



October 10, 2013

Mr. Ed Peartree
Director, Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State
Washington, DC 20522

Subject: RIN 1400-AC37

Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions

Dear Mr. Peartree:

The Aerospace Industries Association (AIA) and our member companies welcome the opportunity to provide comments on the interim final rule amending the International Traffic in Arms Regulations (ITAR), 22 CFR Parts 120-130. The new interim rule responds very favorably to many of industry's concerns and marks a significant streamlining and clarification of the regulatory requirements. AIA and our members are particularly pleased that the following significant amendments have been made to the rule:

- 1) The definitions of "brokers" and "brokering activities" have been narrowed.
- 2) Registration requirements/burdens have been reduced by allowing corporate entities engaged in brokering activities that are owned or controlled by a U.S. Exporter/Manufacturer registrant to be included on that registrant's registration statement, eliminating duplicate registration requirements and cost.
- 3) The types of USML defense articles that trigger brokering approval requirements have been significantly narrowed.
- 4) The need for approvals has been limited by identifying activities exempt from prior approvals.

AIA and our member companies greatly appreciate DDTC's efforts to respond favorably to many of industry's concerns. However, our members have continued to express concern at the failure to provide explicit language and requests further clarification on some aspects of the rule.

§129.2(a) “Broker”

Request for Clarification: §129.2(a) defines a “broker” as any of the following persons “who engages in the business of brokering activities”:

- 1) A US person, wherever located
- 2) A foreign person if located in the United States
- 3) A foreign person located outside the United States where the foreign person is “owned or controlled by a US person.”

This is an important clarification to current language in 129.2 which applies to foreign persons “subject to U.S. jurisdiction”. However, as discussed further below, the 129.3 requirement to register does not refer back to this newly clarified definition of “broker”. Rather, it requires any “person” who engages in “brokering activity” to register regardless of whether they meet the definition of a “broker”. As such, we would respectfully request that this apparent drafting oversight be corrected in the final rule, or at the very minimum be clarified through official DDTC correspondence.

Comment: §129.2(a) is a significant reduction in the extraterritorial reach of the brokering rule to foreign persons outside the United States. However, it has a chilling effect on the ability of U.S. companies that have foreign subsidiaries or entities “controlled” within the scope of the note under §129.2(a) to market foreign defense articles and defense services. Foreign entities competitors in the same business will have a competitive advantage over the U.S. owned or controlled foreign person. This is contrary to one of the objectives of export reform and does not target the scope of the brokering on the particular defense article or defense service but on the nature of U.S. ownership or control. It is suggested that the scope of §129.2(a)(3) be limited to brokering activities involving §126.1 countries.

§129.2(b) “Brokering Activities”

Comment: Item (iii) of §129.2(b) (2) excludes, “Activities by regular employees (see §120.39 of this subchapter) acting on behalf of their employer, including those regular employees who are dual nationals or third-country nationals that satisfy the requirements of §126.18 of this subchapter” from the definition of “brokering activities.” While that provision applies to bona fide regular employees, further clarification by DDTC is requested by industry as to the reason why this provision apparently excludes all other foreign nationals or dual nationals covered by explicit authorizations such as a TAA or MLA or under §124.16. If a third country foreign national or dual national has been authorized by DDTC to be employed by a foreign party to an agreement or otherwise, industry believes that such persons should be included within the scope of the exclusion. It is possible that the exclusion in item (vi) of the same section would cover that situation, but that is not clear especially in light of the explicit reference to the exemption in §126.18. Moreover, the use of the term “regular employees” excludes shorter-term contractors acting on behalf of the company.

Recommendation: AIA urges DDTC to consider removing the term “regular employees” and replacing it with “persons” to provide further clarification.

Request for Clarification: Item (iv) excludes “activities by an attorney that do not extend beyond the provision of legal advice to clients.” This exemption is ambiguous, and could benefit from a clear and specific definition of “legal advice,” as opposed to other legal services that an attorney provides. For example, would drafting a sale agreement be “legal advice”; the same question can be asked about “negotiating” the deal, assisting with internal business strategy decisions, or advising on the bona fides or risks of doing business with any potential buyer or other party to a sales transaction. The attorney is providing legal counsel to either the buyer or seller regarding legal matters affecting the sales transaction, and these activities should be exempt from consideration as brokering.

Comment: Item (iv) only exempts attorneys under the exemption for “*activities by an attorney that do not extend beyond the provision of legal advice to clients.*” However, there are often compliance professionals who have the requisite experience and background knowledge to provide regulatory and compliance guidance on regulations such as the ITAR. AIA and our member companies believe these individuals should be afforded the same benefits as an attorney under the brokering activities exemption.

Recommendation: AIA urges DDTTC to not limit the definition of those providing compliance and “legal advice” to only attorneys and broaden the scope of the exemption.

Question for the FAQ:

A US consulting firm or individual is approached by a foreign company to conduct a study on the possible global (or US) market for a new (current) defense product. The study would:

- Review market needs for such a product
- Discuss competitive products
- Review export control, intellectual property, acquisition rules, etc., with respect to marketing and selling such a product.

