

## U.S. Department of State DIRECTORATE OF DEFENSE TRADE CONTROLS

### Guidelines for Implementing New Dual National/Third-Country National Policy for Agreements

**Federal Register Notice (FRN) 7428 Summary:** The Department of State is amending the International Traffic in Arms Regulations (ITAR) to establish a policy to address those who are unable to implement the exemption for intra-company, intra-organization, and intra-government transfers of defense articles and defense services by approved end-users to dual national and third-country nationals who are employees of such approved end-users. Prior to making transfers to certain dual national and third-country national employees under this policy, approved end-users must screen employees, make an affirmative decision to allow access, and maintain records of screening procedures to prevent diversion of ITAR-controlled technology for purposes other than those authorized by the applicable export license or other authorization. This rule is effective August 15, 2011.

This new FRN provides an option for foreign parties identified in an export agreement or license to vet their own dual national and third-country national (DN/TCN) employees concerning the risk of diversion of USML defense articles/technology. Agreements, specifically technical assistance agreements (TAAs) and manufacturing license agreements (MLAs), have traditionally been the vehicle for identifying and vetting DN/TCNs through DDTTC, and therefore is the focus of these guidelines. Separate guidelines will be posted on the applicability of FRN 7428 to other export licenses.

**Dual National (DN)** – An individual who holds nationality from the country of their employer who is a foreign licensee (or sublicensee) to the agreement, and also holds nationality from one or more additional countries

**Third Country National (TCN)** – An individual who holds nationality from a country other than the country of their employer who is a foreign licensee (or sublicensee) to the agreement

**End-Users** – In the context of this FRN, end-users are the foreign licensees and sublicensees to an MLA or TAA. In these guidelines the term “foreign party(ies)” is used in the same context.

Export of defense articles or services to a foreign person, inside or outside the U.S., is adjudicated as if it were an export to that foreign country. However, approval of a DN/TCN employee only authorizes transfer to that employee. **It does not authorize export to the country from which the employee derives.**

### Implementation

With the new FRN there are now three options for the vetting of DN/TCNs.

**Option 1 (Foreign Vetting):** The foreign parties make the determination on applicability of § 124.16 and/or vet their own DN/TCNs pursuant to § 126.18. This method places the ultimate responsibility of vetting DN/TCNs with the foreign parties. When foreign licensees/sublicensees make determination of employee pursuant to § 126.18, country of origin is not a determining factor—substantive contact with risk of diversion is the determining factor. This option is only applicable to unclassified transactions.

**Option 2 (DDTC Vetting):** The applicant identifies the countries of the foreign parties' DN/TCNs pursuant to § 124.8(5) and § 124.16 in the agreement. This method places the ultimate responsibility of vetting DN/TCNs with DDTC. When DDTC is requested to make the determination, DDTC does consider the country of origin or birth in addition to citizenship. A request pursuant to § 124.8(5) under Option 2 can cover classified as well as unclassified transactions.

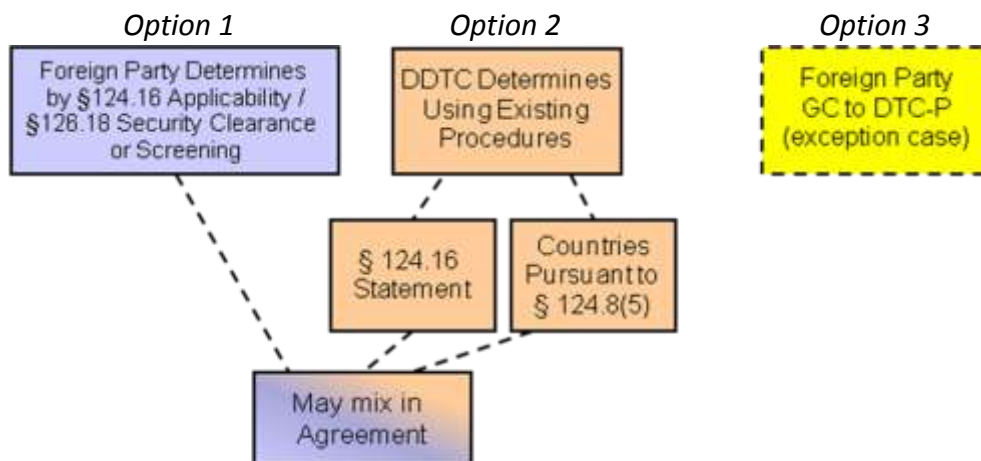
**Option 3 (Foreign GC):** Foreign party requests approval of specific DN/TCN individual directly with DDTC via General Correspondence letter. This method places the ultimate responsibility of vetting a specific DN/TCN with DDTC and is to be used as a last resort when the foreign party cannot make their own determination on the risk of diversion while using Option 1. This option is not tied to a specific transaction but provides authority for involvement of the specific individual in any future authorization.

