

FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE IMPLEMENTATION GUIDE

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FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE

IMPLEMENTATION GUIDE

I. PREFACE

1. PURPOSE. To provide the Department of Energy (DOE) and DOE contractors with recommended procedures for implementing the Foreign Ownership, Control, or Influence (FOCI) Program. Although the guide's use is optional, its complex-wide use will facilitate the standardization of the FOCI Program.
2. APPLICABILITY. This guide applies to all DOE personnel involved in the FOCI Program and DOE contractors and, if the contractor is owned or controlled by another company(ies), all its tier parents.
3. AUTHORITY. This guide supplements Chapter 6 of DOE O 470.1, SAFEGUARDS AND SECURITY PROGRAM, of 9/28/95, and Subtitle E of the National Defense Authorization Act (10 US Code @ 2536). **The publication of this guide cancels all previous FOCI policy clarification memos, unless attached to this guide. Additionally, the completion of the identified action items in the FOCI Implementation Plan, dated March 15, 1996, are pending and need to be completed prior to full implementation of the FOCI policies.**
4. OBJECTIVES. The intent of this guide is to encourage complex-wide standardization of FOCI Program procedures through the field adaptation of the guide. Additionally, it is intended to be flexible enough to accommodate site-specific differences in procedures and to assist the contractor in going through the FOCI process.
5. IMPLEMENTATION GUIDELINES. This guide provides suggested methods for implementing the FOCI Program. The guide covers all of the requirements listed in DOE O 470.1, Chapter 6 and applicable requirements from other chapters of the order. The text which is printed in bold and italics is verbatim from DOE O 470.1. Those requirements which are mandatory are identified with the term "shall." Non-mandatory implementation guidance uses the term "should."
6. ASSISTANCE. Direct any questions regarding this guide to your local FOCI Operations Manager or the FOCI Program Manager, Technical and Operations Security, Office of Safeguards and Security (NN-512.3), at (301) 903-4191.

7. DEFINITIONS. For safeguards and security terms see the SAFEGUARDS AND SECURITY GLOSSARY OF TERMS. For additional clarification of procurement and legal terms, contact your local Procurement Office or General/Chief Counsel.
8. USING THE GUIDE. This guide is designed to allow particular chapters to be removed and duplicated for a specific reader, e.g., Contracting Officers or Contractors. This guide was prepared to make it easier for dissemination to potential users, however, it may be appropriate for the entire guide to be provided to some users.

SAFEGUARDS AND SECURITY

DOE G 470.1-3

FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE

IMPLEMENTATION GUIDE

II. GENERAL PROGRAM INFORMATION

U.S. DEPARTMENT OF ENERGY

OFFICE OF SECURITY AFFAIRS

OFFICE OF SAFEGUARDS AND SECURITY

II. GENERAL PROGRAM INFORMATION

1. OBJECTIVE

It is DOE policy to obtain information that indicates whether offerors/bidders or contractors are owned, controlled, or influenced by a foreign person and whether as a result the potential for an undue risk to the common defense and national security may exist.

The objective of the FOCI Program is to effectively use information regarding ownership, control, or influence of contractors to decide eligibility for facility clearances. When a contractor and, if applicable, their tier parents are determined to be under foreign ownership, control, or influence, the contractor and/or their tier parents are ineligible for a facility clearance or an existing facility clearance may be suspended or terminated unless security measures are taken to negate elements of foreign involvement to a level deemed acceptable to the U.S. Government.

2. APPLICABILITY

Foreign ownership, control, or influence (FOCI) determinations are required of the following.

- a. Contractors, which include any industrial, educational, commercial, or other entity, grantee, or licensee, including an individual, that has executed an agreement with the Federal Government for the purpose of performing under a contract, license, or other arrangement that requires access authorizations. However, the foregoing does not include individuals performing work under a consulting agreement. A FOCI determination is required for subcontractors of any tier, consultants, agents, grantees, and cooperative research and development agreement participants that require access authorizations.***
- b. All tier parents, if the contractor is owned or controlled by another firm(s).***

3. GENERAL REQUIREMENT

(See the attachment II-1, FOCI flow chart for an overview of the FOCI process)

- a. A favorable FOCI determination must be rendered on the prospective contractor and, if applicable, its tier parents, prior to the Lead Responsible Office granting a facility clearance or contract requiring access authorizations. Unless established thresholds are exceeded, the Lead Responsible Office shall render the FOCI determinations(s) on the contractor and, if applicable, tier parents. (See “Lead Responsible Office Processing FOCI Determinations” chapter, item 2, for description of established thresholds.)***

Offerors/bidders with existing U.S. government facility clearances are identified in the Safeguards and Security Information Management System or in the Defense Information Service/Central Verification Activity system. (Until the unclassified Safeguards and Security Information Management System is available to the Contracting Officer, safeguards and security will provide the Contracting Officer with information regarding an organization's facility clearance, if any. When the Unclassified Safeguards and Security Information Management System becomes available, then it will be the Contracting Officers responsibility to check to see if the facility is approved.) Once the Contracting Officer determines which offerors are included in the competitive range, the Contracting Officer should review the unclassified version of the Safeguards and Security Information Management System or the Defense Investigation Service/Central Verification Activity system to determine if a facility clearance, based upon a favorable FOCI determination, for the offerors/bidders, already exists. No further FOCI review is necessary concerning offerors/bidders possessing such facility clearances.

- b. While the Lead Responsible Office will conduct a preliminary review of the FOCI representations and certifications of each firm in the competitive range in a procurement request, a facility clearance, which requires a FOCI determination, can only be requested for the successful offeror/bidder if there is expected to be insufficient lead time between selection and contract award to allow deferral of the FOCI determination and facility registration.***
- c. Prior to the award of a contract requiring access authorizations to an offeror/bidder that does not possess a facility clearance the offeror/bidder shall be required to submit to the Contracting Officer information and documentation that define the extent and nature of any foreign ownership, control or influence over the offeror/bidder and, if applicable, its tier parents.*** Upon receipt of this information from the offeror/bidder, the Contracting Officer should review the information for completeness, and secure any missing information. Once the information is complete, the Contracting Officer should forward the information to the Lead Responsible Office, identifying the successful bidder or those offerors/bidders in the competitive range, if there is expected to be insufficient lead time between selection and contract award. ***The Contracting Officer cannot award the contract/agreement until he/she receives notification from the Lead Responsible Office that a favorable FOCI determination was rendered*** and facility clearance was granted.
- d. A contractor with a facility clearance, based upon a favorable FOCI determination, is required to ensure that the following notification for its organization and each of its tier parents is immediately provided to the Lead Responsible Office.***

 - (1) Written notification of a change in the extent and nature of FOCI that affects the information in the FOCI representation and certification.***

- (2) ***Complete, current, and accurate information, certifications, and explanatory documentation that define the extent and nature of any relevant FOCI whenever:***
- (a) ***there is any change in ownership or control, i.e., any change in the company's OODEP's, and/or a relevant change in the nature of FOCI has occurred.***
 - (b) ***five years have elapsed since the previously provided FOCI representation and certification were executed, or***
 - (c) ***the Lead Responsible Office advises that it considers that a relevant change in the nature of the FOCI has occurred.***
- (3) ***Written notification of anticipated changes that include, but are not limited to, the following:***
- (a) ***action to terminate the contractor organization or any of its parents for any reason, e.g., entering into any transaction of merger, consolidation or amalgamation with another company; conveying, selling, leasing, transferring or otherwise disposing of all or a substantial part of its business or assets; making any material change which could have an adverse effect on the contractor organization's ability to perform their contractual obligations for DOE or other contractors of DOE;***
 - (b) ***imminent adjudication of or reorganization in bankruptcy of the contractor organization or any of its tier parents;***
 - (c) ***discussions or consultations with foreign persons that may reasonably be expected to lead to the introduction or increase of FOCI; or***
 - (d) ***negotiations for the sale of securities to a foreign persons that may lead to the introduction or increase of FOCI.***
- e. ***Contracting Officers must provide written notification to the servicing safeguards and security office in each of the following instances.***
- (1) ***A FOCI determination is required on an offeror/bidder and, if applicable, its tier parents. The Contracting Officers will send the servicing safeguards and security office the FOCI representations and certifications and supporting documentation, which have been reviewed for completeness.***

- (2) *A requested FOCI review is no longer needed.*
 - (3) *A FOCI determination was rendered on an offeror/bidder that was not the successful bidder.*
 - (4) *Within 30 days of the termination or completion of all work by the contractor on a contract requiring access authorizations.* This notification should also be made when access authorizations are no longer required in performance of the contract. (Notification can be accomplished by utilization of DOE F 5634.2)
- f. When DOE has adjudicated the FOCI, and granted a facility clearance, *the Lead Responsible Office shall provide the successful offeror/bidder with written notification that:*
- (1) *DOE has reviewed the FOCI submission and determined the organization is not under FOCI and is eligible for a facility clearance;*
 - (2) *the contractor and any tier parents must keep the FOCI information current;*
 - (3) *identifies the Lead Responsible Office. This office is the only office that the contractor and any tier parents will provide new FOCI representations and certifications or written notification of anticipated or significant changes.*

The notification should consist of the following:

- (1) The necessary processing has been completed and a facility security clearance level at the ____ level is hereby granted your facility.
- (2) Notifies the contractor of its contractual obligation to provide written notification of any changes in the extent and nature of FOCI which affect the information reported on the FOCI representations.
- (3) If there are any excluded parent organizations for which the Lead Responsible Office has oversight responsibility, notifies the contractor that each such identified excluded parent organization has invoked resolutions resolving to promptly provide written notification of any changes in the extent and nature of FOCI which affect the information reported on their respective FOCI representations.
- (4) Notifies the contractor of the annual certification requirement for itself and its excluded parent organization (identified by name). NOTE: Only those excluded parent organizations for which the Lead Responsible Office has oversight

responsibility should be named.

- (5) Identifies itself as the Lead Responsible Office for the contractor and each named excluded parent organization, if applicable. As the Lead Responsible Office, it is the only DOE office that the contractor and each named excluded tier parent should provide (i) new FOCI representations; (ii) all changes to their respective OODEP listing; and/or (iii) written notification of anticipated and/or significant changes.
- g. When a contractor possessing a DOE-approved facility clearance or any of its excluded parent organizations for which the Lead Responsible Office has oversight responsibility has submitted (i) new FOCI representations; (ii) changes to their respective OODEP listing; and/or (iii) written notification of anticipated and/or significant changes, the Lead Responsible Office should provide the contractor with written notification as to whether the results of DOE's review of the provided information are:
- (1) favorable and the contractor is eligible for retention of its facility clearance; or
 - (2) unfavorable and the company has been determined to be under FOCI, therefore, the contractor's facility clearance may be suspended pending implementation of security measures required by the U.S. government. Furthermore, that failure to adopt required security measures may result in termination of the contractor's facility clearance.
- NOTE: When the contractor or one of the contractor's tier parent(s) is determined to be under FOCI, the Lead Responsible Office should ensure that the contractor and, if applicable, the contractor's tier parent(s) is advised of the security measures required by the government to negate or reduce the unacceptable FOCI.
- h. ***When established thresholds are exceeded, the Office of Safeguards and Security (NN-512.3) reviews FOCI cases submitted by a Lead Responsible Office to determine eligibility for a FOCI determination.***
- i. ***When a tier parent has not entered into a contract requiring access authorizations or is performing work on a contract requiring a lower level access authorization, the Lead Responsible Office shall obtain appropriate Board Resolutions (see Attachment II-2) from the contractor and its parent organization(s) to exclude the parent organization(s) from having any unauthorized access.***
- j. ***If a contractor, offeror/bidder, and/or tier parent is determined to be under FOCI, the Lead Responsible Office shall ensure that the contractor, offeror/bidder, and/or tier parent is advised of the existence of FOCI and the security measures, if any, that would***

be necessary to negate or reduce that foreign involvement and its effect.