The firm would not:

- Engage in marketing the product
- Represent the contracting company before any government

Are any actions performed by the firm considered brokering?

Suggested response: No

§129.2 (a), (c)

Comment: Under §129.2 (a) and (c), the scope of brokering is intended to include “engaging in the business of brokering.” However, the definition of brokering activities can capture organizations that are not business entities or engaged in the business of brokering. For example, AIA often sets up events and meetings that could be seen as “promoting” or “otherwise assisting” in the sale of a defense article or defense service. However, AIA is not engaged in the “business of brokering.” It is possible that the some of the activities of AIA and other similar associations would be interpreted to be brokering activities and would require registration and prior approval.

Recommendation: AIA suggests adding the following language to §129.2(c): “*Engaging in the business of brokering means a commercial or industrial enterprise and is not intended to include business associations and similar enterprises where the underlying activity is to promote the general interests of the members of the group and is not for the principle purpose of the sale of a discrete product.*” This language or similar language would clarify that there must be some compensation or other remuneration for an entity to be in the business of brokering.

§129.3(a): “Requirement to Register”

Request for Clarification: §129.3(a) of the new interim rule requires “any person who engages in brokering activities” to register with DDTC. While this may be an oversight, the reference to “person” arguably expands the scope of the registration requirement beyond the definition of “broker” set forth in §129.2(a). For example, “person” would include all foreign persons who engage in “brokering activities” and thus trigger a registration requirement regardless of whether they are located outside the U.S. or are not owned or controlled by a U.S. person as currently written. However, as noted earlier, only a limited number of foreign persons would now be considered “brokers” subject to the ITAR - i.e., foreign persons located in the United States and foreign persons abroad that are owned or controlled by U.S. persons. AIA’s member companies request a correction to this language or at a minimum an official clarification that only individuals and entities who satisfy the definition of “broker” (§129.2(a)), as opposed to “persons”, and who engage in the business of brokering activities, are required to register.

Question for the FAQ:

A multilingual American living in a European city is retained by one or more US companies to review European MOD RFPs and identify possible business for those companies. He:

- Is provided a modest monthly retainer by each company for his services
- Translates where necessary the RFPs
- May interact with government officials to collect information (but does not market products)
- Provides information on the correct procedure and paperwork for making an offer
- Suggests individuals within the MOD or relevant uniformed service to approach
- Proffers advice on what US and local export control issues the company must address
- He may be given a finder’s fee if the company is successful in its bid

He does not:

- Enter into negotiations with the MOD on behalf of the company
- Have any authority to market or promote the US company’s products to the foreign government
- Have the authority to sign any document, contract, or commitment for the company

Has this person crossed the line at any point where he needs to register as a broker?

Suggested response: No

§129.3(b)(2): *Exclusion for Customs Brokering Registration*

Comment: §129.3 (a) states: “Except as provided in paragraph (b) of this section, any broker who engages in brokering activities (see Sec. 129.2) is required to register with the Directorate of Defense Trade Controls. Registration under this section is generally a precondition for the issuance of approval for brokering activities required under this part 129 or the use of exemptions.” Paragraph (b) of that section provides the following exemptions:

“(b) Exemptions. Registration, approval, recordkeeping, and reporting under this section are not required for:

- (1) Foreign governments or international organizations, including their employees, acting in an official capacity; or
- (2) Persons exclusively in the business of financing, insuring, transporting, *customs brokering*, or freight forwarding, whose activities do not extend beyond financing, insuring, transporting, *customs brokering*, or freight forwarding. . . [*emphasis added*”

“Customs brokering” is not among the activities identified as “brokering activities” in §129.2(b)(1)(i). Accordingly, its inclusion in the exemptions is unnecessary and potentially confusing.

Recommendation: Delete “customs brokering” in this section and/or clarify that “customs brokering” is not an identified “brokering activities” in §129.2(b)(1)(i).

§129.4: “*Requirement for approval*”

Comment: §129.4 places foreign persons located outside the U.S. that are owned or controlled by a U.S. person to be at a competitive disadvantage to foreign persons that are not owned or controlled by a U.S. person. In cases where non-owned or controlled foreign person have similar foreign defense articles or defense services as the U.S. owned or controlled entity, brokering activities of the latter entity would be subject to the jurisdiction of DDTC. The oversight by DDTC of activities of the U.S. owned or controlled foreign person and possible requirement for prior approval will be used by the non-owned or controlled foreign person to the former’s detriment. It is recognized that §129.5(b) provides an exemption for NATO “plus” but it is unclear why the scope of the exemption is not broader. The national security or foreign policy interest should be tied to the defense article or defense service being provided and not to whether the foreign entity is owned or controlled by a U.S. person.

Recommendation: AIA and our member companies believe there should be equal treatment for all foreign persons, regardless of U.S. ownership or control, for foreign defense articles or defense services.

Question for FAQ:

Was §129.4 intended to have symmetric treatment of foreign defense articles or defense services and US-origin defense articles or defense services? If so, would “enumerated in §129.4(a) (2)” be seen to modify both foreign and US-origin defense article or defense service?

