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DDTC Updates its "Guidelines for Preparing Electronic Agreements" to Implement New Dual/Third Country National Rule

On August 17, 2011, DDTC updated its "Guidelines for Preparing Electronic Agreements" (the "Guidelines") to reflect implementation of the new rule and provide guidance to exporters preparing ITAR agreements. The new license exemption provides a new "foreign vetting" option for non-U.S. end-users, parties (*i.e.*, signatories) and sublicensees (collectively, "non-U.S. licensees") identified in an ITAR agreement to vet their own DTCN employees concerning the risk of diversion of ITAR-controlled defense articles or technology. The new option provides for "substantive contacts" screening for DTCN employees that when exercised by the non-U.S. licensee, replaces DDTC's traditional "country of birth" analysis for approval of DTCN employees under §§ 124.8(5) and 124.16 clauses in ITAR agreements. In subsequent guidance, DDTC detailed factors to be considered in DTCN substantive contacts screening, which factors include information about contacts with a third country, including business, family and government relations as well as frequency of travel to that country. Where a non-U.S. licensee has made an effort to screen a DTCN and determined the individual has substantive contacts with a U.S. arms embargoed (§126.1) country but is unable to determine the risk of diversion, a general correspondence ("GC") request may be submitted to DDTC.

Pursuant to the Guidelines, to exercise the new option, the non-U.S. licensee must first institute effective procedures to prevent diversion. This may take the form of *either* requiring a security clearance from the host nation for DTCN employees *or* performing substantive screening of employees against §126.1 countries and requiring employees to execute a non-disclosure agreement. The non-U.S. licensee must also implement a technology security/clearance plan documenting the substantive contacts screening and maintain records of screening results subject to review at the request of DDTC. If a non-U.S. licensee does not wish to utilize this new foreign vetting option, the parties and sublicensees to the ITAR agreement may continue to rely on DDTC to vet DTCN employees identified in §§ 124.8(5) and 124.16 clauses in the course of the agreement approval process; however, in that scenario "country of birth" is still considered during the agreement approval process. Agreements may also use some combination of these options, *e.g.*, where one non-U.S. licensee chooses the foreign vetting option while another non-U.S. licensee relies on DDTC for determinations regarding DTCN approval. A combination approach is especially likely to occur in agreements with large numbers of non-U.S. licensees. A single party may also choose to exercise multiple options under a single agreement.

No matter what option or combination non-U.S. licensees choose to vet DTCN employees, two changes must be made to proposed agreements (at this time, no changes are required in transmittal letters for DTCN issues). First, for all agreements, the §124.8(5) verbatim clause must be updated. This revision, the text of which is found on page twenty-four of the Guidelines, must be made even if the parties do not seek approval for DTCN employees and consists of the following text:

> "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, as specifically authorized in this agreement, or where prior written approval of the Department of State has been obtained."

Second, the Guidelines highlight several changes that must be made to proposed agreements to ensure appropriate DTCN consideration in the agreement approval process. The specific changes that must be made vary based on the vetting options chosen by the non-U.S. licensees. Agreements do not need to be amended at this time unless the parties seek to immediately rely upon the foreign vetting option. Otherwise, implement changes at the time of the next amendment/rebaseline.

If an agreement seeks to utilize only the foreign vetting option, a new §127.4(4) clause must be included to that effect. This new clause replaces the standard §§ 124.8(5) and 124.16 clauses. The specific language for an exclusive foreign vetting scenario is included on page twenty-five of the Guidelines and consists of the following:

> "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)."

If the parties elect to continue to rely on DDTC to vet DTCN employees, the §124.8(5) clause is included and does not change, but the §124.16 clause must be updated to reflect revisions clarifying that all access/retransfers to ITAR-controlled defense articles and defense services by DTCN employees must take place within the §124.16 territory and that DTCN employees must be "bona fide regular employees" (as defined by §120.39) directly employed by the non-U.S. licensee. The inclusion of a reference to "bona fide regular employees" is an important change because it excludes contract employees who do not meet the definition of §120.39 from eligibility for §124.16 and instead requires approval of these individuals through §124.8(5). The new §124.16 clause, incorporating this language, may be found on page twenty-nine of the Guidelines and consists of the following text:

> "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."

In a combination scenario where both the foreign and DDTC vetting options are utilized, the proposed agreement will include a new §127.4(4) clause in addition to the § 124.8(5) and the revised §124.16 clauses.

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