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September 10, 2010

VIA E-MAIL: DDTCResponseTeam@state.gov

Mr. Charles Shotwell
Director, Office of Defense Trade Controls Policy
U.S. Department of State
SA-1 12th Floor
Washington, D.C. 20522-0112

REF: RIN 1400-AC68

**RE: Proposed Amendment to the International Traffic in Arms Regulations:
Dual Nationals and Third-Country Nationals Employed by End-Users**

Dear Mr. Shotwell:

The American Bar Association (“ABA”) Section of International Law and the Section of Public Contract Law (the “Sections”) welcome this opportunity to comment on the proposed rule published by the U.S. Department of State, Directorate of Defense Trade Controls (“DDTC” or “State”) on August 11, 2010 (75 Fed. Reg. 48,625) regarding dual nationals and third country nationals employed by end-users identified in approved export licenses, other export authorizations, or license exemptions for the transfer of defense articles or technical data (the “Proposed Rule”).

The views expressed herein are presented on behalf of the Section of International Law and the Section of Public Contract Law.¹ They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association itself.

The American Bar Association is the largest voluntary professional association in the world. The Section of International Law, with over 20,000 members, is the ABA leader in the development of policy in the international arena, the promotion of the rule of law and the education of international law practitioners. Many of its members are experienced in the export control laws of the United States and other countries, as well as their national security, privacy and human rights laws. The Section of Public Contract Law is the ABA leader in the development of policy with respect to government contracting. Many of its members are also experienced in the export control laws of the United States and other countries as they apply to US and foreign public procurements, as well as with national security considerations associated with such procurements.

¹ The Honorable Thomas C. Wheeler, a member of the Council of the Section of Public Contract Law, did not participate in and abstained from the Section’s consideration of these comments.



The Sections commend DDTC's efforts to amend the International Traffic in Arms Regulations ("ITAR") to eliminate the separate license requirement for employees of end-users and consignees based upon country of birth or nationality in favor of a requirement for foreign entities to comply with the ITAR and to perform due diligence regarding potential risks of diversion. We believe this approach will strengthen the national security of the United States while enhancing U.S. foreign relations and enabling end-users to avoid liability under host country laws that conflict with DDTC's current practice.

As the Proposed Rule recognizes, separate license requirements for dual and third country national employees of end-users and consignees, based on their country of birth or nationality, have created significant tensions between the United States and its allies. For example, these requirements have adversely impacted the ability of trustworthy and established foreign defense partners to obtain ITAR authorizations for their employees who are citizens of or born in one of the countries specified in Section 126.1 of the ITAR. Consequently, when faced with a dual or third country national employee of a Section 126.1 country, such partners have been forced to choose between two untenable positions: (a) disqualifying or even terminating a trustworthy and valued employee while exposing themselves to significant liability under the host country's human rights, privacy, or discrimination laws; or (b) retaining the employee while risking the loss of the business requiring a DDTC license or violating the ITAR. We believe neither option advanced U.S. national security interests or foreign relations.

The Sections recognize that the changes to the ITAR specified in the Proposed Rule would require foreign defense partners to implement written processes and procedures to ensure compliance and prevent diversion. In general, the Sections welcome

that approach, which allows these partners to shape their compliance policies and programs in a manner tailored to the diversion risk and within the legal system of their host countries. We agree that such compliance policies and programs must be written by foreign defense partners and that these partners must document the application of the procedures in those written programs.

But given the goals of the State Department and its explicit recognition of the need to alleviate the "tremendous administrative burden" and address the human rights issues in connection with the current licensing of dual and third-country nationals, we believe the text of any amendments to the ITAR should be revised and clarified as reflected in the attached Draft Modification to Proposed Section 126.18 and as further described below.

1. Any final or interim rule amending the ITAR to incorporate the changes made in the Proposed Rule should contain language clarifying that foreign defense partners will have the responsibility and discretion to craft effective compliance processes and procedures. We would also like DDTC to confirm that under the language in the Proposed Rule an employee who travels for personal or business reasons to a Section 126.1 country will not be automatically disqualified from access to a defense article or technical data. We believe that, just as nationality and birthplace, these factors alone should not establish a presumption of a diversion risk. We seek such confirmation because the text of the Proposed Rule could be interpreted in a manner that would either disqualify such an employee automatically or require a specific DDTC authorizing determination in her favor, and such an interpretation would negate the objectives outlined in the Proposed Rule. Foreign defense partners should be given the discretion to develop screening procedures and standards that would account for various factors. We believe that DDTC should permit foreign defense partners to weigh all available and relevant information about an employee to determine whether the employee presents a diversion risk.
2. We believe that any changes to the ITAR should provide that foreign defense partners can satisfy the conditions in Section 126.18(b) by certifying, consistent with the laws and regulations of the jurisdictions under which they operate, that they have implemented policies and procedures to prevent diversion of ITAR-controlled defense articles, technical data, and