- k. *When the offeror/bidder requiring access authorizations is a local, State, or Federal governmental agency or department, the affected contract must contain a security clause stating that if the governmental agency or department subcontracts any work requiring access authorizations to a commercial entity, their acquisition regulation, including FOCI policies will be followed. In absence of their own FOCI policies, the DOE will render the FOCI determination.*
- l. *To the extent permitted by law, information submitted in confidence as business/financial information shall be protected as Official Use Only, exempt from public release under the Freedom of Information Act.*

4. ELIGIBILITY REQUIREMENTS

An organization will be considered under FOCI when a foreign person has the power, direct or indirect, whether or not exercised, and whether or not exercisable through ownership of the organization's and/or its tier parents' securities, through indebtedness, by contractual arrangements, or other means, to direct or decide matters affecting the management or operations of that organization in a manner that may result in the compromise of classified information or unauthorized access to nuclear and other hazardous material presenting a potential radiological or toxicological sabotage threat or that may adversely affect the performance of contracts requiring access authorizations. Eligibility requirements include, but are not limited to, the following.

- a. *An organization effectively owned or controlled by a foreign government is ineligible for award of a contract if it is necessary for the organization to be given access to information in a proscribed category of information in order to perform the contract unless the foreign government ownership occurred prior to October 23, 1992. The Secretary of Energy may determine that a waiver from this requirement is essential to the national security interest of the U.S.*

Note: The DEAR defines effectively owned or controlled as “a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror’s officers, directors, partners, regents, trustees, or a majority of the Offeror’s board of directors by any means, e.g., ownership, contract, or operation of law.”

The National Industrial Security Program defines Proscribed Information as Top Secret information; Communication Security (COMSEC) information, except classified keys used to operate secure telephone units (STU IIIs); Restricted Data

as defined in the U.S. Atomic Energy Act of 1954, as amended; Special access Program (SAP) information; or Sensitive Compartmented Information (SCI).

- b. An organization that is owned, controlled, or influenced by a foreign person from a sensitive country identified in DOE 1500.3, FOREIGN TRAVEL AUTHORIZATION, and DOE 1240.2B, UNCLASSIFIED VISITS AND ASSIGNMENTS BY FOREIGN NATIONALS, shall not be eligible, in some cases, for a favorable FOCI determination. The Office of Safeguards and Security will make the determination.***
- c. An organization that is owned, controlled, or influenced by a foreign person from a nonsensitive country shall be eligible for a favorable FOCI determination provided action can be taken to effectively negate or reduce associated FOCI risk to an acceptable level. The Office of Safeguards and Security will make the determination.***
- d. Key management personnel determined to require access authorizations must possess an access authorization to the level of the facility clearance. (As required by chapter V of DOE O 470.1, Key management personnel must be determined case by case. The Lead Responsible Office FOCI Operations Manager, in conjunction with the Facility Clearance Operations Manager, is responsible for determining an organization's key management personnel. Key management personnel must possess access authorizations equivalent with the level of the facility clearance. Other officials, to be determined by the Lead Responsible Office, must possess appropriate access authorization for classified information or special nuclear materials.)***

As a minimum, the following officials for a corporation should possess access authorizations at the level of the facility clearance: President, Chairman of the Board of Directors, and the Facility Security Officer. Normally, the Corporation's Secretary and Treasurer are also cleared to the facility clearance level. In order not to process the Corporation's Secretary and/or Treasurer to the facility clearance level, the Lead Responsible Office should obtain documentation from the Corporation demonstrating that the Corporation's Secretary and/or Treasurer do not need access and are not involved in the protection of classified information and/or special nuclear material. In addition, any owner (whether an OODEP or absentee owner) of the organization controlling 20 percent or more of the voting power of the organization should be processed for an access authorization at the level of the facility clearance

With respect to the key management personnel requiring access authorizations for other business structures, the Lead Responsible Office will have to identify the equivalent to those positions, listed above, within the other various business structures.

The rule when clearing any subordinate facility (i.e., branch, division, office, etc.) of a Multiple Facility Organization, referred to at 5.e. in this Guide, is that the key

management of the organization's headquarters (i.e., home office) must be granted access authorizations at the same level as the key management personnel of the subordinate facility.

For non-possessing facilities, the key management personnel may be processed for an access authorization at a lower level than the facility clearance, provided (i) DOE has determined the key management personnel do not need access and are not involved in the protection of classified information and/or special nuclear material; and (ii) the key management personnel are excluded from the higher classification and/or category of information.

Additionally, based on their (i) control over the organization, (ii) need for access or involvement in the protection of classified information and/or special nuclear material, and/or (iii) having management responsibilities related to performance on classified contracts, other OODEPs in any of the various business structures may also require an access authorization at the facility clearance level or clearance at a lower level.

5. BUSINESS STRUCTURES

a. Sole Proprietorships:

A business owned by an individual who has sole control and the sole direction of its operation. The proprietor owns and operates the business and is personally responsible for its debts. In the event the business is in a community property state, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, or Wisconsin, then, if applicable, information on the sole proprietor's spouse should also be provided on the OODEP listing.

It frequently occurs that the proprietor may be operating a business under a name other than his/her own. For instance, the proprietor is John Smith, but he may choose to operate his business under a trade name, such as, ABC Electric Company. ABC Electric Company is a fictitious name and has no standing at law. Since ABC Electric Company is not a legal entity, for purposes of executing the FOCI representations and certifications, the FOCI certification should be executed by the proprietor in the name of the legal entity, that is, either (i) "John Smith," or (ii) "John Smith, dba ABC Electric Company."

No registration through a state is required for a sole proprietorship. If the sole proprietorship has employees, there may be a Taxpayer Identification Number. In addition, if the proprietor is operating under a trade name, the proprietor should be registered for a trade name and should have a form from the state, with the state seal, acknowledging its use of the trade name.

b. Partnership:

There are two types of partnerships, general partnerships and limited partnerships.

- (1) A general partnership is an association of two or more persons to carry on as co-owners of a business. These general partners are mutually accountable in the eyes of the law for the actions of the general partnership, that is, each of the general partners can bind the partnership with respect to contracts within the scope of the partnership agreement and each partner can be held personally liable for all debts of the partnership.

For purposes of executing the FOCI representations and certifications, any of the partners of a general partnership, as defined in the partnership agreement, may execute the FOCI certification under the official name adopted in the partnership agreement.

No registration is required for a general partnership. The partnership should have a Taxpayer Identification Number. In addition, the partnership agreement should be reviewed.

- (2) Limited Partnerships have two classes of partners, limited and general. Limited partners have a financial interest in the partnership limited to the amount of their investment, but have no control or management authority. The general partner has exclusive management and control of the affairs of the Limited Partnership.

For purposes of executing the FOCI representations and certifications, only the general partners of a Limited Partnership may execute the FOCI certification under the official name adopted in the partnership agreement.

In some instances, Limited Partnerships are registered with the Securities and Exchange Commission. A Limited Partnership should have filed a "Certificate of Limited Partnership" with the state where it was created. The "Certificate of Limited Partnership" is equivalent to a corporation's Articles of Incorporation and Bylaws. The partnership should also have a Taxpayer Identification Number. In addition, the partnership agreement should be reviewed.

c. Corporations:

A corporation differs from the sole proprietorship and the partnership in that the owners of the corporation (stockholders) are not its legal entities. Instead the corporation is considered to be itself an "artificial person" and thus a legal entity and may sue and be sued, make contracts, incur obligations and do many other things much as a natural person, limited only by the purposes set forth in its Articles of Incorporation and authorized by statutory law. With a corporation, the stockholders elect a Board of Directors who then appoint the principal officers of the corporation.

For purposes of executing the FOCI representations and certifications, an authorized official can be determined by reviewing the corporation's Articles of Incorporation and Bylaws. Normally all corporate power is exercised by or under the authority of the Board of Directors. Additionally, the business and affairs of the corporation is managed under the direction of the Board of Directors.

Public and Private Corporations: Corporations may be divided into two main groups, public and private. A public corporation is a political entity created by law for carrying out governmental purposes. Illustrations include states, countries, cities, school districts, and the like. Private corporations on the other hand are created for the purpose of accomplishing some private interest. They may be classed as corporations for profit or nonprofit corporations. The former include the business and commercial corporations which are formed primarily for profit; the latter, such organizations as hospitals, private colleges, and charitable institutions.

Colleges and universities, no matter how organized, sponsored or operated, are chartered by the state, and should have a corporate structure comparable to the structure of a business corporation. They may be either private or public corporations.

Do not confuse the term private and public as used above, with the terms privately (closely) held and publicly held, which are used in connection with the nature of stock ownership. Private corporations are publicly held if their stock is traded to the public through one of the major stock exchanges, and in such cases the corporation should publish the many reports required by the Securities and Exchange Commission. On the other hand, a private corporation is privately held (closely held) if the stock is owned in its entirety by a small group of people (e.g., members of a family; the officers and directors) and is not sold or traded in public. In this case, the rules of the Securities and Exchange Commission do not apply, and the corporation may have no formal Securities and Exchange Commission Form 10-K, Annual Report, Proxy Statement, etc.

If evidence of a corporation in good standing is desired, the corporation can be requested to provide a copy of the state certificate of status or existence and certificate of good standing both of which are provided by the state which created it. In addition, the Articles of Incorporation and Bylaws should be reviewed.

d. **Limited Liability Companies:**

A limited liability company possesses both the limited personal liability found in the corporation form and the favorable federal tax treatment of the partnership form. The availability of the limited liability company as a form of doing business is subject to each state's recognition of the form via special legislation. As there is no uniform limited liability act, organizational provisions and requirements and elements of liability protection can vary from state to state.

A limited liability company is formed by filing articles of organization with the appropriate state

authority, usually the Secretary of State. These articles of organization should meet the requirements of that particular state. At a minimum, the articles of organization set forth information such as the name of the limited liability company (usually some designation as “Limited,” “Ltd.,” or “LLC” should appear in the company name), the purpose of duration, purpose for which organized, and type of management.

Each owner of an interest in the limited liability company is called a member. A member can be a “person” including individuals, a general partnership, a limited partnership, an association or corporation, another domestic or foreign limited liability company, a trust, an estate, or any other legal entity.

An operating agreement or regulations generally govern the conduct of business and affairs of the limited liability company. This agreement or regulations govern distributions of property to members as well as special allocations of profits and losses. In addition, some states allow for different classes or groups of members with different rights, powers, or duties. These different classes or groups are set forth either in the articles of organization or in the operating agreement or regulations.

e. The Multiple Facility Organization:

Any of the types of business structures may be configured (organized) as a Multiple Facility Organization. A Multiple Facility Organization is a legal entity that is composed of two or more facilities.

An Example - The corporate headquarters of “The Smith Company” is in New York, New York. “The Smith Company” has two branch offices as well: one in Oak Ridge, Tennessee; and the other in Albuquerque, New Mexico. Since the headquarters and the two branch offices together comprise a single legal entity, this corporation is a Multiple Facility Organization. Since all of the facilities of a Multiple Facility Organization comprise a single legal entity, only an authorized official of the home office (headquarters), as set forth in the corporation’s by-laws, can execute the FOCI representations and certifications for the Government.

f. The Parent-Subsidiary Relationship:

A subsidiary is a corporation, partnership, or limited liability company that is controlled by another corporation, partnership, limited liability company, person(s), or any other legal entity. The controlling entity is called a parent. (The parent controls the subsidiary through its ownership of over 50 percent of the capital stock of the subsidiary.)