**New § 124.8(5) Verbatim Clause**

These three options are identified in the new language of the § 124.8(5) verbatim clause:

“(5) The technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a foreign person except pursuant to...

- §§124.16 and 126.18, (*Option 1*)
- as specifically authorized in this agreement, (*Option 2*)
- or where prior written approval of the Department of State has been obtained.” (*Option 3*)



**A single foreign party may choose to exercise multiple options under a single agreement.** It is the responsibility of the US applicant to coordinate which DN/TCN options will be applicable for their given agreement and include the appropriate language in the agreement. See the attached DN/TCN Option Decision Tree for a diagram of approving DN/TCNs via the various options.

Note: The DN/TCN options identified above are only applicable to foreign party DN/TCNs and are not applicable to foreign person employees (FPEs) of US companies. A DSP-5 for foreign person employment is still required for each FPE and the country of the FPE must still be identified in the agreement regardless of DN/TCN option(s) used.

After August 15, 2011, all approved agreements/amendments must include the new § 124.8(5) verbatim clause. If the old verbatim clause is used, a proviso will be added to change it to the new clause prior to execution. **Inclusion of the new § 124.8(5) clause is not the authority to exercise Option 1 above.**

### **Option 1 – Foreign Vetting**

To exercise the Foreign vetting option, the agreement must contain the following statement in the section of the agreement addressing DN/TCNs (pursuant to § 124.7(4)):

“Transfers of defense articles, to include technical data, to dual nationals and/or third country nationals by foreign licensees (and its approved sublicensees – if applicable) must be conducted in accordance with the provisions of 22 CFR 124.8(5).”

This statement will identify to DDTC that one or more of the foreign parties to the agreement will be vetting their DN/TCN pursuant to § 126.18 or that the foreign party will make a determination of the applicability of § 124.16 to specific DN/TCN employees.

This statement will replace the traditional 22 CFR 124.16 statement and “Pursuant to 22 CFR 124.8(5)” statement discussed in Option 2 below if the foreign party(ies) will exclusively use Option 1. However, if a foreign party chooses to also use Option 2 below, the statement above will be used in addition to the applicable Option 2 statement(s).

A DN/TCN vetted pursuant to § 126.18(c)(2) must execute a Non-Disclosure Agreement (NDA). The DN/TCN NDA language has changed and a sample of this NDA is attached to these guidelines.

### **Option 2 – DDTC Vetting**

Option 2 is a continuation of the DN/TCNs approval method used prior to FRN 7428. Foreign Parties may choose (in coordination with the US applicant) to continue to identify the countries of their DN/TCNs pursuant to § 124.8(5) or identify the use of § 124.16 to the US applicant for inclusion in the section of the agreement addressing DN/TCNs (pursuant to § 124.7(4)).

### **§ 124.8(5) for Non-§ 126.1 Countries**

The required agreement statement for DN/TCN requests pursuant to § 124.8(5) for countries other than § 126.1 countries is as follows:

“Pursuant to §124.8(5), this agreement authorizes access to defense articles and/or retransfer of technical data/defense services to individuals who are dual/third country national employees of the foreign licensees (and the approved sub-licensees – if applicable). The exclusive nationalities authorized are *(list all foreign nationalities of the employees who do not meet the criteria of §124.16)*. Prior to any access or retransfer, the employee must execute a Non-Disclosure Agreement (NDA) referencing this DTC case number. The applicant must maintain copies of the executed NDAs for five years from the expiration of the agreement.”

