

**DDTC Response to Industry Comments on the
Guidelines for Preparing Agreements, Draft Revision 4.3
March 16, 2016**

One commenting party recommended that additional language be added to the introduction of the guidelines to further clarify that guidelines violations are not ITAR violations. The Department did not accept this recommendation because this topic is adequately covered in the current introduction.

Seven commenting parties expressed concern that the proposed change to Section 2.1 is inconsistent with the proposed definitions rule and recommended keeping the original language. The Department retained the original language and also changed Section 2.1 to further emphasize that limited defense services via DSP-5 is only available in exceptional cases.

One commenting party recommended that language be added to Section 2.1 to clarify the extent to which the “derived data” rule extends. The Department did not accept the recommendation because it believes this is a matter best resolved via Advisory Opinion.

Seven commenting parties submitted that the addition of the word “enabling” in Section 2.3 is confusing and extends current policy. The Department rewrote Section 2.3.b using language from the ITAR.

One commenting party recommended that Section 2.6.b include language to clarify how the average application processing time is calculated. The Department did not accept this comment, as the guidelines are not the proper forum to publish statistical methodology.

Seven commenting parties expressed concern that Section 2.8.o now requires all freight forwarders be identified on the DSP-5 vehicle and that this presents an undue burden on industry. The Department removed the proposed language but emphasizes that the ITAR requires some form of authorization for all freight forwarders.

Four commenting parties recommended that language be added to Section 3.2.e to specify where to include the Expedited Execution clause. The Department added clarifying language to Section 3.2.e. The clause was also added to the agreements templates in Appendix A.

Seven commenting parties recommended either modifying or expanding the scope of the Expedited Execution process or the amendment process. The Department revised Section 3.2 to allow for sublicensee name or address changes under the Expedited Execution process. The Department did not accept other suggestions to modify or expand the process, because Expedited Execution is a new process and the Department desires to assess the impact of its implementation prior to considering additional changes to amendment procedures. The Department stresses that adding the Expedited Execution clause to an existing agreement will require an amendment in order to provide the foreign parties insight into the process they are agreeing to.

One commenting party recommended that language be added to Section 3.3 that would state that the valuation methodologies for technical data and defense services vary from agreement to

agreement. The Department did not accept the recommendation because applicants retain sufficient flexibility for determining valuation with the existing language.

Three commenting parties recommended that language be added to Section 3.3 to clarify how to determine the value of hardware manufactured abroad. The Department added clarifying language to Sections 3.3 and 16.5.

One commenting party recommended that language be added to Section 3.4 to clarify that Part 130 is not applicable to WDAs. The Department did not accept this recommendation since the lack of value already disqualifies WDAs from Part 130 and therefore no clarifying language is required.

One commenting party requested clarification on the term “non-§ 126.1(a) countries” used in Section 3.5.2.d. The Department revised the language in this section to read “§ 126.1 non-(a) countries” when referring to § 126.1 countries not identified in § 126.1(a).

Five commenting parties requested clarification on Dual Nationals (DNs) in Section 3.5.2.d (4). The Department emphasizes that this paragraph only deals with § 126.1 non-(a) DN. Although this section requests identification of § 126.1 non-(a) DN by name in the agreement, it also provides a more flexible option for the applicant *not* to submit the name and additional documentation and have the individual assessed as though they are a TCN from the § 126.1 non-(a) country. Language was added to this section to clarify these two options for submitting § 126.1 non-(a) DN.

One commenting party recommended that language be added to Section 3.5 to clarify which country is being referred to in the phrase “the 126.1 country.” The Department added clarifying language in several places.

One commenting party recommended that Section 3.5.2.b be revised to clarify that identification of DN/TCN nationalities is not required. The Department added the clarifying language.

One commenting party asked if an applicant can include a Foreign Person Employee’s (FPE’s) nationality in the § 124.7(4) clause referenced in Section 3.8.b prior to Department approval of the FPE license. The Department will address such requests on a case-by-case basis.

One commenting party asked if the FPE statement in Section 3.8.b can be added via a minor amendment. The Department revised Sections 3.8.b and 6.3 to reflect that the FPE statement may be added through major or minor amendments.

Five commenting parties asked for clarification of the relationship between contract employees and regular employees. The Department revised Section 3.9 to clarify that the section applies only to non-regular contractor employees; employees who meet the ITAR definition of a regular employee are covered under the authorization of the company with whom they are in a long-term contractual relationship.

Two commenting parties requested clarification about U.S. contract employees hired by U.S. companies through foreign staffing agencies. The Department added paragraph 3.9.a.(4) to address this situation.

Two commenting parties requested clarification about contract employees with respect to sublicensees and licensees. The Department did not accept this comment because the existing language in Section 3.9 is clear. To the extent that an applicant has questions regarding a particular situation, it should submit an Advisory Opinion request.