Unlike a Multiple Facility Organization, which is a single legal entity, in a parent-subsubsidiary relationship the parent and each of its subsidiaries are separate legal entities. Since a subsidiary is thus legally accountable in its own right, when the parent is not performing, or proposing to

perform, work for the government which requires access authorizations, or is performing work on a contract requiring a lower level access authorization, formal action is required by the Boards of Directors of the subsidiary and parent to preclude the parent from having any unauthorized access.

Summary:

Each type of business structure has its individual peculiarities and therefore requires a specific action for obtaining a FOCI determination. Legal entities, that is, individual legal entities and corporate entities, can enter into binding contracts with the government. Unincorporated businesses operating under a fictitious or assumed name are not legal entities and cannot enter into legal contracts. Changes in status of individual entities doing business with the government, such as death of a sole proprietor, void existing contracts and may expose classified information to compromise--there is no one contractually bound to protect the information. A corporation is not a person, but is recognized as such by the laws of the state which created it. The corporation may be perpetual in its existence, since the death of one or more officers or directors does not dissolve the corporation, although a corporation may be dissolved through sale, bankruptcy, etc. Corporations are divided into two groups, public and private. The governing body is the Board of Directors, and they appoint the officers who run the corporation. If a college or university desires to be the recipient of a classified contract, a managerial group having the authority and responsibility for contract negotiation, execution and administration may be appointed and identified. In such a case, the involvement of the rest of the college or university in the facility security clearance process is not necessary.

SAFEGUARDS AND SECURITY
DOE G 470.1-3
FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE
IMPLEMENTATION GUIDE

III. LEAD RESPONSIBLE OFFICE
PROCESSING FOCI DETERMINATIONS

U.S. DEPARTMENT OF ENERGY
OFFICE OF SECURITY AFFAIRS
OFFICE OF SAFEGUARDS AND SECURITY

III. LEAD RESPONSIBLE OFFICE PROCESSING FOCI DETERMINATIONS

1. PROCESSING CONTRACTORS FOR FOCI DETERMINATIONS

- a. The Procurement Request Originator should identify the needs and requirements by utilizing DOE F 4200.33, Procurement Request-Authorization. (Contractors are not obligated to utilize the DOE F 4200.33 form, however should utilize something similar.) This form should have the appropriate areas marked if the work will involve the need for access authorizations. If the work does not indicate any need for access authorizations, the FOCI requirements are not applicable. If the work does require access authorizations, the Contracting Officer should additionally require the Procurement Request Originator to complete DOE F 5634.2, Contract Security Classification Specification.
- b. The Contracting Officer should receive DOE F 4200.33 and F 5634.2 from the Procurement Request Originator and may include the appropriate security provisions, including other FOCI information which may be required. Once the Contracting Officer identifies a competitive range, the preliminary selection of possible offerors/bidders of the contract, the Safeguards and Security Information Management System and Defense Investigative Service/Central Verification Activity should be reviewed, by the Contracting Officer, to determine if the possible offerors/bidders have an approved facility clearance and that it is at the appropriate clearance and safeguarding level for the pending contract.
- c. If an offeror/bidder does possess a facility clearance, the Contracting Officer should send DOE F 5634.2 to the local DOE safeguards and security office for approval. Once signed and returned to the Contracting Officer, an award of the contract can be made.
- d. If an offeror/bidder does not possess the necessary facility clearance, the Contracting Officer should obtain from the offeror/bidder a complete FOCI package from the organization, and all tier parents. After reviewing the information in the FOCI package to ensure its completeness, it should be forwarded to the servicing safeguards and security office.
- e. ***Prior to rendering a FOCI determination, the Lead Responsible Office must accomplish the following:***
 - (1) ***Receive written confirmation of a contractor's facility clearance from the Defense Investigative Service (DIS)/Central Verification Activity (CVA).*** (The Lead Responsible Office may proceed with verbal confirmation as long as written confirmation is being transmitted) ***When the contractor has a Limited Facility Clearance (formerly "Reciprocal" clearance) or DIS/CVA cannot verify the***

contractor's clearance and provides a telephone number to call for verification, the FOCI submission must be immediately forwarded to the Office of Safeguards and Security for adjudication; or

- (2) Request the Office of Safeguards and Security to obtain a Facility National Agency Check (FNAC) if the contractor does not have an active DOE or DOD facility clearance requiring access authorizations. (See attachment III-1 for the memorandum format which should be followed in all requests for a FNAC.) However, the Lead Responsible Office can render the FOCI determination pending the results of the FNAC, under the following conditions.**

 - (a) The responses to the FOCI questions do not exceed the thresholds established by the Office of Safeguards and Security.**
 - (b) Exclusion procedures are invoked when the contractor requiring access authorizations is controlled by a parent(s) either not requiring access authorizations or requiring a lower-level access authorization.**
- (3) If the FOCI case exceeds established thresholds, the Lead Responsible Office shall forward the case file to the Office of Safeguards and Security with a recommended determination. Forwarded case files shall contain certifications from the offeror/bidder/contractor and any tier parents and shall document the reasons the case has been forwarded. The Office of Safeguards and Security shall review the package to determine if it concurs with the Lead Responsible Office's recommendation. The Office of Safeguards and Security, in coordination with General Counsel when appropriate, shall provide a final FOCI determination to the Lead Responsible Office.**

2. ESTABLISHED THRESHOLDS

The Lead Responsible Office is authorized to render FOCI determinations when the response to the FOCI questions does not exceed established thresholds or criteria. Only those issues which indicate "submit to Office of Safeguards and Security(NN-512.3)" exceed established thresholds. However, when confronted with unique situations, especially with regard to the perceived foreign intelligence or unauthorized technology transfer threat, Office of Safeguards and Security (NN-512.3) should be consulted.

Question 1 - If the answer is "Yes" submit to **Office of Safeguards and Security (NN-512.3)**. (NOTE: Determine if the foreign person stockholder or foreign person who has subscribed 5 percent or more of the organization's total capital commitment is permitted representation on the Board or similar governing body, currently or at a future date.)

- Question 2 - If the answer is "Yes," ensure information on any interlocking employees, officers, executive personnel, members of the Board of Directors, (or similar type of governing body), and/or general partners with identified foreign interests is reported. (**NOTE:** Every cleared, or in process of being cleared employee of an organization being processed for a facility clearance who is a Representative of a Foreign Interest should execute a statement of full disclosure of foreign affiliations and be adjudicated through the personnel security process. The Lead Responsible Office will receive Representative of a Foreign Interest statements from consultants and individuals through the FOCI or facility approvals and security survey process. The FOCI Operations Manager will ensure the information is incorporated into the FOCI files and then forward the Representative of a Foreign Interests statements to the cognizant Personnel Security Office to determine if the individual's status as a Representative of a Foreign Interest conflicts with their eligibility or continued eligibility for DOE access authorization. The cognizant DOE Personnel Security Office will make the determination based on information provided in Standard Form 86, questions 14, 15, and 17 and any subsequent personnel security interviews.)
- Question 3 - Submit to **Office of Safeguards and Security (NN-512.3)**, along with the local DOE Personnel Security Office's, determination on the individual's eligibility for a DOE access authorization, and a detailed description of all information and its classification level to be released to the offeror/bidder or contractor in the following instances: (a) if any foreign national, dual citizen, or employee or agent of a foreign person holds positions, such as board members (or similar type of governing body), officers, executive personnel, or general partner in the organization **and** requires an access authorization, and/or (b) if any of the organization's OODEPs requiring access authorizations are a citizen of or were born in any foreign country on the Sensitive Country List (see attachment III-2) or any other foreign country identified by the Office of Safeguards and Security as a concern to DOE.
- Question 4 - Submit to **Office of Safeguards and Security (NN-512.3)** If the answer is "Yes" ensure the organization documents the foreign person and furnishes complete details concerning the control or influence and, if appropriate, provides the pertinent documents which provide the foreign person with such authority.
- Question 5 - See Question Number 7.
- Question 6 - Submit to **Office of Safeguards and Security (NN-512.3)** in the following instances: (a) if 30 percent or more of the organization's assets and/or voting securities have been pledged as collateral; and/or (b) if the ownership of any of the lenders stems to any foreign country on the Sensitive Country List or

identified by the Office of Safeguards and Security as a concern to DOE.

- Question 7 - Submit to **Office of Safeguards and Security (NN-512.3)** in the following instances: (a) if the organization derived 5 percent or more of its total consolidated revenues and/or net income from any foreign country on the Sensitive Country List or any other foreign country identified by the Office of Safeguards and Security as a concern to DOE; and/or (b) in the aggregate 50 percent or more of its total consolidated revenues and/or net income from foreign persons.
- Question 8 - Submit to **Office of Safeguards and Security (NN-512.3)** if there are indications of foreign ownership. (**NOTE:** Indications could include Securities and Exchange Commission Schedule 13D and/or 13G forms reporting foreign ownership, foreign addresses listed as the address of record for a stockholder holding 5 percent or more of the organization's equity securities, foreign addresses or foreign control over any individual or entity who has subscribed 5 percent or more of the organization's total capital commitment.)
- Question 9 - If the answer is "Yes," ensure information on any affiliation by the organization's officers, executive personnel, members of the Board of Directors, or similar type of governing body and/or general partners with foreign persons is reported. (**NOTE:** Every cleared, or in process of being cleared employee of an organization being processed for a facility clearance who is a Representative of a Foreign Interest should execute a statement of full disclosure of foreign affiliations and be adjudicated through the personnel security process.) Submit to **Office of Safeguards and Security (NN-512.3)** along with the DOE Personnel Security Office's adjudication of the individuals's eligibility for a DOE access authorization and a detailed description of all information and its classification level to be released to the offeror/binder or contractor if the interlocking position is with an organization located in any foreign country on the Sensitive Country Listing or any other foreign country identified by the Office of Safeguards and Security as a concern.
- Question 10 - Submit to **Office of Safeguards and Security (NN-512.3)** if access to DOE classified information and/or special nuclear material is involved.
- Question 11 - Submit to **Office of Safeguards and Security (NN-512.3)** if reported foreign involvement indicates foreign control or influence.

If the offeror/bidder/contractor is controlled by another organization, the required FOCI representations and certification should be obtained from all controlling entities. The term "control," as used in the immediately preceding sentence, shall

mean the right to exercise, directly or indirectly, more than 50 percent of the voting rights attributable to the controlled U.S. company, or, if less than majority owned, an organization, directly or indirectly, is permitted to elect the majority of the U.S. company's Board members as a result of a shareholders agreements, operating agreement, etc. If the controlling organization's responses to the FOCI questions do not exceed established thresholds and the controlling organization(s) is not performing work on any DOE contract/subcontract requiring access authorizations or is performing work on a DOE contract/subcontract at a lower-level access authorization than required by the entity it controls, the Lead Responsible Office should ensure that exclusion procedures are invoked.

3. **ACCEPTING A FOCI DETERMINATION RENDERED BY ANOTHER FEDERAL AGENCY**

A contractor facility holding facility clearance from another Federal agency may be approved by DOE for processing, using, or storing classified matter, contingent on the following.

(NOTE: Until the completion of the FOCI Implementation Plan and DOE OSS has transmitted guidance, DOE will not accept a DOD FOCI determination for an organization when the contract involves Secret Restricted Data or Top Secret information.)

