal understandings in place with the foreign country?

Question 7 of 7: Which of the questions listed below best addresses the FOCI factor "Ownership or control, in whole or in part, by a foreign government"?

- ○ Are there any known foreign risks that would jeopardize the classified programs or contracts?
- ○ Is your company subject to foreign government influence or control, and to what extent?
- ○ Does the company operate a legitimate, lawful business in general, and not just for technology transfer?
- ○ What information, assets, or resources require protection from foreign risk or control?

FOCI Mitigation Instruments

There are various action plans that can mitigate, or negate, the risks of foreign ownership, control, or influence—in essence, creating a barrier between a company's foreign ownership and influence and its U.S. classified operations. These mitigation action plans can be divided into two categories: those that are applicable to facilities under Minority Ownership and those that are applicable to facilities under Majority Ownership or Control.

Minority Ownership involves companies in which the foreign interest does not effectively own or control the company but does have a stake in the cleared company. Minority foreign ownership is mitigated with a Board Resolution (BR) or a Security Control Agreement (SCA).

Majority Ownership or Control involves companies in which the foreign interest has direct or indirect majority ownership, or effective control, over the U.S. company. Majority foreign ownership is mitigated with a Special Security Agreement (SSA), a Proxy Agreement (PA), or a Voting Trust Agreement (VTA).

Note that the FOCI mitigation instruments discussed here provide a general overview of the issues and items covered in an actual mitigation agreement. Actual mitigation agreements will vary in content based on the unique needs of each business entity.

Review each mitigation instrument to learn more.

Board Resolution (BR)

A Board Resolution (BR) is used when the foreign entity does not own voting interests sufficient to elect a representative to the company's governing board.

- Legally binding acknowledgement passed by the company's Board of Directors
- Used when foreign entity does not own voting interests sufficient to elect a representative to the company's governing board
- Formally acknowledges the foreign investors, excludes them from access to classified or export-controlled information, and states that they have no involvement in the classified programs
- Formally acknowledges any debts the company owes to a foreign entity
- Foreign shareholder does not sit on the board and does not have the right to appoint a member to the board

Security Control Agreements (SCA)

A Security Control Agreement (SCA) is used when a company is not effectively owned or controlled by a foreign entity but when the foreign interest is entitled to representation on the company's governing board.

- Used when a company is not effectively owned or controlled by a foreign entity but when the foreign interest is entitled to representation on the company's governing board, whether or not this right is exercised
- Preserves foreign owner's voice in the business management of the company while denying unauthorized access to classified and export-controlled information
- If the foreign shareholder sits on the Board of Directors or has the right to appoint a representative, (i.e. Inside Director), an SCA along with at least one outside Director is usually sufficient to mitigate the FOCI

Special Security Agreement (SSA)

A Special Security Agreement (SSA), is used when a cleared company is effectively owned or controlled by a foreign entity.

- Used when a cleared company is effectively owned or controlled by a foreign entity with majority interest
- Access limitations: If classified contracts require access to proscribed information, National Interest Determination (NID) may be required
- Denies foreign owner unauthorized access to classified and export-controlled information while preserving the foreign owner's voice in the business management of the company
- If the foreign owner has the right to appoint a representative (such as an Inside Director), an SSA along with at least three Outside Directors is usually sufficient to mitigate the FOCI

Note: For more information on National Interest Determinations, refer to the NID Short.

Proxy Agreement (PA)

A Proxy Agreement (PA) is used when a cleared company is effectively owned or controlled by a foreign entity.

- Used when a cleared company is effectively owned or controlled by a foreign entity
- 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
- Proxy Holders must obtain approval from the foreign owner with respect to matters such as—
  - Sale or disposal of the company's assets
  - Mergers, consolidations, or reorganizations
  - Filing of a bankruptcy petition
- The company must be financially independent from the foreign owner

Voting Trust Agreement (VTA)

A Voting Trust Agreement (VTA), is used when a cleared company is effectively owned or controlled by a foreign entity.

- Used when a cleared company is effectively owned or controlled by a foreign entity
- Similar in effect to PA, except under a VTA, the foreign owner ***transfers legal title*** in the company to the cleared U.S. citizen ("Trustees") approved by the U.S. government
- The company must be financially independent from the foreign owner

Government Security Committee (GSC)

A Government Security Committee (GSC) is required for SCAs, SSAs, PAs, and VTAs. A GSC is a permanent subcommittee of a cleared company's board of directors made up of Outside Directors, Proxy Holders, Voting Trustees, or any directors who hold personnel security clearances, depending on the type of mitigation agreement in place. As part of the FOCI mitigation requirements, the GSC plays an important role in the management of the company under FOCI and in ensuring compliance with the provisions and security measures of the FOCI agreements.

Members of the GSC must meet several requirements:

- They must be resident U.S. citizens with no prior involvement with the company, its affiliates, or any foreign owners.
- They must act on behalf of the U.S. government.
- They must be nominated by the parent company and approved by DSS.
- And, they must serve as a member of the company's Senior Management and Board of Directors.

