

New ownership disclosure requirements for certain federal high-security leased space

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On Dec. 31, 2020, the president signed into law the Secure Federal Leases from Espionage and Suspicious Entanglements Act (Secure Federal Leases Act), Pub. L. 116-276.¹

The Act imposes disclosure requirements regarding the foreign ownership, particularly “beneficial ownership” of prospective lessors of “high-security space” (i.e., property leased to the federal government having a security level of III or higher) as well as existing lessors of such space. The Act applies to any lease or lease novation entered into six months after the date of the enactment of the Act.

The impetus for the Act was Congress’ determination that GSA was not required to collect beneficial ownership information about leased property and, therefore, lacked important information about whether foreign owners have a stake in buildings leased by Federal agencies.

These requirements are applicable to leases by the U.S. General Services Administration (GSA), the Architect of the Capitol, “or the head of any Federal agency, other than the Department of Defense (DOD), that has independent statutory leasing authority” (Federal lessees).

The Act is not applicable to DOD or to the intelligence community. In that regard, Section 2876 of the FY 2018 National Defense Authorization Act (NDAA) (P.L. 115-91) already provided DOD similar authority to obtain beneficial ownership information with respect to its high-security leased space.

BACKGROUND

The impetus for the Act was Congress’ determination that GSA was not required to collect beneficial ownership information about leased property and, therefore, lacked important information about whether foreign owners have a stake in buildings leased by Federal agencies.

Congress acknowledged a January 2017 Government Accountability Office Report, GAO-17-195, GSA Should Inform Tenant Agencies When Leasing High-Security Space from Foreign Owners,² which found that some law enforcement agencies were leasing high-security office space in foreign-owned properties.

That report also found that GSA was unable to provide ownership information for approximately one-third of its high-security leases.

WHAT IS ‘HIGH-SECURITY LEASED SPACE’?

The Act applies to a federal lessee’s lease of high-security leased space, defined as leased space that will be occupied by federal employees for nonmilitary activities and that has been assigned a facility security level (FSL) of III, IV, or V by the federal tenant in consultation with the Interagency Security Committee, the Department of Homeland Security, and GSA.

FSL III includes buildings with 80,000 to 150,000 square feet, 151 to 450 federal employees, and moderate to high public access. FSL IV includes buildings with 150,000 square feet or more, more than 450 federal employees, and a high level of public access. FSL V includes buildings that are similar to Level IV but are considered critical to national security (such as the Pentagon).³

NEW DISCLOSURE REQUIREMENTS

The Act requires that a covered entity (i.e., “a person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group”; or “any governmental entity or instrumentality of a government”) identify and disclose whether the immediate or highest-level owner of the leased space (defined below), including an entity involved in financing the property, is a foreign person or a foreign entity, including the country of origin associated with the ownership, before a federal lessee enters into a lease agreement with a covered entity or approves a novation agreement with a covered entity that involves a change of ownership under a lease for high-security leased space.

Under the Act, an “immediate owner” is “an entity, other than the offeror of a lease, that has direct control of the offeror, including ownership or interlocking management, identity of interests among family members, shared facilities and equipment, and the

common use of employees” and a “highest-level owner” is “the entity that owns or controls an immediate owner of the offeror of a lease, or that owns or controls 1 or more entities that control an immediate owner of the offeror.”

If a disclosure is made, the federal lessee is required to notify the federal tenant of the building (or other improvement) that will be used for high-security space and to consult with the federal tenant regarding security concerns and to determine whether mitigation measures are necessary prior to lease award or approval of the novation agreement.

A covered entity is required to provide this ownership information in response to a solicitation for offers issued by the federal lessee. Covered entities also must update the information provided to the federal lessee annually beginning on the first anniversary of the federal tenant’s occupancy.

Lease agreements for high-security leased space are now required to include language that limits the access to the leased space by the covered entity and any member of the property management company responsible for the space without prior approval from the federal tenant.

The information that must be provided on an annual basis includes: the list of immediate or highest-level owners of the covered entity during the preceding one-year period of federal occupancy or the information required to be provided relating to each such immediate or highest-level owner.

As discussed below, subject to the development of GSA’s government-wide plan for obtaining ownership information, covered entities also will be required to disclose information about beneficial ownership as well.

