

## Frequently Asked Questions

### **§ 126.18 Exemptions regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual nationals or third-country nationals.**

#### **General Questions**

**1. When does the new § 126.18 become effective?**

You may begin to use the provisions of § 126.18 on **August 15, 2011**, or any time thereafter.

**2. To what types of export authorizations do the terms of § 126.18 apply?**

The provisions of § 126.18 apply to ITAR agreements (Manufacturing License Agreements, Technical Assistance Agreements and Warehouse and Distribution Agreements), approved export licenses, other export authorizations, and license exemptions under which a defense article is received.

**3. Is any level of security clearance acceptable to meet the requirements of § 126.18(c)(1)?**

Yes. The security clearance requirement is not restricted to Secret or above. Section 126.18(c)(1) requires only that the security clearance be approved by the host nation government and does not specify a particular level of clearance.

**4. May a foreign company seek confirmation from DDTC as to whether an identified activity would be considered a “substantive contact?”**

The foreign company should first seek to work out whether something is a “substantive contact” and of concern in a specific instance as this is a discretionary standard. If a foreign company is still uncertain after exhausting all means of determining whether an identified activity is a “substantive contact,” the foreign company may, as a last resort, submit a General Correspondence (GC) request to DDTC. Please refer to DDTC’s “Guidelines for Implementing New Dual National/Third-Country National Policy for Agreements” posting for additional guidance in preparing the GC request and additional information specific to ITAR agreements.

**5. What obligation do U.S. exporters have to verify that foreign companies have technology security/clearance plans in place if a foreign company intends to utilize the provisions of § 126.18?**

Section 126.18 does not impose on the U.S. exporter an obligation to request a written statement or certification from the foreign company that it will be invoking the provisions of § 126.18 and has met all the requirements outlined therein to prevent the diversion of defense articles to unauthorized end-users and end-uses. However, it is always good business practice to be sure that foreign companies that are receiving ITAR-controlled items

understand the requirements and restrictions associated with the receipt and handling of such items.

**6. Is there a preferred format for the technology security/clearance plan?**

No. DDTC has posted a notional implementation plan and is a suggested approach, but is by no means the only way of complying with the rule and its core principle of preventing diversion of defense articles to unauthorized end-users and end-uses. Consistent with local national laws and programs for the control/protection of defense articles/technologies and consistent with the need for private entities to protect proprietary data, technology security plans should be designed with a comprehensive and individualized approach to securing sensitive data of all kinds with appropriate measures for physical security and personnel clearances.

**7. The new rule comes into effect on August 15, 2011. What if there was unauthorized access prior to this date. Is the new rule retroactive?**

No. The new rule can only be implemented for transactions commencing after August 15, 2011, and the related agreement must be amended to incorporate the new language prior to use. Any unauthorized access prior to this date must be reviewed for potential violations.

**8. If implementing § 126.18 and using the § 126.18(c)(2) screening process, must the applicant maintain the Non-Disclosure Agreement or is the foreign licensee responsible for doing so?**

For § 126.18(c)(2), the foreign licensee or sublicensee is responsible for maintaining all records regarding the screening to include the NDA. The U.S. applicant is only required to maintain NDAs for dual or third country nationals requested pursuant to § 124.8(5).

**9. Does every employee in a company need to be vetted and sign a NDA, even if they do not have access to USML-controlled technical data or defense articles?**

No. Only the individuals who will require access to USML-controlled technical data and/or defense articles, and who do not hold a security clearance from the host government, will be required to be screened/vetted pursuant to §126.18.

**10. Will DDTC provide guidance on the implementation of § 126.18 for authorizations other than TAAs and MLAs?**

DDTC is in the process of drafting guidance regarding non-agreement authorizations. Please continue to check the DDTC website for updates.

## **Agreement Specific Questions**

### **11. Is the U.S. applicant required to identify the countries of DN/TCNs in Block 18 of the DSP-5 vehicle who are screened pursuant to § 126.18?**

No. Only DN/TCN individuals requested pursuant to § 124.8(5) must be identified in Block 18 of the DSP-5 vehicle.

### **12. If you have a paper agreement, can an applicant still submit a paper minor amendment to incorporate the new rule, or does the agreement need to be re-baselined to convert to an electronic agreement first?**

A paper minor amendment may be submitted against an active paper agreement to incorporate the new DN/TCN rule (Option 1). If the applicant chooses to submit as an electronic re-baseline, Option 1 may be added then also.

### **13. Is § 126.18 applicable to sublicensees and is there any specific language needed in the agreement for it to be applicable to sublicensees?**

The Option 1 statement is applicable to both foreign licensees and sublicensees. Sublicensees must be specifically identified in the agreement for Option 1 to be applicable to them.

### **14. Can a foreign party choose to use § 126.18 for an individual that qualifies for § 124.16?**

Yes. The foreign party may prefer to screen all their DN/TCNs pursuant to § 126.18 regardless of whether they would qualify for § 124.16.

### **15. Does the agreement need to identify which foreign party is using which option(s)?**

No. There is no requirement to identify which foreign party will use which option. However, the applicant may choose to identify this information in the agreement for clarification between the parties of the agreement.

### **16. Is the U.S. applicant required to contact all the foreign parties to determine which DN/TCN option(s) will be used?**

The U.S. applicant's responsibility is to coordinate which DN/TCN option(s) will be used by the foreign parties to the agreement so that the appropriate language can be included in the body of the agreement for review and approval by DDTC. To accomplish this, the foreign parties must be contacted/pollled. Applicants may choose to receive sublicensee DN/TCN information indirectly through the applicable foreign licensee (i.e. direct contact with sublicensees is not a requirement).

**17. Is country of birth still a factor when utilizing § 124.16?**

Yes. When utilizing § 124.16 the requirements identified in the ITAR and the Federal Register Notice (FRN) must be met. Specifically, the FRN identifies country of birth as a determining factor.

**18. For a currently approved but not yet executed agreement, can §124.7(4) be revised to incorporate the new language and §124.8(5) clause? Can this be notified to DDTC in the cover letter with the executed agreement?**

Yes. If the currently approved agreement has no provisos removing dual and/or third country nationals from specific countries, then the agreement can be revised prior to execution. However the new rule does not go into effect until August 15, 2011, so the execution of the agreement with the new language must wait until then. This change must be annotated in the cover letter with the executed agreement.