The requirements with this option have not changed as a result of the implementation of this FRN (to include DSP-5 vehicle entry requirements in Block 18) with the exception that the new NDA language will be required for new DN/TCNs requested under this option (see NDA sample attached to these guidelines).

## § 124.16

The required agreement statement for § 124.16 DN/TCN requests has changed as a result of this FRN. FRN 7428 adds a reference to “bona fide regular employees directly employed by the foreign signatory or approved sub-licensee.” Therefore, when requesting § 124.16 in Option 2, the following language must be used:

“Pursuant to §124.16, this agreement authorizes access to unclassified defense articles and/or retransfer of technical data/defense services to individuals who are dual/third-country national employees of the foreign signatories (and the approved sub-licensees – if applicable) located in the §124.16 territory, and bona fide regular employees directly employed by the foreign signatory or approved sub-licensee. The exclusive nationalities/territory authorized is limited to NATO, European Union, Australia, Japan, New Zealand, and Switzerland. All access and/or retransfers must take place completely within the physical territories of these countries or the United States.”

Applicants are not required to amend their agreements to correct the § 124.16 statement unless amending the agreement for other reasons.

The applicability requirements of § 124.16 have not changed with this FRN and are still outlined in Section 3.6(b) of the Guidelines for Preparing Electronic Agreements. However, there are two additional changes to policy related to § 124.16: the additional § 124.16 statement pursuant to paragraph 2 of the “Guidelines for Preparing Electronics Agreements, Addition/Clarification” posted on December 13, 2010, will no longer be required (though it may continue to be used if desired by the applicant), and the § 124.16 request will no longer be required in Block 20 of the DSP-5 vehicle.

The FRN did not remove the requirement of § 124.12(a)(10) related to § 124.16. Applicants must continue to identify the applicability of § 124.16 in this statement until such time as the ITAR is updated to remove this requirement.

### Addressing § 126.1 Countries via Option 2

When requesting DN/TCNs from § 126.1 countries via Option 2, it is important to specifically identify in the agreement and DSP-5 vehicle whether the individual is a dual national or a third country national. DDTC does consider the country of origin or birth in addition to citizenship when making a determination under Option 2.

In general, TCNs from § 126.1(a) countries will be disapproved by DDTC. DNs from § 126.1(a) countries requested via Option 2 will be considered by DDTC for approval when the primary nationality of the DN is a non-§ 126.1 country.

DNs from § 126.1(a) countries must be identified by name and applicable country pursuant to § 124.8(5) in the agreement as follows:

“Pursuant to §124.8(5), this agreement authorizes access to defense articles and/or retransfer of technical data/defense services to *(list full legal name of individual)* an employee of *(list company of employment)* who is a **dual national** of *(list nationality other than § 126.1 country)* and *(list § 126.1(a) country)*. Prior to any access or retransfer, the employee must execute a Non-Disclosure Agreement (NDA) referencing this DTC case number. The applicant must maintain copies of the executed NDAs for five years from the expiration of the agreement.”

In addition, the following support documentation must be included with the submission for DNs from § 126.1(a) countries: full legal name of individual, nationality, date and place of birth, significant ties to country, copy of passport, resume, and detailed job description. The applicant should also include any other pertinent information that would enable DDTC to address the significant ties issue, e.g. whether the individual has renounced citizenship, the nature of any travel to such countries or contact with agents, brokers, and nationals of such countries.

Both TCNs and DNs from all other § 126.1 countries (referred to as non-§ 126.1(a) countries below), may be identified for consideration by DDTC. The following § 124.8(5) statements are in addition to any other DN/TCN statements addressed in the section of the agreement addressing DN/TCNs.

