

ALERT

# New DOD Trusted Capital Program Provides Investment Opportunities

January 14, 2021

**WHAT:** The U.S. Department of Defense (DOD) has established a new voluntary program designed to match critical technology companies with vetted sources of private capital.

**WHEN:** On December 1, 2020, DOD issued a Request for Comment on the Trusted Capital initiative; comments are due February 1, 2021. On January 13, 2021, DOD formally announced the establishment of the Trusted Capital Digital Marketplace.

**WHAT DOES IT MEAN FOR INDUSTRY:** Companies in the Defense Industrial Base (DIB) seeking investments may consider this initiative to gain access to vetted sources of capital and potentially lessen the risk of a transaction drawing scrutiny from U.S. regulators in the context of foreign investment reviews and other related processes.

Over the course of the past year, the DOD has developed the Trusted Capital initiative, a program designed to foster investment in critical technology companies by cleared and vetted investors. In December 2020, DOD announced a webpage for the Trusted Capital initiative and issued a Request for Comment in the Federal Register broadly seeking information related to the initiative, including whether “the proposed collection of information is necessary for the proper performance of the functions of the agency.”<sup>1</sup>

The Trusted Capital initiative is led by Katie Arrington, the Chief Information Security Officer for the U.S. Department of Defense, Office of Under Secretary for Defense for Acquisition & Sustainment (OUSD A&S). Ms. Arrington has also spearheaded the OUSD A&S implementation of the Cybersecurity Maturity Model Certification (CMMC) program, which we covered here and here, as well as in our

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According to the Trusted Capital webpage, the Trusted Capital program is intended to connect “companies critical to the defense industrial base with vetted trusted capital providers,” thereby facilitating investments in critical technology companies by trusted and vetted sources of private capital and limiting foreign access to critical technology. Companies seeking to receive investments (known as “Capability Providers”) must be “down-selected by the military services and operate in emerging technology sectors critical to the U.S. defense industrial base.” The Trusted Capital webpage provides little additional information regarding the down-select process or the application requirements for the Trusted Capital program, but there is a portal through which applicants may upload a whitepaper describing their technology. Capital Providers participating in the program will have the benefit of viewing profiles of Capability Providers seeking investments, and DOD has also stated that “[a]dditional market incentives are also being explored.”<sup>2</sup> The Trusted Capital webpage also states that DOD intends to focus the initiative on a list of identified sectors, including advanced computing, artificial intelligence, biotechnologies, communication and networking technologies, energy technologies, semiconductors, and space technologies, among others.

According to Frequently Asked Questions (FAQs) listed on the Trusted Capital webpage, applicants to the Trusted Capital program will be reviewed for national security risks, including for connections to China and 36 other “Countries of Special Concern” that are listed on the Trusted Capital website and described as “countries that may present a risk to national security if associated with a capability or capital provider in the Trusted Capital Marketplace program, especially regarding intellectual property and supply chains.”<sup>3</sup> The FAQs also explain that the Trusted Capital program does not prohibit a trusted Capital Provider from acquiring a majority or controlling position in a trusted Capability Provider, but notes that DOD “would expect notification of the transaction.”

The Under Secretary for A&S, Ellen Lord, has stated publicly that the Trusted Capital marketplace, which lists the Capital Providers and Capability Providers, “already has over 90 participating firms with capital providers representing over \$20 billion in assets under management and another \$700 million currently under review.”<sup>4</sup>

DOD has explained that the purpose of the Trusted Capital program is to reduce the risk of critical and advanced technology being acquired by adversaries, while fostering innovation among DIB companies in need of investment. As an example of the risk the program seeks to address, a Congressional Research Service *In Focus* report, published in November 2020, explained that China is advancing its national economic security interests by “obtain[ing] foreign technology through partnerships in open technology and basic research.” In particular, China plans to advance “indigenous” innovation through the “introduction, absorption, and adaptation of foreign technology that is rebranded as indigenous Chinese capabilities” using “forced technology transfer, industrial subsidies, **state-financed acquisitions of foreign firms in strategic sectors**, cyber intrusions, and other forms of IP theft.”

Similarly, the National Counterintelligence Strategy of the United States of America (2020-2022), published by the National Counterintelligence and Security Center (NCSC), stated that “many countries” target and exploit the U.S. economy, including “adversaries [that] use front companies, joint ventures, mergers and acquisitions,

foreign direct investment, and talent recruitment programs to gain access to and exploit U.S. technology and intellectual property.”<sup>5</sup> According to the NCSC, these activities, among others that exploit the U.S. economy, “have cost the United States hundreds of billions of dollars” and “put[] at risk U.S. innovation and the competitiveness of American companies in world markets.” To meet the objective of countering the exploitation of the U.S. economy, the NCSC states that DOD intends to “work with the private sector to develop better procedures to track foreign investment in the United States and better understand, share, and potentially mitigate counterintelligence issues arising from these investments.”

One significant question is how participation in the Trusted Capital program may be taken into account by U.S. regulators in the context of foreign investment reviews and other related processes, such as those conducted by the Committee on Foreign Investment in the United States (CFIUS) and the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (formerly known as Team Telecom). Each of these inter-agency committees is tasked with performing national security reviews of foreign investments in U.S. companies, and participation in the Trusted Capital program could potentially be viewed favorably by DOD and other regulatory agencies in the context of these reviews. Indeed, in discussing the importance of the Trusted Capital initiative, DOD specifically cited CFIUS’s role in blocking or unwinding transactions involving foreign investment from adversaries.<sup>6</sup> However, DOD has not yet provided any definitive guidance as to how participation in the Trusted Capital program will factor into these reviews, if at all.

Another question is whether the Trusted Capital program will be limited to companies of a particular size or whether the program will be available to any DIB companies seeking investments. Ms. Lord’s article in *National Defense*, for example, focused on the risks from startup companies accepting capital investments from strategic funding supported by adversaries.<sup>7</sup> The Trusted Capital website states that any company may apply and does not appear to impose size restrictions as a condition of eligibility.

Wiley will continue to monitor the Trusted Capital initiative, and remains at the forefront of federal activity on critical and emerging technologies and innovation policies, as well as U.S. government review of foreign investment through CFIUS, Team Telecom, and other related regulatory processes. Our Government Contracts, Telecom, Media & Technology (TMT), International Trade, and National Security Practices help companies and industries work with the government and anticipate federal scrutiny and regulation. Should you have any questions regarding the Trusted Capital initiative and its potential impact on U.S. foreign investment reviews, please do not hesitate to contact any of the attorneys listed on this alert.

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[1] 85 FR 77187 (Dec. 1, 2020).

[2] <https://dodtrustedcapital.force.com/tcm/s/tcm-capital-provider-faqs>

[3] <https://dodtrustedcapital.force.com/tcm/s/tcm-capability-provider-faqs>; <https://www.acq.osd.mil/tc/country-designations.html>

[4] <https://www.nationaldefensemagazine.org/articles/2020/7/26/trusted-capital-marketplace-protects-dod-supply-chain>

[5] [https://www.dni.gov/files/NCSC/documents/features/20200205-National\\_CI\\_Strategy\\_2020\\_2022.pdf](https://www.dni.gov/files/NCSC/documents/features/20200205-National_CI_Strategy_2020_2022.pdf)

[6] <https://www.defense.gov/Explore/News/Article/Article/2420133/dod-prioritizes-december-launch-of-trusted-capital-marketplace/>

[7] <https://www.nationaldefensemagazine.org/articles/2020/7/26/trusted-capital-marketplace-protects-dod-supply-chain>