One commenting party recommended the deletion of language referencing the *Federal Register* Notices in Section 3.10, as these rules are not final. The Department deleted the references to proposed rules and will revise the guidelines after the Department publishes final rules impacting U.S. persons employed abroad.

One commenting party recommended that language be added to Section 3.16 to further define what operations qualify as a USOP. The Department did not accept this recommendation, as the current supporting documentation requirements detailed in Section 3.16 are sufficient to accurately identify an operation for expedited processing.

Three commenting parties pointed out that Section 5.1.d.(5) is redundant since connections to FMS are already required to be included in the transmittal letter under § 124.12(a)(3). The Department made conforming changes throughout the guidelines. However, the Department re-emphasizes the importance of identifying connections to FMS cases in the transmittal letter.

One commenting party recommended deleting the word “contract” from the § 124.9(a)(6) statement as it differs from § 123.9 Destination Control Statement. The Department did not accept the recommendation, as the § 124.9(a)(6) language is taken directly from the ITAR.

One commenting party recommended that Section 5.2 be amended to allow for agreements to contain USML defense services and CCL technology with no USML technical data. The Department did not accept this recommendation, as it does not meet the ITAR requirements for the use of paragraph (x).

One commenting party was unclear on whether the value of CCL technology should be included in the agreement. The Department notes that this information is covered in Section 5.1.b.(6) and Section 20.1.g.

Two commenting parties expressed confusion about the meaning of the phrase “exports that have not been approved” in the discussion of amendment devaluation in Section 6.1. The Department clarified by deleting the language where it appeared. The Department notes that this question is addressed by the following sentence found in Sections 6.1, 9.3, and 20.1: “For the purposes of agreement valuation and decrementing hardware, all previously approved IFO licenses for permanent export should be included.”

One commenting party recommended revising the explanations of “In Furtherance Of” (IFO) and “In Support Of” in Section 15. The Department did not accept this recommendation, as the existing explanations are adequate.

One commenting party recommended adding clarifying language to Section 15.1 on whether all IFO licensees need to be part of the agreement. The Department added a clarifying sentence.

Two commenting parties recommended adding clarifying language to Section 15.1 to distinguish the value of paragraph (x) items from USML items. The Department added a clarifying sentence.

One commenting party requested clarification as to whether the Canadian Exemption can be used on a Congressionally Notified agreement prior to the agreement being executed. The Department added clarifying language to Section 15.4 that the agreement must be approved and executed prior to using the Canadian Exemption.

Six commenting parties recommended deletion of the “routine, anticipated maintenance” clarification in Section 15.5, as it adds a significant burden with little added benefit. The Department deleted the new language.

Three commenting parties expressed concern that the initial export notification requirement in Section 16.2 is confusing. The Department did not accept the recommendation since the initial export notification requirement comes straight from the ITAR.

Two commenting parties suggested that the phrase “relevant paper agreement” in Section 16.2.b does not include the rare situation when an electronic agreement has been rebaselined. The Department changed “paper” to “prior.”

One commenting party recommended deleting “agreement” from the sentence about major amendments in Section 20.1g, as agreements normally do not have values specified within the agreement text. The Department deleted “agreement.”

One commenting party recommended adding “until its expiration” to “IFO license remains valid” in Section 20.1g.(1). The Department added the language in several places for clarity.

One commenting party requested clarification on the validity of IFO licenses when a commodity transitions to the CCL. The Department did not accept this comment, emphasizing that this is addressed in 78 FR 22747, “Amendment to the International Traffic in Arms Regulations: Initial Implementation of Export Control Reform,” and in the Oct 9, 2015 DDTC web guidance, “ECR Transition Timeline Extended.”

One commenting party recommended adding USML paragraphs to the agreements templates. The Department did not accept this recommendation, as it would impose a new requirement that may not be appropriate for all agreements.

One commenting party recommended expanding the reference to other agreements in the transmittal letter templates. The Department did not accept this recommendation, since it would

impose a new requirement and since applicants are already expected to adequately explain precedent cases in the “Background” section.

Three commenting parties recommended removal of the requirement for a Part 130 statement in the transmittal letter since it is already required in the DSP-5 vehicle for agreement submission. The Department made the conforming changes.

One commenting party recommended consolidating all guidance on classified articles into one section of the guidelines. The Department did not accept this recommendation, as the extra length of the guidelines would outweigh the potential benefits of such a section.

One commenting party recommended adding language to Appendix D stating that the agreement and/or transmittal letter control if there is a conflict with the DSP-5. The Department did not accept this recommendation, as this is already addressed in Section 2.0.

One commenting party recommended identification of which DSP-5 fields are most critical. The Department did not accept this recommendation, as all DSP-5 fields are important to the review process, and what constitutes a “critical” field may differ between submissions.