Non-§ 126.1(a) TCNs may be requested pursuant to § 124.8(5) as follows:

“Pursuant to §124.8(5), this agreement authorizes access to defense articles and/or retransfer of technical data/defense services to individuals who are **third country national** employees of the foreign licensees (and the approved sub-licensees – if applicable). The exclusive nationalities authorized are (*list non-§ 126.1(a) countries*). Prior to any access or retransfer, the employee must execute a Non-Disclosure Agreement (NDA) referencing this DTC case number. The applicant must maintain copies of the executed NDAs for five years from the expiration of the agreement.”

Non-§ 126.1(a) DNs may be requested pursuant to § 124.8(5) as follows:

“Pursuant to §124.8(5), this agreement authorizes access to defense articles and/or retransfer of technical data/defense services to employees of the foreign licensees (and the approved sub-licensees – if applicable) who are **dual nationals** of (*list primary nationality other than § 126.1 country*) and one of the following countries: (*list non-§ 126.1(a) countries*). Prior to any access or retransfer, the employee must execute a Non-Disclosure Agreement (NDA) referencing this DTC case number. The applicant must maintain copies of the executed NDAs for five years from the expiration of the agreement.”

Applicant’s submitting requests for non-§ 126.1(a) DNs must also include a copy of the individual’s passport with the submission for record of dual national status.

All § 126.1 DN/TCNs must be added by name in Block 18 of the DSP vehicle. The Address and Role fields of Block 18 should identify whether the person is a DN or TCN; the City field should reflect all applicable nationalities; and the Country field of Block 18 must reflect the applicable § 126.1 DN/TCN country (i.e. not the country of the employer).

**Block 18. Name and address of foreign intermediate consignee**

Name: < Enter Full name of Individual >

Address: < Enter DN (Dual National) or TCN (Third Country National) as applicable >

City: < Enter the applicable countries > (e.g. if person is a national of Australia born in China, enter “China and Australia” in this field)

Country: < Enter the country code for the §126.1 country >

Role: < Enter DN (Dual National) or TCN (Third Country National) as applicable >

Option 2 may be used for vetting DN/TCNs from § 126.1 countries that cannot be fully vetted by the foreign parties and if approved provides access for the specific individual for the applicable agreement only. Option 3

below also provides a mechanism for final determination on specific § 126.1 individuals when the foreign party chooses to exercise § 126.18 and a determination on risk of diversion cannot be made.

### **Option 3 – Foreign Party General Correspondence (GC) for Specific Individual**

Option 3 is exclusively for the instance where a foreign party has made an effort to screen a specific DN/TCN pursuant to § 126.18(c)(2) and determined the individual has substantive ties with § 126.1 countries but is unable to make the determination on the risk of diversion.

When submitting this request, the GC must include the full legal name of the individual, nationality, date and place of birth, copy of passport, resume, a detailed job description and justification for transfer to the specific individual, as well as a summary of the substantive ties the individual has with the § 126.1 country(ies) and why a determination could not be made by the foreign party.

This GC letter will be addressed to Mr. Charles B. Shotwell, Director, Office of Defense Trade Controls Policy at the address provided below and clearly identify in the subject line that the request is for DDTC-P Determination of DN/TCN Pursuant to § 126.18(c)(2).

Mr. Charles B. Shotwell  
Director, Office of Defense Trade Controls Policy  
2401 E Street N.W., Suite 1200 (SA-1)  
Washington, D.C. 20522-0112

Approval of a specific DN/TCN using Option 3 will be authority for involvement of the specific individual in any future authorization, i.e. it will not be tied to a specific agreement. If the foreign party determines at a later time that there is a clear risk of diversion, the foreign party must notify DDTC-P immediately of the updated circumstances so that the approval can be revoked.

Note: In accordance with § 126.18(c)(2), DN/TCNs with substantive contacts with persons from countries listed in § 126.1(a) **must be** identified to DDTC for a final determination. This may be accomplished via Option 2 or Option 3 above. In such submissions, the applicant must certify they have applied the substantive ties/contacts criteria from 22 CFR 126.18(c)(2) and provide the relevant support documentation identified above.

