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.

<u>General Questions</u>

1. 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.

2. 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.

3. 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. For details, please refer to Section 3.5.3 of the "Guidelines for Preparing Electronic Agreements."

4. 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.

5. 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).

6. 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.

7. 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.

8. 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.

9. Does the agreement need to identify which foreign party is using which DN/TCN 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.

10. 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/polled. Applicants may choose to receive sublicensee DN/TCN information indirectly through the applicable foreign licensee.

11. Can §124.16 be used to authorize dual/third country nationals of §124.16 countries employed by the applicant or other US Signatories to the Agreement?

No. All foreign nationals employed by a US Person must be authorized on a DSP-5 for foreign national employment or as a signatory to an agreement.

12. When an agreement involves the transfer of classified defense articles, can §124.16 still be used to authorize dual/third country nationals access to only unclassified defense articles associated with the agreement?

Yes, but the proposed amendment must specifically address that only unclassified defense articles apply. Failure to specify that the dual/third country nationals will only have access to unclassified defense articles will result in NO APPROVAL for dual/third country nationals.

13. Per §124.12 (a)(10) "This agreement (does/does not) request retransfer of defense articles and defense services pursuant to §124.16." Should this statement include a reference to technical data?

No, Per §120.6, defense article means any item or technical data designated in §121.1 of this subchapter.