- (1) *The Federal agency facility clearance at the appropriate classification level and encompasses the DOE activity. The other Federal agency's facility clearance shall not be accepted if it is based on a Special Security Agreement, Security Control Agreement, Limited Facility Clearance, or Reciprocal Clearance. However, the Lead Responsible Office may submit a request to accept one of the above Federal agency's facility clearances to the Office of Safeguards and Security (NN-512.3) who will make a determination on a case-by-case basis.*
- (2) *The cognizant Federal agency agrees that it shall not cancel the facility clearance without prior notification to the Lead Responsible Office.*
- (3) *The last survey report is acceptable, in those areas that could affect the DOE activity.*
- (4) *The cognizant Federal agency agrees to furnish the Lead Responsible Office copies of its periodic survey reports or memoranda covering the DOE activity.*
- (5) *Each employee to be granted access to DOE classified information has, as a minimum, a Federal security clearance equivalent to that required by DOE, or reconciliation through interagency coordination on a case-by-case basis.*

- (6) *If Restricted Data (RD) or Formerly Restricted Data (FRD) are involved, the cognizant Federal agency has provided assurance of compliance with the requirements of the Atomic Energy Act of 1954, as amended, including the mandatory personnel clearance requirements.*
- (7) *The requirements identified above have been documented in a letter or memorandum of agreement between the Lead Responsible Office and the cognizant Federal agency.*

4. **SCHEDULE OF REQUIREMENTS FOR PROCESSING FOCI DETERMINATIONS**

The Lead Responsible Office shall observe the following schedule in processing FOCI determinations:

- (1) *Initial review and verification procedures shall be accomplished within 15 working days of the receipt of a FOCI submission from the Contracting Officer.*
- (2) *Within an additional 20 working days, one of the following actions will be taken.*
 - (a) *A FOCI determination will be rendered by the Lead Responsible Office if FOCI thresholds are not exceeded.*
 - (b) *If required, additional information shall be requested either verbally or in writing from the offeror/bidder/contractor.*
 - (c) *The FOCI case, which has been reviewed for completeness, shall be forwarded to the Office of Safeguards and Security if established thresholds are exceeded.*

For cases forwarded to the Office of Safeguards and Security for action, the forgoing schedule shall also be observed.

If for any reason a FOCI determination has not been rendered within 90 working days of receipt:

- (1) *The Lead Responsible Office shall either (i) provide written notification to the submitting contracting officer, with a copy to the Office of Safeguards and Security regarding the reason for the delay in processing/completing the submission, or (ii) return the submission to the submitting Contracting Officer if the contractor has been non-responsive to the Lead Responsible Office's request for additional information or implementation of required security measures. The Lead Responsible Office should coordinate with the Contracting Officer for*

assistance in obtaining information from an unresponsive offeror/bidder.

- (2) ***The Office of Safeguards and Security shall either (i) provide written notification to the Lead Responsible Office regarding the reason for the delay in processing/completing the submission, or (ii) return the submission to the Lead Responsible Office if the contractor has been non-responsive to the Office of Safeguards and Security's request for additional information or implementation of required security measures.*** The Lead Responsible Office should coordinate with the Contracting Officer for assistance in obtaining information from an unresponsive offeror/bidder.

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IV. PROCUREMENT RESPONSIBILITIES

U.S. DEPARTMENT OF ENERGY
OFFICE OF SECURITY AFFAIRS
OFFICE OF SAFEGUARDS AND SECURITY

IV. PROCUREMENT RESPONSIBILITIES

1. CONTRACTING OFFICERS DUTIES

- a. ***The Contracting Officer cannot award the contract/agreement***, that involves access to classified information or a significant amount of special nuclear material, or that requires the issuance of personnel security access authorizations, ***until he/she receives notification from the Lead Responsible Office that a favorable FOCI determination was rendered***, signed, and returned to the Contracting Officer DOE F 5634.2 .
- b. The Contracting Officer should receive DOE F 4200.33, attachment IV-1, or equivalent, and F 5634.2, attachment IV-2, from the Procurement Request Originator. Upon receipt of these forms, the Contracting Officer should include in the solicitation the appropriate terms and conditions, and should state in the solicitation that should an offeror/bidder be included in the competitive range, they may be required to complete the FOCI package. Once the Contracting Officer identifies a competitive range, i.e., the preliminary selection of possible offerors/bidders of the contract, the unclassified version of the Safeguards and Security Information Management System and Defense Investigative Service/Central Verification Activity should be reviewed to determine if the possible offerors/bidders have an approved facility clearance. (Until the unclassified version of the Safeguards and Security Information Management System is available, the Contracting Officer should contact the local DOE safeguards and security office.)

NOTE: The contractor may not use the same forms or have the same position titles for their Contracting Officer or Procurement Request Originator. It may be necessary for the DOE Contracting Officer to identify the equivalent forms and titles from the contractor on a site specific basis.

- c. If an offeror/bidder does possess a facility clearance, the Contracting Officer should send DOE F 5634.2 to the local DOE safeguards and security office for approval. Once the local DOE safeguards and security office signs and returns DOE F 5634.2 to the Contracting Officer, an award of the contract can be made.
- d. ***If an offeror/bidder***, in the competitive range, ***does not possess a facility clearance, the Contracting Officer shall obtain from the offeror/bidder the FOCI package***, as described below, from the organization and any tier parents. After reviewing the information in the FOCI package to ensure its completeness, the Contracting Officer should forward the FOCI package along with DOE F 5634.2 to the servicing safeguards and security office.

(1) FOCI REPRESENTATIONS AND CERTIFICATION

- (2) CONTENTS REVIEW REQUIRED BY THE OFFEROR - for use by the offeror/bidder and any tier parent when reviewing FOCI documentation prior to submission, see attachment V-1;
 - (3) SUMMARY FOCI DATA SHEET - to be completed by the offeror/bidder and, if applicable, each of its tier parents, see attachment V-2;
 - (4) LIST OF OWNERS, OFFICERS, DIRECTORS AND EXECUTIVE PERSONNEL (OODEP) FORM - to be completed by the offeror/bidder and, if applicable, each of its tier parents, see attachment V-3; and,
 - (5) REPRESENTATIVE OF FOREIGN INTEREST STATEMENT - to be completed by any employee and/or OODEP of the offeror/bidder and any tier parent if the individual is acting as a representative of a foreign person or the individual possesses or is being processed for a DOE personnel security access authorization. This would also include a cleared employee and/or OODEP who has been appointed by his or her U.S. employer to be its representative in the management of a foreign subsidiary and/or affiliate, see attachment V-4.
- e. Prior to submitting an initial FOCI representation(s) and certification(s) from an offeror or bidder to safeguards and security, the Contracting Officer should review the submission to ensure that the FOCI representations and certification as well as all supporting documentation are attached. Ensure that the following information has been obtained from the offeror/bidder and each tier parent organization, if applicable:
- (1) The FOCI representations was executed by an authorized official of the company;
 - (2) A copy of the U.S. company's articles of incorporation and an attested copy of the U.S. company's by-laws, or similar documents filed for the U.S. company's existence and management, and all amendments to those documents.
 - (3) Consolidated Financial Information and statements for the organization's most recently closed accounting year,
 - A. Publicly-traded companies (whether the ultimate parent, intermediate parent, or subsidiary) should submit its annual report and Securities and Exchange Commission Form 10-K report for the most recently closed accounting year, as well as its most recent proxy statement for the annual meeting of stockholders.
- If the Company's stock is not publicly traded but the company has publicly-traded debt, the company should submit its Securities and Exchange Commission Form 10-K report for the most recently closed accounting year.

B. Privately-owned companies (whether the ultimate parent, intermediate parent, or subsidiary) should submit consolidated financial information (i.e., to include the accounts of the company and its subsidiary companies) for the most recently closed accounting year. The financial information should be prepared and presented in accordance with generally accepted accounting principles as established by the financial accounting standards board, to include accompanying footnote disclosures. If available, audited financial information should be provided. If audited financial information is not available, unaudited information should be accepted, but only if accompanied by a certification attesting to the unavailability of audited information.

(4) Listing of owners, officers, directors, and executive personnel (OODEP).

The contractor and all tier parents should submit a list identifying their respective organization's owners, owner's representatives, officers, directors, and executive personnel, to include their complete names; social security numbers; date and place of birth; citizenship; titles of all positions they hold within the organization; and what clearances, if any, they possess or are in the process of obtaining and identification of the government agency(ies) that granted or will be granting those clearances.

If any position is vacant, so state.

For sole proprietorships operating in community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, or Wisconsin), information on the sole-proprietor's spouse, if applicable, should also be provided on the OODEP listing.

With respect to the U.S. organization's owners, publicly-traded companies do not need to provide all identifying information on its owners as required on the OODEP listing unless those individuals are OODEPs of the U.S. organization. However, publicly-traded companies should provide the most recent copies of any Schedules 13D and/or 13G received from any beneficial owners (foreign or domestic) who hold 5 percent or more of any class of the U.S. organization's securities.

(5) The Summary FOCI Data Sheet.

- f. After receipt and review for completeness, of the above identified documents, the FOCI package is to be forwarded by the Contracting Officer to safeguards and security for processing. If any of the above documents are missing, the Contracting Officer should obtain the required documentation and advise the offeror that award of the contract cannot be made until all documents are furnished.

- g. Upon completion of DOE's review of the offeror's/bidder's foreign involvement, the local safeguards and security office should provide the Contracting Officer with written notification of the results of the FOCI review. If the FOCI determination is favorable and the offeror/bidder is granted a DOE-approved facility clearance, the local DOE safeguards and security office should sign and return DOE F 5634.2 to the Contracting Officer. Contract award can be made upon (i) receipt of notification of a favorable FOCI determination from the local DOE safeguards and security office, (ii) receipt of the signed DOE F 5634.2 from the local DOE safeguards and security office, and (iii) the Contracting Officer ensuring that the appropriate security clauses, listed below, are included in the contract.
- (1) 952.204-2 "Security Clause," attachment IV-3
 - (2) 952.204-70 "Classification Clause," attachment IV-4
 - (3) 952.204-74 "Foreign Ownership, Control or Influence Over Contractor Clause," attachment IV-5

Additionally, the Department of Energy Acquisition Regulation letter, number 92-2R, dated April 8, 1993 is included as attachment IV-6.

2. SAFEGUARDS AND SECURITY INFORMATION MANAGEMENT SYSTEM

The Safeguards and Security Information Management System serves as DOE's computer library for DOE approved facility clearances, facility administrative information, written survey reports, and related ratings, findings, and corrective actions. The Safeguards and Security Information Management System provides on-line, fully interactive, multi-user capabilities for sharing, updating, and retrieving information throughout all DOE Headquarters and DOE Operations/Field Offices. This system allows electronic updating of the facility status and is maintained by DOE safeguards and security.

The Contracting Officer should examine the unclassified version of the Safeguards and Security Information Management System, when available, and if no record exists, contact the Department of Defense (DOD) Defense Investigative Service/Central Verification Activity, to verify whether the offer/bidder holds a facility clearance from DOD at the appropriate safeguarding level for the pending contract, as established by DOE. When the Contracting Officer completes the verification of the offer's/bidder's facility clearance, documentation to the file should be completed. If the offer/bidder does not currently hold the necessary facility clearance, the offeror/bidder and, if applicable, any tier parents should be required to complete the FOCI representation and certification. (Note: Eventually, the DOD Defense Investigative Service/Central Verification Activity will be tied into the unclassified version of the Safeguards and Security Information Management System. When the databases are developed, the

Contracting Officer will be contacting the DOD Defense Investigative Service/Central Verification Activity through the unclassified version of the Safeguards and Security Information Management System. Guidance will be modified when this is in place.)

Training is provided on the unclassified version of the Safeguards and Security Information Management System for all Contracting Officers through the Central Training Academy. All personnel should attend the training on the unclassified version of the Safeguards and Security Information Management System prior to being authorized to access the system.