### **Currently Approved Agreements**

For currently approved agreements, the applicant must amend the agreement to use Option 1, and the agreement must be executed prior to implementation. This amendment may be submitted as a minor amendment pursuant to § 124.1(d) or as part of the next substantive amendment pursuant to § 124.1(c). The amendment must update the current § 124.8(5) verbatim clause with the new § 124.8(5) verbatim clause, and must add the new statement identified in Option 1 above in the section of the agreement addressing DN/TCNs (pursuant to § 124.7(4)). This statement may be a standalone statement if the foreign party(ies) will exclusively use Option 1 (replacing the current DN/TCN statement(s) if they were previously approved), or may be added to the Option 2 statements.

Note: If the approved agreement is a paper agreement, the minor amendment may be submitted via paper submission as either a conformed agreement or “changes only summary.” If the approved agreement is electronic, then the minor amendment must be uploaded as a conformed agreement to the most current approval.

There is no requirement to submit an amendment to existing agreements if the foreign parties choose not to use Option 1. The currently approved agreement may continue as is until there is a need to submit a substantive amendment pursuant to § 124.1(c). At that time the amendment must update the current § 124.8(5) verbatim clause with the new § 124.8(5) verbatim clause, but may leave the section of the agreement addressing DN/TCNs (pursuant to § 124.7(4)) as is.

Currently approved agreements that received proviso(s) restricting/removing DN/TCNs from the agreement must be submitted for proviso reconsideration in order to implement Option 1. The applicant can submit the amendment for the Option 1 update in conjunction with the proviso reconsideration. Previous paper agreements that require a proviso reconsideration must be re-baselined at the same time and submitted electronically.

DN/TCNs previously approved by DDTC are not required to re-execute an NDA with the new language if the DN/TCN request remains pursuant to § 124.8(5). Previously approved DN/TCNs whose employers choose to re-vet an individual pursuant to § 126.18(c)(2) must execute an NDA with the new language (see NDA sample attached to these guidelines).

### **Classified Transfers**

Any dual/third country nationals requiring access to classified defense articles and/or technical data must be requested by country in accordance with § 124.8(5) of Option 2 above (including identifying by country in Block 18 of DSP-5 vehicle). The following paragraph must be included in the section of the agreement addressing DN/TCNs (pursuant to § 124.7(4)):

“Pursuant to §124.8(5), this agreement authorizes access to **classified** (and unclassified) defense articles and/or retransfer of technical data/defense services to individuals who are dual/third country national employees of the foreign licensees (and the approved sub-licensees – if applicable). The exclusive nationalities authorized are *(list all foreign dual/third-country nationalities of the employees)*. Prior to any access or retransfer, the employee must execute a Non-Disclosure Agreement (NDA) referencing this DTC case number. The applicant must maintain copies of the executed NDAs for five years from the expiration of the agreement.”

### **Country Specific Exception Clauses for Australia, Canada, and The Netherlands**

The country specific clauses for Australia, Canada, and The Netherlands are predicated on the issuance of a security clearance by the respective government. If implementing Option 1 above, these clauses are no longer necessary for unclassified transfers as the requirements are met at 22 CFR 126.18(c)(1) covering security clearances. If retaining and/or utilizing Option 2, or for classified transfers, these clauses are still relevant and may be used when applicable.

### **Contract Labor and Regular Employee Clarification**

The requirement to include the contract labor clause has not changed with this FRN. If foreign parties will be using contract labor, the clause in Section 3.9(c) of the Guidelines for Preparing Electronic Agreements must be included in the agreement:

“Contract employees to any party to the agreement hired through a staffing agency or other contract employee provider shall be treated as employees of the party, and that party is legally responsible for the employees’ actions with regard to transfer of ITAR controlled defense articles to include technical data, and defense services. **Transfers to the parent company by any contract employees are not authorized.** The party is further responsible for certifying that

each employee is individually aware of their responsibility with regard to the proper handling of ITAR controlled defense articles, technical data, and defense services.”

