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Aerospace, Defense, and Government Services M&A Considerations

A Practical Guidance® Practice Note by Jerry Howe, Leidos Holdings, Inc.; James McCullough, Michael J. Anstett, Nathaniel L. Asker, Michael Gershberg, and Barry Nigro, Fried, Frank, Harris, Shriver & Jacobson LLP



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This practice note covers key aspects of mergers and acquisitions (M&A) particular to the aerospace, defense, and government services industry. The discussion covers regulatory concerns (particularly mitigating regulatory risk, organizational conflicts of interest, small business set-aside contracts, proposal protection, and integration issues); government approvals (novation considerations, antitrust, and national security approvals); considerations for foreign buyers (CFIUS; foreign ownership, control, or interest; and U.S. export controls), and the market outlook.

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Jerry Howe, General Counsel, Leidos Holdings, Inc.

Jerry Howe is a lawyer and business executive in the aerospace, defense, intelligence, and government services sectors. Since July 2017, he has served as executive vice president and general counsel of Leidos Holdings, Inc. [NYSE: LDOS]. There Mr. Howe has responsibility for legal, contracts, and corporate governance matters, and administrative oversight of the company's ethics and compliance and internal audit functions. Leidos is a Fortune 250® science and technology solutions and services leader, working to solve the world's toughest challenges in the defense, intelligence, civil, and health markets — with over 44,000 employees and approximately $14 billion in annual revenue.

From March 2013 through June 2017, Mr. Howe was a partner with the New York and Washington law firm of Fried, Frank, Harris, Shriver & Jacobson LLP, where he was a member of the firm's government contracts, mergers and acquisitions (M&A), and aerospace and defense practices. His team was named "Group of the Year" nationally by Law360 in three of the five years he led it.

Mr. Howe's prior senior corporate positions include Veridian [VNX: NYSE] and TASC, where he had responsibility for legal affairs, corporate development, M&A, contracting, ethics and compliance, government relations, and security. Before moving to the corporate world in 2000, he was a partner for a decade at a leading Washington law firm. Preceding private practice, Mr. Howe was a law clerk for Judge George MacKinnon of the U.S. Court of Appeals for the D.C. Circuit, a highly respected federal jurist.

Mr. Howe was previously president of the Federal Circuit Bar Association, chair of the Washington Space Business Roundtable, treasurer of the All America PAC, and director of Intermap Technologies [IMP: TSX]. Currently, in addition to serving as a moderator for the Aspen Institute, he is active as co-founder and treasurer of No Labels and as vice-chair of the Intelligence and National Security Association Legal Roundtable.

Mr. Howe received his J.D. cum laude from Harvard Law School, where he was an editor of the Harvard Law Review; his honors M.A. in modern history and economics from Oxford University, where he was a Sachs Scholar; and his A.B. magna cum laude from Princeton University and its School of Public and International Affairs.

A native of Washington, D.C. and Bethesda, Maryland, Mr. Howe is married with two grown daughters and two grandsons.

James McCullough, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP

As head of our Government Contracts Practice, James ("Jim") McCullough represents government contractors in all aspects of government contracting, including pre-award bid protest litigation and counseling on contract formation issues, post-award disputes and bid protest litigation, and the representation of government contractors in various civil proceedings.

Clients have engaged Jim as lead counsel in numerous bid protests before the US Government Accountability Office, the US Court of Federal Claims, and other federal courts. Clients benefit from his extensive litigation experience involving claims and terminations at various Boards of Contract Appeals and the Court of Federal Claims.

Jim's work with government contractors includes Procurement Integrity and Freedom of Information Act disputes and enforcement matters involving mandatory disclosure and suspension and debarment.

Jim has frequently participated in the resolution of government contract disputes through the use of alternative dispute resolution techniques, including mediation and arbitration. He has frequently participated as government contracts counsel in M&A, private equity investments, and joint venture transactions involving aerospace and defense companies.

Prior to joining the firm, Jim served as a trial attorney and assistant to the general counsel in the Office of the General Counsel of the Navy (1976-1979). He also served on active duty as an officer of the United States Navy from 1969 to 1973.

Jim is a sought-after writer and lecturer on government contract matters. He has co-authored a book titled *Contracting with the RTC and FDIC* (Prentice Hall Law and Business, 1991), co-authored a chapter on bid protests in *Multiple Award Schedule Contracting* (Xlibris Corporation, 2002), and annually co-authors a chapter on US procurement in *The International Comparative Legal Guide to Public Procurement* (Global Legal Group, 2020).