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V. CONTRACTOR REQUIREMENTS

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OFFICE OF SECURITY AFFAIRS
OFFICE OF SAFEGUARDS AND SECURITY

V. CONTRACTOR REQUIREMENTS

1. INSTRUCTIONS FOR COMPLETING THE FOCI REPRESENTATIONS AND CERTIFICATION

Prior to forwarding a FOCI submission to the Lead Responsible Office, the offeror/binder, or contractor/subcontractor should review the submission, see attachments V-1 and V-2, to ensure that:

If the offeror/bidder is owned by a parent organization(s), the FOCI representations and certification should be attached for all tier parents, i.e., ultimate parent and any intervening levels of ownership. Each certification should be signed and dated by a person authorized to represent and sign for the organization as officially recorded by the organization (that is, in the document which sets forth the terms and conditions of its operation and management--the by-laws, operating agreement, partnership agreement, etc.), or any other employee, identified by name, of the organization if designated in writing by such an authorized official as having been delegated authority to execute the FOCI representations and certification on behalf of the organization.

The foregoing paragraph also applies to a contractor of any tier possessing a DOE approved facility clearance, however, FOCI representations and certification do not need to be submitted to the Lead Responsible Office for any of the contractor's tier parents, if applicable, unless (i) a change(s) has occurred in the extent and nature of FOCI which would affect the answers provided to the questions in the parent's previously provided FOCI representations and certification; (ii) a change in ownership or control has occurred; (iii) five years have elapsed since the parent's previously provided FOCI representations and certification were executed; or (iv) the Lead Responsible Office has advised the contractor that it considers a relevant change in the nature of FOCI has occurred and has requested comprehensive FOCI representations and certification for the tier parent(s).

In addition to the executed FOCI representations and certification, an offeror/bidder and, if applicable, its tier parents should also submit the following to the Contracting Officer, or a contractor with a DOE approved facility clearance and, if applicable, its tier parents should also submit the following to the Lead Responsible Office:

1. A copy of the U.S. company's articles of incorporation and an attested copy of the U.S. company's by-laws, or similar documents filed for the U.S. company's existence and management, and all amendments to those documents. NOTE: A contractor with a DOE approved facility clearance and, if applicable, its tier parents do not need to provide these documents unless (i) the U.S. company's articles of incorporation and by-laws, or similar documents filed for the U.S. company's existence and management, have been amended; or (ii) the Lead Responsible Office has requested the documents.

2. Complete and return the attached Summary FOCI Data Sheet. NOTE: A contractor with a DOE approved facility clearance and, if applicable, its tier parents do not need to provide the Summary FOCI Data Sheet unless (i) a change(s) has occurred which would affect the answers to the information in the Summary FOCI Data Sheet previously provided by the contractor and/or its tier parents, if applicable; or (ii) the Lead Responsible Office has requested the contractor and/or its tier parents to complete and return the Summary FOCI Data Sheet. The Summary FOCI Data Sheet will enable the Lead Responsible Office to review and verify the submitted information in a quicker and more thorough manner which will provide a quicker determination.
3. Consolidated information and statements for the organization's most recently closed accounting year.
 - a. Publicly-traded companies (whether the ultimate parent, intermediate parent, or subsidiary) should submit its annual report and securities and exchange commission form 10-K report for the most recently closed accounting year, as well as its most recent proxy statement for the annual meeting of stockholders.

If the company's stock is not publicly traded but the company has publicly-traded debt, the company should submit its Securities and Exchange omission Form 10-K report for the most recently closed accounting year.

- b. Privately-owned companies (whether the ultimate parent, intermediate parent, or subsidiary) should submit consolidated financial information (i.e., to include the accounts of the company and its subsidiary companies) for the most recently closed accounting year. The financial information should be prepared and presented in accordance with generally accepted accounting principles as established by the financial accounting standards board, to include accompanying footnote disclosures. If available, audited financial information should be provided. If audited financial information is not available, unaudited information should be accepted, but only if accompanied by a certification attesting to the unavailability of audited information.
4. Listing of owners, officers, directors, and executive personnel (OODEP)

The contractor and all tier parents should submit a list identifying their respective organization's owners, owner's representatives, officers, directors, and executive personnel, to include their complete names; social security numbers; date and place of birth; citizenship; titles of all positions they hold within the organization; and what clearances, if any, they possess or are in the process of obtaining and identification of the government agency(ies) that granted or will be granting those clearances. (See attachment V-3)

If any position is vacant, so state.

For sole proprietorships operating in community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, or Wisconsin), information on the sole proprietor's spouse, if applicable, should also be provided on the OODEP listing.

With respect to the U.S. organization's owners, publicly-traded companies do not need to provide all identifying information on its owners as required on the OODEP listing unless those individuals are OODEPs of the U.S. organization. However, publicly-traded companies should provide the most recent copies of any Schedules 13D and/or 13G received from any beneficial owners (foreign or domestic) who hold 5 percent or more of any class of the U.S. organization's securities.

FOCI Representation and Certification Questions:

Question Number 1. Does a foreign interest own or have beneficial ownership in 5 percent or more of your organization's voting securities?

In order to encompass the DOE Acquisition Regulation definition of foreign interest, when answering this question use the definitions of "foreign person" and "U.S. person" contained in the National Industrial Security Program Operating Manual of January, 1995, (foreign person is "Any foreign interest and any U.S. person effectively owned or controlled by a foreign interest," and U.S. person is "Any form of business enterprise or entity organized, chartered or incorporated under the laws of the U.S. or its possessions and trust territories and any person who is a citizen or national of the U.S." Accordingly, identify any foreign person(s) directly or indirectly owning or having beneficial ownership of 5 percent or more of the outstanding shares of any class of your organization's equity securities, or if the organization has not issued stock, identify any foreign person(s) which directly or indirectly has subscribed 5 percent or more of your organization's total capital commitment.

Question Number 2. Does your organization own 10 percent or more of any foreign interest?

Ownership of foreign interests should be reported whether the ownership is direct or indirect (i.e., through one or more of the U.S. company's subsidiaries). If your answer is "Yes," furnish the legal name(s) of the foreign interest(s), the country of legal residence of each identified foreign subsidiary/affiliate, and your percentage of ownership of each identified foreign subsidiary/affiliate. Also provide the following information for each employee and/or OODEP of the U.S. company who has been appointed by the U.S. company executing the FOCI representations to be its representative in the management of the identified foreign subsidiary(ies)/affiliate(s): (a) complete name, (b) citizenship, (c) titles of his/her position(s) within the U.S. company and within the identified foreign subsidiary/affiliate; and (d) what

personnel security access authorization(s), if any, the identified individual possesses or is in the process of obtaining, to include identification of the U.S. government agency(ies) which granted or is processing the personnel security access authorization(s). If any of the identified individuals possesses or is being processed for a DOE access authorization, and the U.S. company has not already submitted a “Representative of Foreign Interest Statement,” as shown at attachment V-4, for the individual to either the Contracting Officer or the Lead Responsible Office, as appropriate, the U.S. company should ensure the identified individual(s) complete the “Representative of Foreign Interest Statement,” as shown at attachment V-4, for each foreign subsidiary/affiliate in which he/she holds a position and that such statement is provided with the FOCI representations and certification. In addition, if a cleared employee and/or OODEP of a U.S. company possessing a DOE approved facility clearance becomes a Representative of Foreign Interest and/or his/her status as a Representative of Foreign Interest changes subsequent to the submission of the U.S. company’s latest comprehensive FOCI representations and certification, the U.S. company should submit a written report, including the executed Representative of Foreign Interest Statements, which discloses such changes to the Lead Responsible Office.

Does your organization have branch/sales offices or other facilities, or are you qualified to do business as a foreign corporation in any other countries?

Question Number 3. Do any foreign interests have management positions, such as directors, officers, or executive personnel in your organization?

In order to encompass the DOE Acquisition Regulation definition of foreign interest, when answering this question use the definitions of “foreign person” and “U.S. person” contained in the National Industrial Security Program Operating Manual of January, 1995, (foreign person is “Any foreign interest and any U.S. person effectively owned or controlled by a foreign interest,” and U.S. person is “Any form of business enterprise or entity organized, chartered or incorporated under the laws of the U.S. or its possessions and trust territories and any person who is a citizen or national of the U.S.”).

Accordingly, identify any foreign national(s); dual citizen(s); or employee(s) or agent(s) of a foreign person(s), whether a foreign national(s) or a U.S. citizen(s), who hold positions, such as board members (or similar type of governing body), officers, executive personnel, or general partners in your organization.

Question Number 4. Does any foreign interest control or influence, or is any foreign interest in a position to control or influence the election, appointment or tenure of any of your directors, officers, or executive personnel?

In order to encompass the DOE Acquisition Regulation definition of foreign interest, when answering this question use the definitions of “foreign person” and “U.S. person” contained in

National Industrial Security Program Operating Manual of January, 1995, (Foreign person is “Any foreign interest and any U.S. person effectively owned or controlled by a foreign interest,” and U.S. person is “Any form of business enterprise or entity organized, chartered or incorporated under the laws of the U.S. or its possessions and trust territories and any person who is a citizen or national of the U.S.”).

Accordingly, identify and furnish full details regarding any foreign person(s) that has the power, directly or indirectly, presently or at a future date, whether or not exercised, and whether or not exercisable through ownership of voting securities or by contract or otherwise, to control or influence the direction of the management and/or policies of your organization.

Question Number 5. Does your organization have any contracts, binding agreements, understandings or arrangements with a foreign interest(s) that cumulatively represent 10 percent or more of your company*s gross income?

In order to encompass the DOE Acquisition Regulation definition of foreign interest, when answering this question use the definitions of “foreign person” and “U.S. person” contained in National Industrial Security Program Operating Manual of January, 1995, (Foreign person is “Any foreign interest and any U.S. person effectively owned or controlled by a foreign interest,” and U.S. person is “Any form of business enterprise or entity organized, chartered or incorporated under the laws of the U.S. or its possessions and trust territories and any person who is a citizen or national of the U.S.”).

Accordingly, identify and furnish full details as follows: (a) legal name of the foreign person(s), country of legal residence of the foreign person(s) and/or country of legal residence of foreign person’s ultimate owner; (b) nature of agreement or involvement with the foreign person(s); (c) whether the agreement or involvement is (i) purely commercial in nature, (ii) involves classified information and/or special nuclear material, and/or (iii) involves services/products related to a U.S. export-controlled commodity, technical know how, or technical data. If the agreement, contract, etc. involves a product(s) related to a U.S. export controlled commodity or a service being performed in support of a U.S. export controlled commodity, and/or a dual use commodity or munitions commodity controlled by the International Traffic in Arms Regulation (ITAR), compliance with export license and ITAR requirements should be acknowledged; and (d) during your organization’s most recently closed accounting year, provide information on the amount, by country and total, of your organization’s total consolidated revenues and net income which were derived from international sales and U.S. export sales to foreign person(s). The information provided cannot be reported by the country location of the selling entity, but should disclose the country location of the client paying for the product/service if the foreign person client is located in a foreign country, or the country of legal residence of the foreign person’s ultimate owner if the foreign person client is domiciled in the U.S. or its possessions and trust territories.

Question Number 6. Is your organization indebted to foreign interests?

In order to encompass the DOE Acquisition Regulation definition of foreign interest, when answering this question use the definitions of “foreign person” and “U.S. person” contained in National Industrial Security Program Operating Manual of January, 1995, (Foreign person is “Any foreign interest and any U.S. person effectively owned or controlled by a foreign interest,” and U.S. person is “Any form of business enterprise or entity organized, chartered or incorporated under the laws of the U.S. or its possessions and trust territories and any person who is a citizen or national of the U.S.”).