If a contract labor employee meets the definition of “regular employee” as defined in the new § 120.39 definition, and the contract labor employee is a DN/TCN, then § 124.16 and § 126.18 may be used (within the context of Option 1 or Option 2 as applicable) to allow access to the specific DN/TCN contract labor employee without having to identify the specific DN/TCN’s country to DDTC.

If the DN/TCN is a contract labor employee who does not meet the definition of regular employee, then that person must be vetted by DDTC pursuant to § 124.8(5) in Option 2.

### **Agreements Pending Approval**

Beginning August 15<sup>th</sup>, all agreements/amendments approved by DDTC must incorporate the new language for § 124.8(5) (the verbatim statement). Agreements/amendments submitted with the old language will be directed to change via proviso. Agreements with the old § 124.16 language will also be directed to change via proviso. In addition, a proviso will be added authorizing the revision of the section of the agreement addressing DN/TCNs (pursuant to § 124.7(4)) prior to execution, **if so desired by the applicant.**

Proviso regarding Revision for new § 124.8(5):

Prior to execution, the applicant must revise the § 124.8(5) verbatim statement to reflect the updated language identified in FRN 7428, published Monday, May 16, 2011.

Proviso regarding Revision for new § 124.16:

Prior to execution, the applicant must revise the § 124.16 statement in Article XX of the agreement to the new language as follows: “Pursuant to §124.16, this agreement authorizes access to unclassified defense articles and/or retransfer of technical data/defense services to individuals who are dual/third-country national employees of the foreign signatories (and the approved sub-licensees – if applicable) located in the §124.16 territory, and bona fide regular employees directly employed by the foreign signatory or approved sub-licensee. The exclusive nationalities/territory authorized is limited to NATO, European Union, Australia, Japan, New Zealand, and Switzerland. All access and/or retransfers must take place completely within the physical territories of these countries or the United States.”

Proviso regarding DN/TCN statement in 22 CFR 124.7(4):