- defense services to unauthorized destinations and entities, or for unauthorized purposes. Included with our recommended changes to the Proposed Rule is a form of certification for these purposes. This certification will require foreign defense partners to commit in writing to implement the policies and procedures, and to provide them to DDTC upon request, but will not dictate the content of particular policies or procedures as such requirements could conflict with many differing host country human rights, privacy, or discrimination laws. Attached is a suggested Non-Disclosure Agreement (NDA) that foreign defense partners may use in their compliance processes and procedures for preventing diversion.
3. We believe the text contained in the Proposed Rule should be amended so that foreign defense partners can rely upon the security clearance process and determination of the host country, and not be required to screen beyond that process, though leaving open the discretion to conduct further due diligence when advisable.
 4. We believe DDTC should recognize the effectiveness of host government industrial security regimes that provide for effective safeguarding of defense articles and prevent unauthorized access to such articles such as Canada's Controlled Goods Program. Accordingly, we believe the text of the Proposed Rule should be amended to provide that compliance with such programs when approved by DDTC will satisfy the conditions of Section 126.18(b).
 5. We believe the term "substantive contacts" should be revised to better reflect both the objective of the Proposed Rule and to help foreign defense partners who are not already subject to an effective host government industrial security regime develop a screening standard for employees without a host country security clearance. For example, the current text of the Proposed Rule can be interpreted to include relationships with family members in a Section 126.1 country and presumed to raise a risk of diversion. Such an interpretation leads to the same human rights concerns that the Proposed Rule aims to eliminate since discrimination on the basis of family status or relationships is prohibited in many foreign jurisdictions. We believe any amendments to the ITAR should specify that "substantive contacts" are limited to contacts from activities controlled by this Subchapter and do not include relationships with family members. In addition, we believe that the any amendments to the ITAR should not attempt to define "substantive contacts" with a Section 126.1 country because: (1) a "substantive contact" can vary, depending on the factual scenario in question; and (2) attempts to define (and require screening of) a "substantive contact" could result in creating conflicts of law with the host country's human rights, privacy, or discrimination laws.
 6. Because the text of the Proposed Rule states that "nationality does not, in and of itself, prohibit access to defense articles or defense services," we understand that DDTC's focus is on the risk of diversion posed in particular factual contexts, rather than making any assumption that an employee with nationality or birthplace in a particular country necessarily (or even presumptively) must be denied access to defense technology. We agree with this approach. In order to give legal effect to this policy intent, we believe it would be necessary for the final regulation to clarify that Section 126.18 applies notwithstanding the statement in Section 126.1(a) that the exemptions provided in the ITAR do not apply with respect to articles for export to any proscribed countries, areas, or persons listed in Section 126.1.
 7. We believe that DDTC should allow foreign defense partners to seek guidance as to whether their procedures and other aspects of their compliance programs are sufficient to meet the standards of the Proposed Rule, to the extent that DDTC resources permit. One approach to screening may be effective for one foreign defense partner but not for another. We believe a foreign defense partner should be given the discretion to shape its effective compliance program. To the extent resources permit, we believe DDTC should provide advice on its expectations in specific cases if requested, although the submission of policies, procedures, or

screening programs for DDTC review should not become a license condition or TAA approval condition.