Review Activity

Activity 2

Let's see how much you've learned about the various FOCI action plans. Select the FOCI mitigation instrument for each description.

Question 1 of 5: Which of these FOCI mitigation instruments is a Majority Ownership/Control agreement in which foreign owner relinquishes most rights of ownership by conveying voting rights to proxy holders?

- ○ Board Resolution (BR)
- ○ Security Control Agreement (SCA)
- ○ Special Security Agreement (SSA)
- ○ Proxy Agreement (PA)
- ○ Voting Trust Agreement (VTA)

Question 2 of 5: Which of these FOCI mitigation instruments is a Minority Ownership agreement that preserves the foreign owner's voice in the business management of the company while denying unauthorized access to classified and export-controlled information?

- ○ Board Resolution (BR)
- ○ Security Control Agreement (SCA)
- ○ Special Security Agreement (SSA)
- ○ Proxy Agreement (PA)
- ○ Voting Trust Agreement (VTA)

Question 3 of 5: Which of these FOCI mitigation instruments is a Majority Ownership/Control agreement in which the foreign owner transfers legal title in the company to a Trustee?

- ○ Board Resolution (BR)
- ○ Security Control Agreement (SCA)
- ○ Special Security Agreement (SSA)
- ○ Proxy Agreement (PA)
- ○ Voting Trust Agreement (VTA)

Question 4 of 5: Which of these FOCI mitigation instruments is a Minority Ownership agreement that formally acknowledges the foreign investors, excludes them from access to classified information, and states that they have no involvement in the classified programs?

- Board Resolution (BR)
- Security Control Agreement (SCA)
- Special Security Agreement (SSA)
- Proxy Agreement (PA)
- Voting Trust Agreement (VTA)

Question 5 of 5: Which of these FOCI mitigation instruments is a Majority Ownership/Control agreement that denies unauthorized access to classified information while preserving the foreign owner's voice in the business management of the company?

- Board Resolution (BR)
- Security Control Agreement (SCA)
- Special Security Agreement (SSA)
- Proxy Agreement (PA)
- Voting Trust Agreement (VTA)

Summary

In this age of increasing globalization, FOCI mitigation exists to protect the U.S. against National Security threats while still allowing foreign investment in the U.S. economy and the U.S. industrial base. To this end, all U.S. companies in the NISP must properly identify any FOCI and must take appropriate security measures to protect against it.

You can find additional FOCI information on the Short Resources page, on the DSS website, and in the *Understanding FOCI* eLearning Course.

Answer Key

Activity 1

Question 1 of 7: Which of the questions listed below best addresses the FOCI factor "Record of economic and government espionage against U.S. targets"?

- ○ Has the company previously demonstrated willingness to place controlled technologies at risk?
- ○ What level of foreign influence or control is involved and how does it affect the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?
- ⊙ **Are there any known foreign risks that would jeopardize the classified programs or contracts?**
- ○ Is your company subject to foreign government influence or control, and to what extent?

***Feedback**: Asking about any known foreign risks that could jeopardize the classified programs or contracts best addresses the FOCI Factor "Record of economic and government espionage against U.S."*

Question 2 of 7: Which of the questions listed below best addresses the FOCI factor "Record of enforcement and/or engagement in unauthorized technology transfer"?

- ⊙ **Has the company previously demonstrated willingness to place controlled technologies at risk?**
- ○ What level of foreign influence or control is involved and how does it affect the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?
- ○ Is your company subject to foreign government influence or control, and to what extent?
- ○ Does the company operate a legitimate, lawful business in general, and not just for technology transfer?

***Feedback**: Asking whether the company has demonstrated a willingness to put controlled technologies at risk best addresses the FOCI Factor "Record of enforcement and/or engagement in unauthorized technology transfer."*

Question 3 of 7: Which of the questions listed below best addresses the FOCI factor "The type and sensitivity of the information that shall be accessed"?

- ○ Is your company subject to foreign government influence or control, and to what extent?
- ○ Does the company operate a legitimate, lawful business in general, and not just for technology transfer?
- ⦿ **What information, assets, or resources require protection from foreign risk or control?**
- ○ Are there industrial security agreements, declarations of principles, or other formal understandings in place with the foreign country?

Feedback*: Asking what information, assets, or resources require protection from foreign risk or control best addresses the FOCI Factor "The type and sensitivity of the information that shall be accessed."*

Question 4 of 7: Which of the questions listed below best addresses the FOCI factor "The source, nature, and extent of FOCI"?

- ⦿ **What level of foreign influence or control is involved and how does it affect the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?**
- ○ Are there any known foreign risks that would jeopardize the classified programs or contracts?
- ○ Is your company subject to foreign government influence or control, and to what extent?
- ○ Does the company operate a legitimate, lawful business in general, and not just for technology transfer?

Feedback*: Asking about a company's level of foreign influence or control and how it affects the company's business operations, decisions, and ability to act independently of the foreign stakeholders best addresses the FOCI Factor "The source, nature, and extent of FOCI."*

Question 5 of 7: Which of the questions listed below best addresses the FOCI factor "Record of compliance with U.S. laws, regulations, and contracts"?