A “beneficial owner” is “with respect to a covered entity, each natural person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) exercises control over the covered entity; or (ii) has a substantial interest in or receives substantial economic benefits from the assets of the covered entity.”

However, a beneficial owner of a covered entity does not include: a person acting as a nominee, intermediary, custodian, or agent on behalf of another person; a person acting solely as an employee of the covered entity and whose control over or economic benefits from the covered entity derives solely from the employment status of the person; a person whose only interest in the covered entity is through a right of inheritance or a creditor of the covered entity unless either also meets the definition of “beneficial owner.”

CHANGES TO LEASE TERMS

Lease agreements for high-security leased space are now required to include language that limits the access to the leased space by the covered entity and any member of the property management company responsible for the space without prior approval from the federal tenant.

The federal tenant may only grant access to the high-security leased space (or any property or information located in the space) if the tenant determines that access is “clearly consistent with [its] mission and responsibilities.”

The federal lessee is required to have written procedures, signed by both the federal lessee and the covered entity, that govern “access to the high-security leased space in case of emergencies that may damage the leased property.”

GOVERNMENT-WIDE PLAN FOR OBTAINING OWNERSHIP INFORMATION

A highlight of the Act is the requirement that GSA (in conjunction with the Office of Management and Budget) develop a government-wide plan for agencies to identify all immediate, highest-level, or beneficial owners of high-security leased spaces before entering into a lease agreement with a covered entity for the accommodation of a federal tenant in a high-security leased space.

The plan must require the disclosure of any immediate, highest-level, or beneficial owner that is a foreign person and notification by the federal lessee of high-security space to the affected federal tenant of such foreign ownership.

The plan, however, must exclude collecting ownership information on widely held pooled-investment vehicles, mutual funds, trusts, or other pooled-investment vehicles.

The Act requires GSA to submit the plan to specific Congressional committees by Dec. 31, 2021, and to implement the plan by Dec. 31, 2022.

IMPLICATIONS

This Act is another recent example of congressional concern about foreign ownership and control and congressional action in the world of government contracting to help address potential national security concerns. *See, e.g.*, FY 2021 NDAA (P.L. 116-283),⁴ § 819, Modifications to Mitigating Risks Related to Foreign Ownership, Control, or Influence of DOD Contractors and Subcontractors; FY 2019 NDAA (P.L. 115-232),⁵ § 889, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment.

Covered entities already provide certain information on immediate and highest-level ownership through the System for Award Management registration process. However, covered entities should be prepared for these enhanced requirements regarding the disclosure of beneficial ownership information and to face increased scrutiny when entering into

leases of high-security spaces or acquiring those properties through novation.

The Senate Report accompanying the legislation considers that it may not be appropriate for a federal agency to lease high-security space if there is foreign ownership and that the “legislation will allow agencies to properly evaluate the risks of doing so and consider appropriate mitigation measures.” S. Rept. 116-92,⁶ at 3 (2019).

The Act not only requires disclosure of the “immediate or highest-level owner of the leased space” but also “an entity involved in the financing thereof.” Additionally, subject to the development and implementation of GSA’s government-wide plan, the Act requires disclosure of creditors who may be deemed beneficial owners if they either exercise control over the covered entity or have a substantial interest in or receive substantial economic benefits from the covered entity’s assets.

Therefore, property owners should take into account this provision of the Act when considering financing options for leasing high-security space to the federal government.

In short, covered entities should understand the breadth of the disclosure requirements, be prepared to identify foreign ownership, understand that foreign ownership of a property for high-security leases space may become problematic, and be prepared to enter into mitigation plans, if necessary, to address these growing federal leased property security concerns.

Notes

¹ <http://bit.ly/3oidKp9>

² <https://bit.ly/36c1boU>

³ The U.S. Marshals Service categorized federal facilities by security level in 1995. See U.S. Department of Justice, U.S. Marshals Service, Vulnerability Assessment of Federal Facilities (<https://bit.ly/2MrLEu0>), Washington, DC, June 28, 1995, at 2-3- 2-5.

⁴ <http://bit.ly/2KSJ8Ni>

⁵ <https://bit.ly/3odfjoh>

⁶ <https://bit.ly/3ojkToS>

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