8. We believe that the proposed rule should be amended to make clear that no approval from DDTC is required for U.S. companies to work directly with dual/third country national employees of foreign defense partners. As currently drafted, the Proposed Rule permits transfers “within” a foreign defense partner. The Proposed Rule does not specifically authorize transfers from a U.S. company directly to dual/third country national employees of authorized foreign defense partners. Without this modification, we expect that a significant number of U.S. applicants will continue to apply for additional licenses or provide additional information within a license application to cover dual and third country national employees. Accordingly, the attached amends the Proposed Rule to permit transfers “to or within” a foreign defense partner.
9. We believe Section 124.16 of the ITAR is a useful provision and has proven consistent with the national security objectives of the United States.. Moreover, nothing in the preamble to the Proposed Rule suggests otherwise, or provides any national security rationale for the removal of Section 124.16. Accordingly, we urge DDTC to retain this provision in the ITAR. The proposed Section 126.18 does not eliminate the need for Section 124.16, nor is the former inconsistent or incompatible with the latter. In situations where a foreign defense partner is unable to satisfy the requirements of the proposed Section 126.18 (for example, when an employee does not have a security clearance and the approved foreign entity has not completed documentation of the screening process and/or technology security/clearance plan) or elects not to incur the additional administrative and other burdens inherent in compliance with Section 126.18, retaining Section 124.16 would provide a useful authorization (as it does currently) to permit retransfers to certain employees of the foreign entity (i.e., nationals of countries that are members of NATO, the European Union, Australia, Japan, New Zealand, and Switzerland). The removal of Section 124.16 would result in a rollback of current authorizations and may require certain companies who currently utilize this authorization to seek licenses in the future. In addition, it should be made clear in the preamble to the Proposed Rule that it does not apply to authorizations, including under TAAs and MLAs, already in existence at the effective date of the rule.
10. We believe the proposed Section 126.18 to be inconsistent with the current Section 124.16, which authorizes the retransfer of technical data and defense services to “individuals who are third country/dual nationals employees.” Section 124.16 does not distinguish between “direct employees” and other forms of employees that constitute a foreign defense partner’s “regular” workforce (such as contract employees who work under the operational control of the partner, or part-time employees), and the preamble contains no suggestion that this has been a problem in the context of Section 124.16. Furthermore, as stated in the current DDTC “Guidelines for Preparing Agreements” and “Guidelines for Preparing Electronic Agreements” foreign defense partners who are signatories to a DDTC-issued agreements may be authorized to treat contract employees as their employees if the partners are willing to assume legal responsibility for the contract employees’ actions with regard to the ITAR and if the contract employee has signed a Non-Disclosure Agreement. If the dual or third country national otherwise meets the conditions of the exemption as specified in Section 126.18(c), we believe the form of employment should not be determinative of the applicability of the exemption. If not clarified to be consistent with the current Section 124.16 and DDTC Guidelines, which includes all forms of a foreign defense partner’s regular workforce, to include part-time and contract employees, the proposed regulations would constitute a rollback of current authorizations. Furthermore, the new rule would result in multiple complicated authorization requirements for many partners who rely on many forms of employment to meet workforce needs (particularly in the current economy). As such, the new exemption would be difficult to manage and would be

impractical, thereby leading many partners to conclude not to utilize the Section 126.18 exemption, but rather continue to seek licenses or agreements. This issue is addressed in the attached revisions to the Proposed Rule.

11. Furthermore, we note that the current Section 124.16 authorizes the transfer of technical data and defense services to “individuals who are third country/dual nationals employees” of authorized sublicensees, while the proposed Section 126.18 does not authorize such transfers. Again, there is no indication that the inclusion of sublicensee employees has been an issue under Section 124.16. If the proposed Section 126.18 is not amended to include sublicensee employees, many companies will continue to apply for additional licenses or provide additional information within a license application to cover dual national and third-country national employees of their sublicensees.
12. The President has committed his Administration to harmonize the treatment of foreign persons under the ITAR and the Export Administration Regulations (“EAR”). Accordingly, we anticipate that Bureau of Industry and Security will amend the EAR to remove deemed reexport license requirements when a corporation maintains a due diligence program to prevent diversion by its employees, including persons who are not nationals of the host country.
13. We recommend that State further consult with U.S. industry and governments of U.S. allies to develop formal or informal model due diligence standards and practices. Given the short period of time available to comment on the Proposed Rule, we do not believe there has been sufficient time for concerned parties to present for immediate consideration effective, practical standards and practices for due diligence regarding risk of diversion within the comment period. Upon request and adequate lead-time, the ABA Section of International Law, Export Controls and Economic Sanctions Committee would be pleased to provide recommendations regarding model due diligence standards.

We recommend that the attached revisions to the language of the Proposed Rule be made before any amendments to the ITAR are issued in an interim final or final rule. We believe the attached recommendations and the comments set forth above are consistent with DDTC’s intent and preserve the national security of the United States. We look forward to continued communications regarding these important issues and we appreciate your consideration of these comments.

Sincerely,



Salli A. Swartz
Chair, ABA Section of International Law



Donald G. Featherstun
Chair, ABA Section of Public Contract Law

Draft Modification to Proposed Section 126.18

Sec. 126.18 Exemptions Regarding Transfers to Employees who are Dual Nationals or Third-Country Nationals.

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(a) Subject to the requirements of paragraphs (b) and (c) of this section and notwithstanding any other provisions of this Part, no approval is needed from the Directorate of Defense Trade Controls (DDTC) for the transfer of defense articles, including technical data and defense services, to or within a foreign business entity, foreign governmental entity, or international organization that is an approved end-user, consignee, or sublicensee for those defense articles (including technical data and defense services), including the transfer to dual nationals or third country nationals who are bona fide, regular or contract employees, employed by the foreign business entity, foreign governmental entity, or international organization. The transfer of defense articles (including technical data and defense services) pursuant to this section must take place completely within the physical territories of the country where the end-user is located or the consignee operates, and be within the scope of an approved export license, other export authorization, or license exemption.