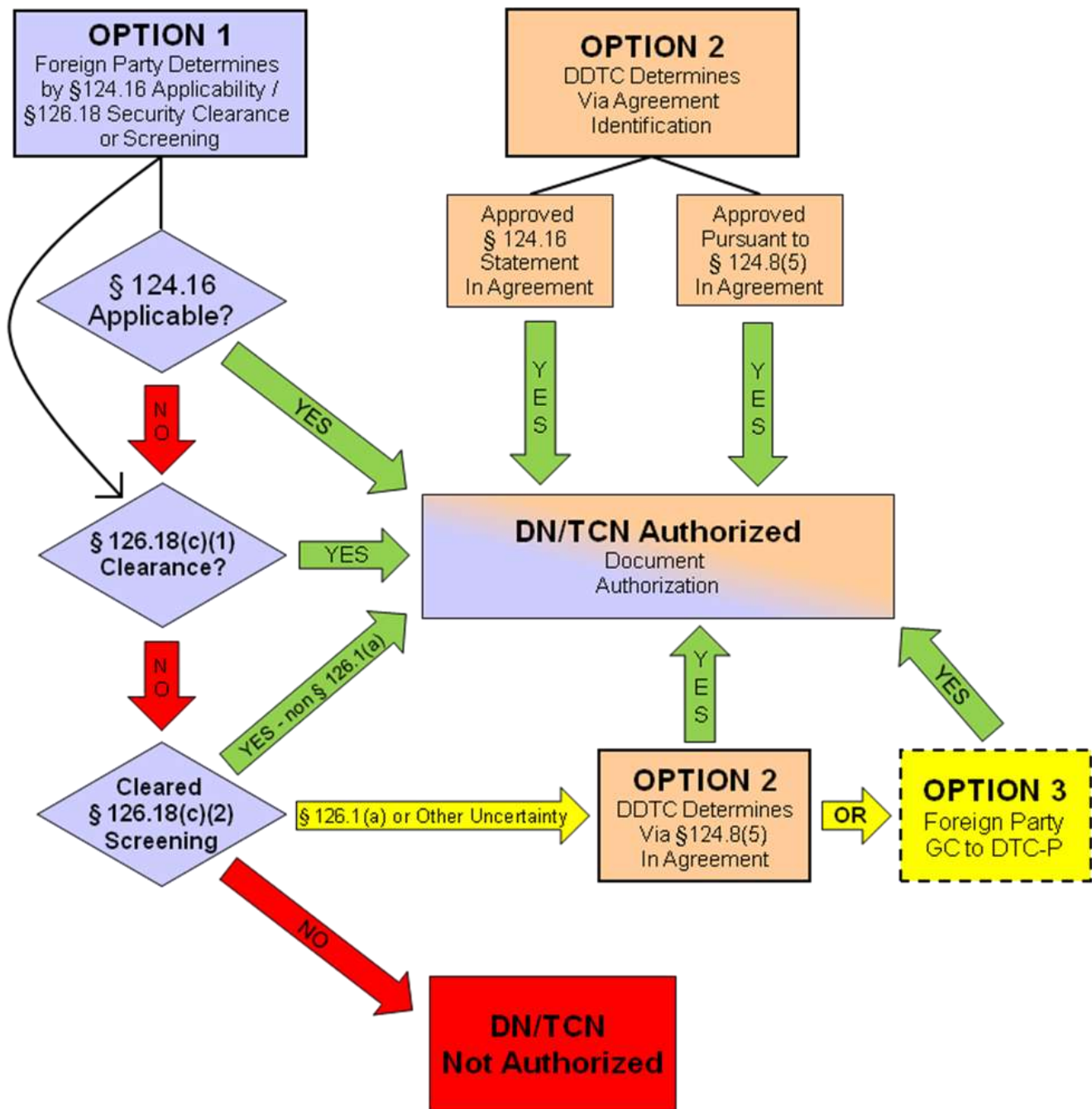
Prior to execution, the applicant is authorized to revise the current language regarding dual/third country nationals in Article XX of the agreement to include the new language as follows: “Transfers of defense articles, to include technical data, to dual nationals and/or third country nationals by foreign licensees (and its approved sublicensees – if applicable) must be conducted in accordance with the provisions of 22 CFR 124.8(5).”

**Once again, the effective date of the FRN is not until August 15, 2011.** Applicants may begin submitting agreements incorporating the new policy on August 1, 2011, however, DDTC will not start approving these agreements until the effective date.



For additional guidance or clarification, please contact the DDTC Response Team at (202) 663-1282 or by email at [DDTCResponseTeam@state.gov](mailto:DDTCResponseTeam@state.gov).

## DN/TCN Option Decision Tree



## Sample Non-Disclosure Agreement (NDA)

I, \_\_\_\_\_, acknowledge and understand that any technical data related to defense articles on the U.S. Munitions List and proprietary data that I will have access to or which is disclosed to me by (employer's name) are subject to control under United States law (the International Traffic in Arms Regulations (the "ITAR").

I hereby certify that such controlled technical data will not be further disclosed, exported, or transferred in any manner not authorized under the ITAR, except with the prior written approval of the U.S. Department of State and [employer's name]. I certify that I will report promptly to [employer's name] and its security and export control officers any inquiry or request to provide controlled technical or proprietary data to any third person without authority.

I further certify that I have never acted for, represented, or provided information to and do not currently act for, represent, or provide information to any country or person acting on its behalf that is subject to Section 126.1 of the ITAR, including but not limited to Iran, Syria, North Korea, Sudan, China, Burma, Cuba, or Libya, or any entity that is owned or controlled by such country. Furthermore, I certify that I understand and will comply with the notification requirements of Section 126.1(e) of the ITAR or any other law.

I make this certification voluntarily and understand and agree that it may be provided to the government of [employer's location] and the United States which have an interest in ensuring that controlled defense articles and technical data are not provided or transferred to persons without authority.

\_\_\_\_\_  
Signature & Printed Name & Address