Jim is consistently recognized by *Chambers USA: America's Leading Lawyers for Business* as a leading individual in Government Contracts and Government Contracts: Bid Protests (Spotlight Table), where he is described by a client as "one of the best government contracts lawyers out there" who "brings a tremendous amount of experience, expertise and knowledge." One client states that Jim "was the internet before there was the internet. He has instant recall on every single issue and is able to advise immediately." Another client noted that "James is a legend in the field and it's great to know he's in our corner." Other clients enthuse that "Jim is absolutely top tier and a walking encyclopedia of the GAO," "he has a stellar reputation and is strong in bid protests," "he is a very strong advocate and is exceptionally accurate in predicting outcomes," and "he's seen every single thing in the government contracts space."

Jim is also consistently recognized by *Legal 500* as a "Leading Lawyer" in Government Contracts and recognized in the "Hall of Fame," which highlights individuals who have received constant praise by their clients for continued excellence. Clients remark that his "depth of knowledge relating to all aspects of government contracts is unrivaled among our outside counsel." In addition, Jim was named by *Law360* as a 2020 "MVP" for Government Contracts.

Jim received a Life Service Award from the Boards of Contract Appeals Bar Association for his many years of dedication, loyalty, and outstanding commitment to the organization.

Michael J. Anstett, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP

Michael Anstett represents government contractors in matters involving M&A, private equity investments, bid protests, claims and subcontract disputes, regulatory compliance, and suspension and debarment proceedings.

Working with a broad array of government contractors, including major aerospace defense and information technology clients, Michael counsels on contract formation and post-award disputes and litigation, government audits, government contracts due diligence, Procurement Integrity Act and Freedom of Information Act disputes, and voluntary and mandatory disclosures.

Government contractors seek Michael's representation in fraud investigations and False Claims Act *qui tam* litigation, and Michael regularly appears before the US Government Accountability Office, the US Court of Federal Claims, and boards of contract appeals.

Michael is recognized by *Chambers USA: America's Leading Lawyers for Business* in Government Contracts, where he has been described by clients as "a trusted partner on complicated issues in this area." Clients also said he is "diligent and responsive" and report that "Michael provides exceptional service and is of the highest caliber when it comes to professionalism, diligence and talent." Consistently recognized by *Legal 500* as a key lawyer in Government Contracts, Michael also was named by *Law360* as a 2020 MVP for Government Contracts.

Nathaniel L. Asker, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP

Nathaniel L. Asker advises public companies, private equity firms, and their portfolio companies on antitrust aspects of mergers, acquisitions, and joint ventures, as well as other government investigations and compliance matters.

Nate's clients come from a range of industries, including technology and software, consumer products, aerospace and defense, industrials, pharmaceuticals, and financial services, among others. He regularly represents clients before the US Department of Justice and Federal Trade Commission in obtaining antitrust approvals for their most critical strategic transactions and in other investigations.

Chambers USA: America's Leading Lawyers for Business consistently recognizes Nate as a leading practitioner in Antitrust, quoting clients who say "he is terrific" and "you want him on your side on mergers." Nate is further described as "absolutely outstanding," "very strong analytically," and "a top-notch antitrust lawyer" who is "extraordinarily responsive and, more importantly, very thoughtful in his responses." *Chambers* sources also report that Nate is "knowledgeable about the subject matter, has contacts at the regulators, and is excellent at client communication."

Nate was selected as a "Global Leader" by *Who's Who Legal: Competition* and is consistently recognized by *Legal 500* in Antitrust: Merger Control. Legal 500 cites clients who describe Nate as "excellent," and notes that "he's great at talking to high level executives and CEOs and also good at explaining complicated concepts into simple, easy-to-understand terms."

Michael Gershberg, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP

Michael Gershberg represents foreign and domestic clients regarding the application of economic sanctions, export control laws and regulations, and the CFIUS review process.

Much of Michael's work involves offering practical guidance on the Export Administration Regulations (EAR), International Traffic in Arms Regulations (ITAR), and economic sanctions administered by the Office of Foreign Assets Control (OFAC). Clients also seek Michael's counsel in connection with their obligations under the anti-boycott and anti-money laundering rules.