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The transfer of defense articles (including technical data and defense services) to any dual national or third-country-national contract employee of an approved foreign entity, foreign governmental entity, or international organization that is hired through a staffing agency or other contract employee provider is authorized only if the foreign entity, foreign governmental entity or international organization is legally responsible for such contract employee's actions with regard to transfer of ITAR-controlled defense articles to include technical data, and defense services. Transfers of defense articles to include technical data to the staffing agency or other contract employee provider, either from the foreign entity or from any contract employee is not authorized.

(b) The provisions of Sec. 127.1(b) are applicable to any transfer under this section. As a prerequisite to receiving any defense article, any foreign business entity, foreign governmental entity, or international organization, as a "foreign person" within the meaning of Sec. 120.16, that receives a defense article, including technical data, is responsible for implementing effective procedures to prevent diversion to destinations, entities, or for purposes other than those authorized by the applicable export license or other authorization (e.g., written approval or exemption) and must comply with U.S. laws and regulations (including the ITAR).

(c) (1) Pursuant to paragraph (b) of this section, the end-user, or consignee, can meet the above conditions, prior to access to defense articles, by:

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(i) Requiring a security clearance approved by the host nation government for its employees; or

(ii) Executing an ITAR Compliance Certification in the format below that it has implemented policies and procedures to prevent diversion of ITAR-controlled defense articles, technical data, and defense services to unauthorized destinations and entities, or for unauthorized purposes; or

(iii) Complying with the host nation government's industrial security program that provides for effective safeguarding of defense articles, including technical data, and prevents unauthorized access to such articles, as approved for this purpose by DDTC.

(2) In the case of (c)(ii) above, the written policies and procedures may include, for example, screening its employees for substantive contacts (limited to activities controlled by this Subchapter and excluding contacts with family members) with restricted or prohibited countries listed in Sec. 126.1, the execution of Non-Disclosure Agreements, or other similar procedures. The written policies and procedures will be available to DDTC or its agents upon request.

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(ii) The end-user or consignee have in place a process to screen its employees and to have executed a Non-Disclosure Agreement that provides assurances that the employee will not transfer any information to persons or entities unless specifically authorized by the consignee or end-user.

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Deleted: Substantive contacts include, but are not limited to, recent or regular travel to such countries, recent or continuing contact with agents and nationals of such countries, continued allegiance to such countries, or acts otherwise indicating a risk of diversion. Though nationality does not, in and of itself, prohibit access to defense articles or defense services, an employee that has substantive contacts with persons from countries listed in Sec. 126.1(a) shall be presumed to raise a risk of diversion, unless DDTC determines otherwise. End-users and consignees must maintain a technology security/clearance plan that details its procedures for screening employees for such substantive contacts and maintain records of such screening.

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ITAR Compliance Certification

In accordance with Section 126.18 of the International Traffic in Arms Regulations (the "ITAR"), and as a condition for eligibility to transfer to its employees ITAR-controlled defense articles, technical data, or defense services it receives pursuant to any ITAR authorization or exemption, [PARTY] hereby certifies, to the fullest extent permitted by the laws and regulations of the jurisdictions under which it operates, that it:

1. has implemented policies and procedures to prevent diversion of ITAR-controlled defense articles, technical data, and defense services to unauthorized destinations and entities, or for unauthorized purposes, and will provide copies of such policies and procedures to the U.S. State Department, Directorate of Defense Trade Controls ("DDTC") upon request; and
2. understands the requirement under Section 126.1(e) of the ITAR to inform DDTC of any proposed or actual sale or transfer of ITAR-controlled defense articles, technical data, or defense services to any country identified in Section 126.1 of the ITAR.

NAME:

TITLE:

SIGNATURE:

DATE:

SUGGESTED NON-DISCLOSURE AGREEMENT

I, _____, acknowledge and understand that any technical data related to defense articles on the U.S. Munitions List that I will have access to or which is disclosed to me under this export license by (employer's name) is subject to export control under the International Traffic in Arms Regulations (Title 22 Code of Federal Regulations Parts 120-130) (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 Office of Trade Controls Licensing, Directorate of Defense Trade Controls, U.S. Department of State.

I further certify that I do not represent any entity that is owned or controlled by, nor do I act for or on behalf of, any country that is subject to Section 126.1 of the ITAR. Furthermore, I certify that I understand and will comply with the notification requirements of Section 126.1(e) of the ITAR.

[REST OF NDA FORMAT REMAINS UNCHANGED]

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