Accordingly, identify and furnish full details regarding any Revolving Loans, Letter of Credit accommodations, and all other obligations, liabilities and indebtedness of every kind, nature and description to a foreign person(s), whether as borrower, surety, endorser, guarantor or otherwise, whether direct or indirect, absolute or contingent, joint or several, due or not due, primary or secondary, liquidated or unliquidated, secured or unsecured, and however acquired by the Lender. Ensure that full details are provided as to (i) the type of each reported indebtedness or obligation, (ii) the legal name of the foreign person(s), country of legal residence of the foreign person(s) and/or country of legal residence of foreign person’s ultimate owner; (iii) the amount of outstanding indebtedness or available credit line or contingent obligation if there is currently no outstanding indebtedness; and (iv) full specifics as to what collateral, if any, has been furnished or pledged.

Question Number 7. Does your organization derive any income from communist countries included in Country Groups Q, S, W, Y, and Z in Supplement No. 1, 15 CODE OF FEDERAL REGULATIONS Part 770?

In order to encompass the DOE Acquisition Regulation definition of foreign interest, when answering this question use the definitions of “foreign person” and “U.S. person” contained in National Industrial Security Program Operating Manual of January, 1995, (Foreign person is “Any foreign interest and any U.S. person effectively owned or controlled by a foreign interest,” and U.S. person is “Any form of business enterprise or entity organized, chartered or incorporated under the laws of the U.S. or its possessions and trust territories and any person who is a citizen or national of the U.S.”

Identify and furnish full details as follows: (a) legal name of the foreign person(s), country of legal residence of the foreign person(s) and/or country of legal residence of foreign person’s ultimate owner; (b) nature of agreement or involvement with the foreign person(s); (c) whether the agreement or involvement is (i) purely commercial in nature, (ii) involves classified information and/or special nuclear material, and/or (iii) involves services/products related to a U.S. export-controlled commodity, technical know how, or technical data. If the agreement, contract, etc. involves a product(s) related to a U.S. export controlled commodity or a service being performed in support of a U.S. export controlled commodity, and/or a dual use commodity or munitions commodity controlled by the ITAR, compliance with export license and ITAR requirements should be acknowledged; and (d) during your organization’s most recently closed

accounting year, provide information on the amount, by country and total, of your organization's total consolidated revenues and net income which were derived from international sales and U.S. export sales to foreign person(s) clients located in or whose ultimate ownership stems to foreign countries. The Information provided cannot be reported by the country location of the selling entity, but should disclose the country location of the client paying for the product/service, or the country of legal residence of the foreign person's ultimate owner if the foreign person client is domiciled in the U.S. or its possessions and trust territories but its ultimate ownership stems to a foreign country.

Question Number 8. Is 5 percent or more of any class of your organization's securities held in "nominee shares," in "street names," or in some other method which does not disclose the beneficial owner of equitable title?

(Nominee Share is a share of stock or registered bond certificate which has been registered in a name other than the actual owner. A Street Name is the common practice of registering publicly traded securities in the name of one or more brokerage firms.)

If "Yes," what percentage is in Nominee Shares, Street Names, etc., which does not disclose the beneficial owner of equitable title. Also, identify each foreign institutional investor holding the 5 percent or more of the voting stock. This identification should include the name and address of the investor and percentage of stock held. State whether the investor has attempted or has actually exerted any management control or influence over the appointment of directors, officers, or other key management personnel, and whether such investors have attempted to influence the policies of your organization. The most current copies of any Schedule 13Ds and/or Schedule 13Gs filed by any investor, foreign or domestic, with the Securities and Exchange Commission, should be attached.

Question Number 9. Does your organization have interlocking directors/officers with foreign interests?

In order to encompass the DOE Acquisition Regulation definition of foreign interest, when answering this question use the definitions of "foreign person" and "U.S. person" contained in National Industrial Security Program Operating Manual of January, 1995, (Foreign person is "Any foreign interest and any U.S. person effectively owned or controlled by a foreign interest," and U.S. person is "Any form of business enterprise or entity organized, chartered or incorporated under the laws of the U.S. or its possessions and trust territories and any person who is a citizen or national of the U.S.").

If your answer is "yes" furnish the legal name(s) of the foreign person(s); foreign person's address; the country of legal residence of the foreign person(s) and/or country of legal residence of foreign person's ultimate owner; your organization's affiliation, if any, with the identified foreign person(s); and for any of your organization's board members (or similar type of

governing body), officers, executive personnel, or general partners who hold any type of position with or serve as consultants or agents with the identified foreign person(s) provide: (a) individual's complete name, (b) citizenship, (c) titles of his/her position(s) with the U.S. company and within the identified foreign person(s); and (d) what personnel security access authorization(s), if any, the identified individual possesses or is in ;the process of obtaining, to include identification of the U.S. government agency(ies) which granted or is processing the access authorization(s). If any of the identified individuals possesses or is being processed for a DOE access authorization, and he/she holds any type of position or serves as consultants or agents with a foreign person(s) not organized, chartered, or incorporated under the laws of the U.S. or its possessions and trust territories, the U.S. company should ensure that completed "Representative of Foreign Interest Statement," are submitted for there individuals in the same manner as requested in Question Number 2.

Question Number 10. Are there any citizens of foreign countries employed by or who may visit your offices or facilities in a capacity which may permit them to have access to classified information or a significant quantity of special nuclear material?

Identify the individuals, to include dual citizens, and the country(ies) of which they are citizens. Also explain the individual*s affiliation with your organization, identify which U.S. government agency has security cognizance over the classified information and/or special nuclear material, and provide details as to why they will need such access.

Question Number 11. Does your organization have any foreign involvement not otherwise covered in your answers to the above questions?

Describe the foreign involvement in detail including why the involvement would not be reportable in the preceding questions.

NOTE: *If any of the information listed above is incomplete, the Contracting Officer cannot complete award of the contract.*

2. REPORTING SIGNIFICANT CHANGES

When changes in the extent and nature of FOCI which affect the information in a contractor's and/or any tier parents' most recent DOE FOCI submission(s) have occurred, the contractor/parent shall immediately provide written notification and supporting documentation relevant to the changes to the Lead Responsible Office. A significant FOCI increase/change that warrants processing of the contractor/parent for a new FOCI determination includes, but is not necessarily limited to, the following.

For a contractor possessing a DOE approved facility clearance acquiring access authorizations:

- a. *A new threshold or factor that did not exist when the previous determination was made (e.g., a "no" answer changes to a "yes" answer), and any additional factors associated with the questions on the FOCI representation and certification.*
- b. *A previously reported threshold or factor that was favorably adjudicated by the Lead Responsible Office has increased to a level requiring a determination by the Office of Safeguards and Security.*
- c. *A previously reported financial threshold or factor that was favorably adjudicated has increased by 5 percent or more; or a shift has occurred of 5 percent or more by country location or end user (i.e., for revenue and/or net income) or lenders (i.e., indebtedness).*
- d. *A previously reported foreign ownership threshold or factor that was favorably adjudicated by the Office of Safeguards and Security has increased to the extent that a FOCI negation method or a different FOCI negation method is required.*
- e. *Any changes in the ownership or control of the contractor and/or any tier parents.*

If an offeror/bidder and, if applicable, its tier parents have submitted comprehensive FOCI representations and certification to a Contracting Officer, however, changes, as referenced in 2.a. through e. above, in the extent and nature of FOCI which affect the information in the offeror's/bidder's and/or any tier parents' respective FOCI representations have occurred prior to the completion of DOE's review and adjudication of the certification pertaining to FOCI, the offeror/bidder and/or its tier parents should immediately provide written notification and documentation relevant to the changes to the Contracting Officer.

3. ANNUAL CERTIFICATION

Each contractor holding a facility clearance shall certify annually to the Lead Responsible Office that (i) no significant changes have occurred in the extent and nature of FOCI which would affect the organization's answers to the questions provided in its FOCI representations; (ii) no changes have occurred in the organization's ownership; and (iii) no changes have occurred in the organization's officers, directors, and executive personnel.

When the contractor is controlled by parent organizations that have been excluded, the contractor must also provide annually to the Lead Responsible Office written certification from an authorized official from each such excluded parent that (i) no significant changes have occurred in the extent and nature of FOCI which would affect the organization's answers to the questions provided in its FOCI representations; (ii) no changes have occurred in the organization's ownership; and (iii) no changes have occurred in the organization's officers, directors, and executive personnel.

At the end of each year of operation, the trustees, proxy holders, or other principals as appropriate of those organizations operating under a DOE approved Voting Trust Agreement, Proxy Agreement, Special Security Agreement, or Security Control Agreement shall submit to the Lead Responsible Office an annual implementation and compliance report. Failure of the cleared U.S. organization to ensure compliance with the terms of the applicable security arrangement may result in the organization's facility clearance being suspended pending resolution of the FOCL. The contents of an annual implementation and compliance report are detailed below:

- A. When the contractor's Board of Directors (or similar governing body) has invoked resolutions to process key management personnel for access authorizations and to exclude from the personnel clearance requirement certain members of its Board of Directors and other officers and executive personnel, the contractor should provide annually to the Lead Responsible Office written certification (i) that each of the organization's key management personnel required to obtain and retain an access authorization possesses the required clearance; (ii) as to whether any changes have occurred in the positions held by any of the organizations OODEP whereby the duties of such position(s) requires the OODEP, to be identified by name, to have access to classified information and/or SNM or to be involved in the protection of classified information and/or SNM; (iii) as to whether the invoked resolutions remain in full force and effect; and (iv) as to whether there were any acts of noncompliance with these security measures, whether inadvertent or intentional, with a description of steps that were taken to prevent such acts from recurring.
- B. When the contractor is controlled by a tier parent(s) which has not entered into a contract requiring access authorizations and the contractor's and tier parent's Boards of Directors have invoked resolutions to exclude the parent(s) from having any unauthorized access, the contractor should provide annually to the Lead Responsible Office written certification (i) that the Exclusionary Resolutions invoked by the contractor's and tier parent's Board of Directors remain in full force and effect; and (ii) as to whether there were any acts of noncompliance with the security measures, whether inadvertent or intentional, with a description of steps that were taken to prevent such acts from recurring.
- C. When the contractor is operating under a DOE approved Voting Trust Agreement, Proxy Agreement, Special Security Agreement, or Security Control Agreement, the trustees, proxy holders, or other principals as appropriate of those organizations should submit to the Lead Responsible Office an annual implementation and compliance report. This report should include:
 - (1) A detailed description of the manner in which the company is carrying out its obligations under the arrangement.
 - (2) Changes to security procedures, implemented or proposed, and the reasons for those

changes.

- (3) A detailed description of any acts of noncompliance, whether inadvertent or intentional, with a discussion of steps that were taken to prevent such acts from recurring.
- (4) Any changes, or impending changes, of senior management officials, or key Board members, including the reasons.
- (5) Any changes or impending changes in the organizational structure or ownership, including any acquisitions, mergers or divestitures.
- (6) Any other issues that could have a bearing on the effectiveness of the applicable security clearance arrangement.

Failure of the cleared U.S. organization to ensure compliance with the terms of its applicable security arrangement may result in the organization's DOE approved facility clearance being suspended pending resolution of the FOCI.