- ○ What level of foreign influence or control is involved and how does it affect the company's business operations, decisions, and ability to act independently from the foreign stakeholder(s)?
- ○ Are there any known foreign risks that would jeopardize the classified programs or contracts?
- ○ Is your company subject to foreign government influence or control, and to what extent?
- ⊙ **Does the company operate a legitimate, lawful business in general, and not just for technology transfer?**

***Feedback**: Asking whether the company operates a legitimate lawful business and is not just being used for technology transfer best addresses the FOCI Factor "Record of compliance with U.S. laws, regulations, and contracts."*

Question 6 of 7: Which of the questions listed below best addresses the FOCI factor "The nature of any bilateral and multilateral security and information exchange agreements that may pertain"?

- ○ Is your company subject to foreign government influence or control, and to what extent?
- ○ Does the company operate a legitimate, lawful business in general, and not just for technology transfer?
- ○ What information, assets, or resources require protection from foreign risk or control?
- ⊙ **Are there industrial security agreements, declarations of principles, or other formal understandings in place with the foreign country?**

***Feedback**: Asking about industrial security agreements, declarations of principles, or other formal understandings in place with a foreign country best addresses the FOCI Factor "The nature of any bilateral and multilateral security and information exchange agreements that may pertain."*

Question 7 of 7: Which of the questions listed below best addresses the FOCI factor "Ownership or control, in whole or in part, by a foreign government"?

- ○ Are there any known foreign risks that would jeopardize the classified programs or contracts?
- ⊙ **Is your company subject to foreign government influence or control, and to what extent?**
- ○ Does the company operate a legitimate, lawful business in general, and not just for technology transfer?
- ○ What information, assets, or resources require protection from foreign risk or control?

Feedback*: Asking whether a company is subject to foreign government influence or control best addresses the FOCI Factor "Ownership or control, in whole or in part, by a foreign government."*

Activity 2

Question 1 of 5: Which of these FOCI mitigation instruments is a Majority Ownership/Control agreement in which foreign owner relinquishes most rights of ownership by conveying voting rights to proxy holders?

- ○ Board Resolution (BR)
- ○ Security Control Agreement (SCA)
- ○ Special Security Agreement (SSA)
- ⊙ **Proxy Agreement (PA)**
- ○ Voting Trust Agreement (VTA)

Feedback*: A Proxy Agreement (PA) is a Majority Ownership/Control agreement in which foreign owner relinquishes most rights of ownership by conveying voting rights to proxy holders.*

Question 2 of 5: Which of these FOCI mitigation instruments is a Minority Ownership agreement that preserves the foreign owner's voice in the business management of the company while denying unauthorized access to classified and export-controlled information?

- ○ Board Resolution (BR)
- ⊙ **Security Control Agreement (SCA)**
- ○ Special Security Agreement (SSA)
- ○ Proxy Agreement (PA)
- ○ Voting Trust Agreement (VTA)

***Feedback**: A Security Control Agreement (SCA) is a Minority Ownership agreement that preserves the foreign owner's voice in the business management of the company while denying unauthorized access to classified and export-controlled information.*

Question 3 of 5: Which of these FOCI mitigation instruments is a Majority Ownership/Control agreement in which the foreign owner transfers legal title in the company to a Trustee?

- ○ Board Resolution (BR)
- ○ Security Control Agreement (SCA)
- ○ Special Security Agreement (SSA)
- ○ Proxy Agreement (PA)
- ⊙ **Voting Trust Agreement (VTA)**

***Feedback**: A Voting Trust Agreement is a Majority Ownership/Control agreement in which the foreign owner transfers legal title in the company to a Trustee.*

Question 4 of 5: Which of these FOCI mitigation instruments is a Minority Ownership agreement that formally acknowledges the foreign investors, excludes them from access to classified information, and states that they have no involvement in the classified programs?

- ⦿ **Board Resolution (BR)**
- ○ Security Control Agreement (SCA)
- ○ Special Security Agreement (SSA)
- ○ Proxy Agreement (PA)
- ○ Voting Trust Agreement (VTA)

***Feedback**: A Board Resolution (BR) is a Minority Ownership agreement that formally acknowledges the foreign investors, excludes them from access to classified information, and states that they have no involvement in the classified programs.*

Question 5 of 5: Which of these FOCI mitigation instruments is a Majority Ownership/Control agreement that denies unauthorized access to classified information while preserving the foreign owner's voice in the business management of the company?

- ○ Board Resolution (BR)
- ○ Security Control Agreement (SCA)
- ⦿ **Special Security Agreement (SSA)**
- ○ Proxy Agreement (PA)
- ○ Voting Trust Agreement (VTA)

***Feedback**: A Special Security Agreement (SSA) is a Majority Ownership/Control agreement that denies unauthorized access to classified information while preserving the foreign owner's voice in the business management of the company.*