Clients of Michael's export control and economic sanctions practice rely on his advocacy before governmental agencies, and turn to him to conduct internal investigations and prepare voluntary self-disclosures and other legal submissions. Michael also assists clients in connection with export transactions and enforcement issues, due diligence for mergers and acquisitions, economic sanctions and export control training, determining export jurisdiction and classification, developing compliance plans and providing compliance counseling, and export licensing.

Michael also advises clients concerning regulatory issues related to foreign investment transactions, including proceedings before the inter-agency Committee on Foreign Investment in the United States (CFIUS). Foreign investors and US sellers engage his representation throughout the CFIUS process, from negotiating CFIUS risk allocation with transaction counterparties to preparing CFIUS filings and negotiating mitigation agreements. Michael also advises public and private companies and investment managers regarding CFIUS jurisdiction and national security risk, and he prepares related provisions in M&A transaction agreements and private fund formation documents.

Chambers Global and Chambers USA recognize Michael among the world's leading lawyers for business in International Trade: Export Controls & Economic Sanctions, as well as International Trade: CFIUS Experts, where clients enthuse "Michael is an excellent attorney and is super responsive," "his expertise in trade compliance is invaluable," and "his deep experience in sanctions and export compliance and his ability to break down complex concepts are his individual strengths." Other clients note that "Michael is a key provider of advice with respect to economic sanctions," and "he is commercially oriented and knows his stuff." He is also recognized by *Who's Who Legal* for Foreign Investment Control. Michael was also named a *Law360* MVP in International Trade and has been named in *Thomson Reuters* Stand-Out Lawyers List.

Michael is the editor of the ITAR Enforcement Digest and a contributor for the CFIUS chapter of the *M&A treatise Takeover Defense: Mergers and Acquisitions*. He is also a co-author of *Fried Frank's International Trade and Investment Alert®*, which reports on significant developments regarding CFIUS, economic sanctions, export controls, and other regulatory compliance matters affecting business activities.

Prior to joining Fried Frank, Michael was of counsel at a large international law firm.

Barry Nigro, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP

Bernard A. Nigro Jr. ("Barry") is Global Chair of Fried Frank's Antitrust and Competition Department. Barry previously served as the Department of Justice's Principal Deputy Assistant Attorney General for Antitrust and the Federal Trade Commission's Deputy Director for the Bureau of Competition.

During his almost 40 years of practice and government service, Barry has handled hundreds of civil and criminal matters in dozens of industries ranging from concrete to high tech and everything in between. For example, Barry has been involved in some of the largest M&A transactions during the past decade, served as the antitrust compliance monitor in United States v. Apple Inc. (S.D.N.Y. 2013), worked on a variety of cartel matters, and counseled on complex compliance and litigation matters. While in government, Barry supported the rollout of the Procurement Collusion Strike Force, an initiative to modernize the merger review process, and revisions to the merger guidelines and remedies policies.

Barry is recognized as a leader by *Chambers USA: America's Leading Lawyers for Business*, a *"Leading Lawyer"* by *Legal 500* in Antitrust: Merger Control, and a "Global Leader" by *Who's Who Legal:* Competition. Clients say "Barry is very adept at getting deals across the finish lines. He knows the inside game very well," "he is a skilled and knowledgeable antitrust lawyer with a very practical approach," and "knows how to marry business and antitrust." Other clients describe him as "the rare combination of DOJ and FTC expertise that is invaluable to clients who need to understand the agencies' latest thinking" and note that "his decades of experience generally, and recent experience as the number-two lawyer in the Antitrust Division, make him a knowledgeable and skilled counselor on a broad array of government enforcement matters." Clients say he is "fabulous" and "figures out quickly what's important and focuses energies there." Clients also report that "[n]o one compares to Barry Nigro in terms of goodwill" and note his "years of experience make his counsel and perspective, particularly seeing what is coming down the road, exceptional."

Barry's commitment to public service includes having served as Vice Chair of the American Bar Association's Section of Antitrust Law (numbering over 10,000 members from across the globe), President of the George Washington University Law Alumni Association, a member of the Executive Committee of Higher Achievement's DC President's Council, a member of St. Albans School's Development Committee, a member of Bishop Ireton High School's Campaign Leadership Committee, and a member of Georgetown University's Class of 1982 Executive Committee, among many other roles.

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