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IMPLEMENTATION GUIDE

VI. PROGRAM MANAGEMENT

U.S. DEPARTMENT OF ENERGY
OFFICE OF SECURITY AFFAIRS
OFFICE OF SAFEGUARDS AND SECURITY

VI. FOCI PROGRAM MANAGEMENT

1. MANAGEMENT ACTIVITIES

The FOCI Operations Managers' management responsibilities should include at least the following:

- a. Planning. Writing FOCI Lead Responsible Office implementation plans and contributing to other plans (e.g., self-assessment, risk management, security, and operations); developing local FOCI policies and procedures; writing deviations to policy; and contributing to the budgeting process.
- b. Organizing. Participating in organizational structuring or restructuring, developing coordination schemes between FOCI, other safeguards and security programs, procurement, and Chief Counsel, and drafting job qualifications and descriptions.
- c. Staffing. Recruiting, orienting, developing, and training employees. The FOCI Operations Manager needs to ensure coordinated efforts are being conducted amongst the procurement and Chief Counsel staff. This is to include training on current policies and procedures. Additionally, the limited use of contractor support services in the FOCI program is permissible with certain constraints as are identified in attachment VI-1, memorandum from Edward McCallum to distribution, dated May 10, 1995.
- d. Directing. Supervising and coordinating the daily activities of the FOCI program; troubleshooting and problem solving; participating in risk assessments, and risk management; coordinating and integrating with related safeguards and security programs and the procurement organization; communicating up, down, and laterally; managing change; providing guidance and support to subordinates; and providing support and expert advice to clients and superiors.
- e. Controlling. Observing and reporting (inspection and survey results, self-assessment results, standard reports, etc.); developing standards and criteria for self-assessments; evaluating both the FOCI program and program employees; conducting self-assessments; reviewing results; taking corrective actions; and rewarding and disciplining.

2. RISK MANAGEMENT

The purpose of risk management is to balance the risk of loss or damage caused by disclosure of classified information and special nuclear material against the cost of countermeasures.

- a. Risk Management Process. Risk management normally is defined as the following five-step process:

- (1) **Asset Valuation and Judgment About Consequences of Loss.** First, determine what is to be protected and what is the value of each item. Second, determine the consequences of the loss of each item. Part of asset valuation is understanding that assets may have a different value to an adversary than they do to the DOE.
 - (2) **Identification and Characterization of the Threats to Specific Assets (Threat Analysis).** The threat analysis may be accomplished at the national level, the program level, or the facility level. The principal concern is to determine which adversaries (nations or groups) pose a threat and the nature of these threats (i.e., what are their operating methods, techniques, and capabilities).
 - (3) **Identification and Characterization of the Vulnerability of Specific Assets (vulnerability assessment).** A vulnerability assessment is a tool used to identify exploitable weaknesses either in the security systems protecting valuable assets or in the assets themselves. Changes in design, operations, or security measures may be made to reduce the risk levels.
 - (4) **Risk Assessment.** A risk assessment is accomplished by combining the information from the asset valuation, threat analysis, and vulnerability assessment information. This combination yields a probability that an event will occur and the likely damage caused by the event. Once the risk level is determined, management should establish the maximum acceptable risk for each asset.
 - (5) **Identification of Countermeasures, Cost, and Trade-offs.** During this final part of the risk management process, management should examine the various courses of action available to reduce the risk to an acceptable level and pick the most cost-effective and operationally feasible solution.
- b. Deviation Process. If a site needs deviations from stated DOE policy, use DOE 470.1, SAFEGUARDS AND SECURITY PROGRAM, to determine whether the situation requires a variance, a waiver, or an exception. Risk management analysis will help determine which of the deviation options is appropriate for the situation.
- c. FOCI Manager Role. The FOCI manager's role is to participate in the risk management process to provide input concerning FOCI issues. Examples of what the FOCI manager might do are as follows: provide assistance in conducting a national interest determination and recommend countermeasures based upon a cost-effectiveness analysis. This analysis would consider all of the elements (e.g., Procurement Request Originator, Contracting Officer, etc.) of the FOCI program.

3. PROGRAM INTERFACES

The FOCI Operations Manager needs to ensure appropriate interfaces and coordinated efforts are occurring between the FOCI, facility clearance, personnel security, counterintelligence, and procurement Programs and with the Chief Counsel. Each program effects and is effected by the FOCI Program.

4. SURVEYS AND SELF-ASSESSMENTS

DOE and contractor facilities are required to perform surveys or self-assessments. Self-assessments provide internal monitoring of safeguards and security programs and activities to assure compliance with safeguards and security requirements. For requirements on conducting surveys of the FOCI Program, reference DOE O 470.1, Chapter IX and for self-assessments, Chapter X.

The DOE Safeguards and Security Survey and Self-Assessment Guide, in attachment A, is a document which will provide information on suggested methods and steps to be followed while conducting a survey or self-assessment of the FOCI Program.

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VII. LEAD RESPONSIBLE OFFICE
METHODS TO NEGATE OR REDUCE ADVERSE DETERMINATIONS

U.S. DEPARTMENT OF ENERGY
OFFICE OF SECURITY AFFAIRS
OFFICE OF SAFEGUARDS AND SECURITY

VII. LEAD RESPONSIBLE OFFICE METHODS TO NEGATE OR REDUCE ADVERSE DETERMINATIONS

Under normal circumstances, foreign ownership of a U.S. company under consideration for a facility clearance becomes a concern to the U.S. Government when a foreign shareholder has the ability, either directly or indirectly, presently or in the future, whether or not exercised, and whether or not exercisable through ownership of voting securities or by contract or otherwise, to control or influence the direction of the management and/or policies of the U.S. company. Foreign involvement which cannot be so manifested is not, in and of itself, considered significant.

1. ADVERSE DETERMINATIONS

When an offeror/bidder or contractor determined to be under FOCI will not implement the necessary security measures, as determined by DOE, to negate or reduce the foreign involvement to an acceptable level, an adverse determination will be rendered by the Office of Safeguards and Security. When a contractor with a FOCI determination experiences significant changes in its FOCI resulting in a determination that the contractor is under FOCI, the contractor's facility clearance shall be suspended and may be terminated, by the Lead Responsible Office.

2. METHODS TO NEGATE OR REDUCE UNACCEPTABLE FOCI

The affected U.S. organization(s), or its legal representatives may propose a plan to negate or reduce unacceptable FOCI; however, DOE reserves the right and has the obligation to impose any security method, safeguard, or restriction it believes necessary to ensure that unauthorized access to classified information and/or special nuclear material is precluded. A plan may consist of one or more of the insulating measures prescribed, in paragraph 3, as appropriate. It may also consist of other measures employed in conjunction with, or apart from, these methods, such as:

- a. physical or organizational separation of the component performing the work requiring access authorizations,*
- b. modification or termination of agreements with foreign persons,*
- c. diversification or reduction of agreements with foreign persons,*
- d. diversification or reduction of revenue from foreign persons,*
- e. assignment of specific security duties and responsibilities to selected officials of the organization,*

- f. *creation of special executive-level committees to consider and oversee classified information and/or special nuclear material.*

3. METHODS TO NEGATE OR REDUCE RISK IN FOREIGN OWNERSHIP CASES

- a. ***National Interest Determination.*** *An organization cleared under a Special Security Agreement and its cleared employees may only be afforded access to “proscribed information” with special authorization.* Proscribed information is defined as Top Secret information; Communication Security information, except classified keys used to operate secure telephone units; Restricted Data as defined in the U.S. Atomic Energy Act of 1954, as amended; Special Access Program information; or Sensitive Compartmented Information. (The Lead Responsible Office should identify the resolutions made for resolving any FOCI concerns and place this information into the Safeguards and Security Information Management System.) ***This special authorization must be manifested by a favorable national interest determination that must be program/project/contract-specific. Access to proscribed information must be predicated on compelling evidence that release of such information to an organization cleared under the Special Security Agreement arrangement advances the national security interests of the United States. The authority to make this determination shall not be permitted below the Assistant Secretary. In all majority ownership cases, national interest determination will be prepared and sponsored by the Contracting Officer whose contract or program, is involved and it shall include the following information.***

- (1) *Identification of the proposed awardee and a synopsis of its foreign ownership (include solicitation and other reference numbers to identify the action.)*
- (2) *General description of the procurement and performance requirements.*
- (3) *Identification of national security interest involved and the ways in which award of the contract helps advance those interests.*
- (4) *The availability of any other U.S. company with the capacity, capability, and technical expertise to satisfy acquisition, technology base, or industrial base requirements and the reasons any such company should be denied the contract.*
- (5) *A description of any alternate means available to satisfy the requirement, and the reasons alternative means are not acceptable.*

A national interest determination shall be initiated by the Contracting Officer. A company may assist in the preparation of the determination, but the Contracting Officer is not obligated to pursue the matter unless it believes further consideration to be warranted. The Contracting Officer shall, if it is supportive of the national interest

determination, forward the case through appropriate channels. (The national interest determination should be initiated by the Contracting Officer and forwarded to the DOE Headquarters Program Secretarial Office and then to the Office of Safeguards and Security.) *If the proscribed information is under the classification or control jurisdiction of another agency, the approval of the cognizant agency is required (e.g., NSA for COMSEC, DCI for SCI).*

It is the responsibility of the cognizant approval authority (The DOE Headquarters Program Office) *to ensure that pertinent security, counterintelligence, and acquisitions interest are thoroughly examined.*

- b. ***Board Resolution for Noncontrolling Foreign Minority Cases.*** *When a foreign person(s) owns voting stock, directly or indirectly, but is not permitted representation in the U.S. organization (that is, to hold a position as or appoint any of the U.S. organization's management and/or allowed to transfer any of its employees or any of its foreign-owned parent's or other foreign-owned affiliate's employees to the U.S. organization), resolutions by the U.S. organization's board of directors and other actions as described below may be considered to negate or reduce the FOCI.*
- (1) *Resolutions shall address the following.*
 - (a) *Acknowledge and describe all FOCI elements; identify foreign persons and describe the type and number of foreign-owned shares.*
 - (b) *Acknowledge the organization's obligations to comply with all security program and export control requirements.*
 - (c) *Certify that foreign persons shall not require, shall not have, and can be effectively precluded from access to all classified information or nuclear and other hazardous material presenting a potential radiological or toxicological sabotage threat entrusted to or held by the U.S. organization; certify that the foreign persons will not be permitted representation in the U.S. organization or to influence the organization's policies and practices in the performance of contracts requiring access authorization(s).*
 - (2) *Criteria. The following criteria must also be satisfied for a board resolution to serve as the sole method accepted to negate or effectively reduce the risk of compromise arising from foreign ownership within the levels prescribed herein.*
 - (a) *Identified U.S. person(s) own a majority of the stock.*
 - (b) *A foreign person is not the single largest shareholder.*

- (3) ***Publication of the Resolution(s).*** *The U.S. organization shall be required to distribute to its directors and its principal officers copies of such resolutions and report in its corporate records the completion of such distribution. In addition, the substance of the foregoing resolution(s) shall be brought to the attention of all of the company personnel possessing or being processed for an access authorization.*
- (4) ***Verification.*** *Compliance with the resolution(s) shall be verified during periodic surveys.*
- c. ***Security Control Agreement for Noncontrolling Foreign Minority Cases.*** *When a foreign person(s) owns voting stock, directly or indirectly, and is permitted representation in the U.S. organization (that is, to hold a position as or appoint any of the U.S. organization's management and/or allowed to transfer any of its employees or any of its foreign-owned parent's or other foreign-owned affiliate's employees to the U.S. organization), the Security Control Agreement may be considered to negate or reduce the FOCI.*
- d. ***Controlling Foreign Majority Cases.*** *A controlling foreign majority case is one in which foreign person(s) own a majority of the voting securities of the U.S. organization or, if less than 50 percent is foreign-owned, it can be reasonably determined that foreign person(s) or their representatives are in a position to effectively control or dominate the business management of the U.S. organization.*
- (1) ***Voting Trust Agreement.*** *A Voting Trust Agreement is an acceptable method to negate or reduce risks associated with a controlling foreign majority case. Under this arrangement, the following requirements must be met.*
- (a) *Foreign stockholders must transfer legal title of foreign-owned stock to the Trustees, and the U.S. organization to be cleared must be organized, structured, and financed to operate as a viable business entity independent from the foreign stockholder(s).*
- (b) *The Voting Trust Agreement must unequivocally provide for the exercise of all prerogatives of ownership by the Trustees with complete freedom to act independently and without consultation with, interference by, or influence from foreign stockholders.*
- (c) *There shall be at least three Trustees, and all must become members of the U.S. organization's board of directors. In addition, the Trustees must:*
- 1*** *be U.S. citizens residing within the limits of the U.S. and capable of assuming*

full responsibility for voting the stock and exercising the management prerogatives relating thereto in such a way as to effectively insulate foreign stockholder(s) from the cleared U.S. organization;

2 be completely disinterested individuals with no prior involvement with either the cleared U.S. organization, its foreign-owned tier parent(s), and any of its foreign-owned affiliate(s);

3 be issued and be able to maintain an access authorization to the level of the facility clearance or safeguards and security activity;

4 be approved by the Office of Safeguards and Security when a vacancy occurs due to the resignation or removal of a trustee and a successor trustee is appointed by the remaining trustees;

5 prior to being accepted as trustees by the Office of Safeguards and Security, be advised by the Office of Safeguards and Security of the duties and responsibilities they are undertaking on behalf of DOE to insulate the cleared U.S. organization from the foreign person(s), and indicate, in writing, their willingness to accept this responsibility.

(d) The voting trust agreement may, however, limit the authority of the trustees by requiring approval from the foreign stockholder(s) with respect to the following.

1 The sale or disposal of the cleared U.S. organization's assets or a substantial part thereof.

2 Pledges, mortgages or other encumbrances on the capital stock which they hold in trust.

3 Corporate mergers, consolidations, or reorganizations.

4 The dissolution of the cleared U.S. organization.

5 The filing of a bankruptcy petition.

(e) Trustees must assume full responsibility for the voting stock and for exercising all management prerogatives relating thereto in such a way as to ensure that the foreign stockholder(s), except for the approvals enumerated above, will be effectively insulated from the cleared U.S. organization and continue solely in the status of beneficiaries.

- (f) *The Certification and Visitation Approval Procedure Agreement of paragraph 3d(3) is required under this arrangement.*
- (2) *Proxy Agreement. A proxy agreement is an acceptable method to negate or reduce risks associated with controlling foreign majority cases. Under this arrangement, the voting rights of stock owned by foreign persons are conveyed to proxy holders by an irrevocable proxy agreement. Legal title to the stock remains with the foreign persons. All other provisions of the voting trust agreement as they apply to trustees and the terms of the agreement shall apply to the proxy holders. Conditions for consideration of use of a proxy agreement are the same as required for a voting trust agreement. Proxy agreements must be coordinated with General Counsel.*
- (3) *Visitation Approval Procedure Agreement. In every case where a voting trust agreement or proxy agreement is employed to negate or reduce risks associated with foreign ownership, a visitation approval procedure agreement shall be executed between the cleared U.S. organization, the foreign persons, the Office of Safeguards and Security, and as appropriate, trustees, proxy holders, or other designated individuals. The visitation approval procedure agreement must identify who may visit, for what purposes, when advance approval is necessary, and the approval authority. The cleared U.S. organization shall submit individual requests to the approval authority for each visit. The visitation approval procedure agreement shall provide that, as a general rule, visits between foreign stockholder(s) and the cleared U.S. organization are not authorized; however, as an exception to the general rule, the approval authority may approve such visits in connection with regular day-to-day business operations pertaining strictly to purely commercial products or services and not pertaining to contracts requiring access authorization(s).*
- (4) *Special Security Agreement and Security Control Agreement. The Special Security Agreement and the Security Control Agreements are substantially identical arrangements that impose substantial industrial security and export control measures within an institutionalized set of corporate practices and procedures; require active involvement of senior management and certain Board members in security matters (who must be cleared, U.S. citizens); provide for the establishment of a Government Security Committee to oversee classified and export control matters; and preserve the foreign stockholder's right to be represented on the Board with a direct voice in the business management of the company while denying unauthorized access to classified information.*
- (a) *The Special Security Agreement may be considered to negate or reduce the FOCI for a U.S. organization effectively owned or controlled by a foreign person.*

However, access to proscribed information is permitted only with the written permission of the agency with classification or control jurisdiction over the proscribed information (e.g., NSA for COMSEC, DCI for SCI). A determination to disclose proscribed information to a company cleared under a Special Security Agreement requires that a favorable national interest determination be rendered prior to contract award. Additionally, DOE must have entered into a General Security Agreement with the foreign government involved (that is the country to which the foreign ownership stems). A General Security Agreement is developed between the U.S. Government and another Government for the protection and control of national security information. To determine what General Security Agreements exist, contact the Office of Safeguards and Security.

- (b) The Security Control Agreement may be considered to negate or reduce the FOCI for an organization not effectively owned or controlled by a foreign person. Limitations on access to classified information are not required under a Security Control Agreement.*

See Attachments VII-1, Proxy Agreement, VII-2, Proxy Certificate, VII-3 Visitation Approval Procedure Agreement, and VII-4 Security Control Agreement.

SAFEGUARDS AND SECURITY
DOE G 470.1-3
FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE
IMPLEMENTATION GUIDE

VIII. LEAD RESPONSIBLE OFFICE
ANNUAL REVIEWS

U.S. DEPARTMENT OF ENERGY
OFFICE OF SECURITY AFFAIRS
OFFICE OF SAFEGUARDS AND SECURITY

VIII. LEAD RESPONSIBLE OFFICE REVIEWS

1. ANNUAL REVIEWS

Representatives of the Lead Responsible Office shall meet annually with senior management officials of organizations operating under a Voting Trust Agreement, Proxy Agreement, Special Security Agreement, or Security Control Agreement to review the effectiveness of the pertinent security arrangement and to establish common understanding of the operating requirements and how they will be implemented within the cleared organization. The Lead Responsible Office should conduct these reviews in person. These reviews should include an examination of the following:

- (1) Acts of compliance or noncompliance with the approved security arrangement, standard rules, and applicable laws and regulations.
- (2) Problems or impediments associated with the practical application or utility of the security arrangement.
- (3) Whether security controls, practices, or procedures warrant adjustment.

A. Preparation

The FOCI Operations Manager should, after consultation with the facility, schedule the annual visit.

- (1) Under normal circumstances, the visit should be held at the cleared facility. The Facility Security Officer should always be scheduled to attend.
- (2) A letter should be prepared and sent to the facility scheduling the annual meeting.
- (3) Review the facility file folder.
- (4) Review and discuss prior reviews/surveys at the facility and identify issues which require follow-up at the annual meeting.

B. Preliminary Meeting

Meet with Proxy Holders/Trustees separately. Provide an up-to-date threat briefing. Ascertain if they have items of concern which need to be surfaced at the general meeting with representatives of the facility's management and the foreign owner. Ask them if there have been any actions on the part of the foreign shareholder which are inconsistent with the terms of the FOCI isolating instrument in effect at this facility.

Review the degree of involvement on the part of the Proxy Holders/Trustees with regard to the fulfillment of their oversight role. How often do they visit the facility? How do they monitor the day-to-day activities of the facility, especially with regard to actual or potential involvement with the foreign shareholder? In essence, how well are they fulfilling their responsibility to the Government?

C. Introduction to General Meeting

- (1) Review the intent of the pertinent arrangement and ensure a common understanding of the operating requirements and how they are implemented in the organization.
- (2) Ensure compliance with all controls, practices and procedures established to insulate the cleared facility from the foreign interest.
- (3) Review of the annual implementation and compliance report submitted by the Proxy Holders/Trustees.

D. Conduct of meeting

- (1) Review any issues requiring follow-up from the prior initial/annual compliance review meeting.
- (2) Review any changes to the FOCI isolating instrument or any proposed changes. Are they clearly understood by all parties concerned?
- (3) Has the facility's Standard Practice Procedure, or equivalent procedure, been determined to be adequate and is the facility complying with the procedures?
- (4) Have the Proxy Holders/Trustees conducted any audits of the visit control procedures? Have they determined them to be adequate?
- (5) Have the Proxy Holders/Trustees given any blanket approvals for multiple visits between the foreign shareholder and the cleared facility? If so, what were the conditions of those approvals; how are they monitored; and who made the decision to approve?
- (6) The Facility Security Officer should provide an overall assessment of the facility's visitor control system highlighting any particular problems which have been identified.
- (7) The Facility Security Officer should provide an overall assessment of the facility's security education program with particular emphasis on how employees are made

aware of the provisions of the FOCI isolating instrument, including any deficiencies noted.

- (8) Are there any individuals, especially foreign nationals, working at the cleared company that have been affiliated with the foreign owner? If an affiliation does exist, including prior employment, are the Proxy Holders/Trustees aware of the individual's employment? Are actions being taken to ensure compliance with the FOCI isolating instrument?
- (9) Are there any representatives of the foreign shareholder on-site at the cleared organization? If yes, review what they are doing and what kind of decisions they are making. Has the Facility Security Officer provided an assessment as to how their movements are monitored with regard to accessing classified information, unclassified controlled nuclear information, and/or export controlled technical data?
- (10) Are there any teaming arrangements with the foreign shareholder? Are there any employees of the foreign shareholder (or affiliated companies of the foreign shareholder) on-site at the cleared organization because of the teaming arrangement(s)? If yes, has the Facility Security Officer provided an assessment as to how they are treated and what controls are in place to ensure protection of classified information, special nuclear material unclassified controlled nuclear information, and/or export controlled technical data?
- (11) Are there instances where classified information unclassified controlled nuclear information, and/or export controlled technical data has been disclosed to the foreign shareholder, its affiliates, or their representatives? Is the proper U.S. Government authorization in place to effect such transfer?
- (12) Review all existing business relationships between the foreign shareholder and the cleared facility. Pay particular close attention to "service-type" agreements whereby the subsidiary is obligated to go to the foreign shareholder for certain functions, e.g., payroll, etc.
 - a. Are the Proxy Holders/Trustees aware of all such business relationships? Have they specifically approved each one?
 - b. Is there any opportunity for the foreign shareholder to exercise control of the cleared subsidiary through these business relationships?
- (13) Review with senior management the strategic direction of the cleared facility. Questions should include, but not necessarily limited to, the following:

- a. What strategic decisions have been made by the cleared organization since the last annual meeting? (Review all areas of the cleared facility's operations to include financial, personnel, marketing, production, and technological development.) What were the issues with regard to these decisions? Who had input to these decisions, both direct and indirect?
 - b. What role, if any, did the foreign shareholder play in these decisions? Even if the foreign person did not play a role, what was the foreign owner's position with regard to these decisions (or what was the owner's position perceived to be -- at all levels, not just top management)? How was this post conveyed to the cleared facility and its management and other personnel? (In other words, how did the cleared facility learn of the foreign shareholder's position?)
 - c. What was the final decision and how did it relate to the foreign owner's post? Does unauthorized influence or coercion by the foreign shareholder appear to have played a role in the decision making process?
 - d. Have there been any actions by the Board of Directors which required the approval of the foreign shareholder? What were they? What was the impact of the Board action on the facility?
- (14) Review any other issues surfaced in the annual implementation and compliance report submitted by the Proxy Holders/Trustees.

E. Special Points of Interest

- (1) For a Special Security Agreement: Review how the "inside" Directors (Directors representing the foreign shareholder on the Board of the cleared organization) are denied access to classified information, special nuclear material, unclassified controlled nuclear information, and/or export controlled technical data.
 - a. Since the "inside" Directors are not subject to prior visit approval, what do they do and who do they see when they visit the cleared facility?
 - b. Do the "inside" Directors provide direction of any kind to the cleared facility through means other than Board meetings? Does management of the cleared firm consult with the "inside" Directors on business decisions?