Suggested response: Yes

129.5(b): “Exemption from requirement for approval”

Request for Clarification: §129.5(b) provides an exemption from requirement for approval to a foreign defense article or defense service when “arranged wholly within and destined exclusively for the North Atlantic Treaty Organization, any member of that organization, Australia, Israel, Japan, New Zealand, or South Korea, except in the case of the defense articles or defense services specified in §129.4(a)(2) for which approval is required”.

AIA member companies presume and thus request clarification from DDTC that foreign defense articles manufactured outside of these countries still benefit from the "NATO plus" exemption if (a) destined for an end-customer within these countries, and (b) the sale is brokered or arranged by parties only within these countries. Furthermore, it is not entirely clear what "arranged wholly within" means, and a clarification in this regard would also be helpful. Finally, please refer back to the comment on §129.4 that it is not clear why this exemption is not broader.

Request for Clarification: As the rule current reads, the "NATO plus" exemption only applies to foreign defense articles and defense services. Therefore, a prior approval would still be required for all US-origin defense articles and defense services listed §129.4(a)(2), even if brokering activities only involve these countries. However, there is some ambiguity with regard to whether all foreign defense articles and services are exempt. The exception clause at the end of this provision in the exemption states - "except in the case of the defense articles or defense services specified in §129.4(a)(2) for which approval is required". AIA believes that the accurate reading of this statement is a carve-out from the exemption of those foreign defense articles that have the same characteristics and capabilities as the USML categories identified in §129.4(a)(2). Thus, AIA request that DDTC clarify whether all foreign defense articles and services are eligible for the "NATO plus" exemption, or a more limited set that excludes items otherwise defined by the specified USML categories.

§129.6 (b) (1): *Procedures for Obtaining Approval*

Comment: §129.6(b) states that the request for approval shall describe fully the brokering activities that will be undertaken, including: “(1) the action to be taken by the applicant to facilitate *the manufacture, export, import, or transfer* of a defense article or defense service (which may be referred to as a “defense article or defense service transaction”).” [*Emphasis added.*]

This list of actions is not consistent with the definition of “brokering activities” in Sec. 129.2, (*i.e.*, “manufacture, export, *permanent* import, transfer, *reexport, or retransfer.*” [*Emphasis added.*] Omission of certain terms creates uncertainty as to what procedures to follow.

Recommendation: Actions required to be identified by §129.6(b) should be consistent with the actions as defined in Sec. 129.2.

§129.7: “Policy on Embargoes and Other Proscriptions”

Comment: The current reading of this section could be interpreted to require a foreign person, with no connection to a U.S. person and therefore not required to register with DDTC, to either not engage in or make a proposal to engage in brokering in a §126.1 country. It would appear to be a stretch of jurisdictional reach to make the broker regulations applicable to foreign entities where there is no apparent connection to the United States.

Question for FAQ:

Is §129.7 applicable to a foreign entity that is not U.S. owned or controlled and therefore not required to register?

Suggested response: No. *The jurisdictional scope of the brokering regulations does not include foreign entities that are not U.S. owned or controlled and there is no intention to include them within the scope of any portion of the regulations.*

§ 129.8(c): Statement of Registration Certification

Comment: This section requires the intended registrant to certify, in part, whether it (the registrant), its related entities (such as parent and affiliated entities), its officers, directors and other senior officers or officials (as well as those of its parent and affiliates), and “partners, members” have ever been charged or convicted of various crimes or otherwise ineligible to contract. The inclusion of the words “partners” and “members” is confusing and potentially overreaching because those terms are not limited to “partners” or “members” who are significant owners of the registrant. As a result, the regulation could be interpreted to include “business partners” (such as subcontractors who are independent third parties) and non-equity or minor-equity “members” or owners of an association or other organization that is required to register (i.e., if engaged in “brokering” activities). A publicly-held company may have hundreds or thousands of shareholders who could potentially fall within these definitions. Requiring certification for “partners” or “members” is unreasonable and impractical for many corporations.

Recommendation: AIA respectfully requests that DDTC either remove the terms “partners” and “members,” or a clarification that the terms refer only to partners and members who are significant owners of a registrant (e.g., more than 30% stakeholder).

§129.8(d) (2) “Submission of Statement of Registration, registration fees, and notification of changes in information furnished by registrants.”

Comment: §129.8(d) (2) of the interim rules identifies various changes to a registered broker's existing statement that would trigger a five day notification requirement to DDTC. Of particular note, such notifications would be required for changes to the “legal organization structure” and “partners” of a registrant. However, there could be a number of organizational structure changes that should not be material or otherwise require notification to DDTC. AIA does not believe that industry should be required to monitor and notify DDTC every time there is an internal change in reporting relationships, corporate functional realignments, changes in divisions or business units that have no impact on ITAR-

regulated activity, etc. It is unclear to AIA and our members as to how such information would be relevant to DDTC's regulatory oversight role. Furthermore, it is unclear as to what is meant by the word "partners" – which could be inapplicable to many corporate structures if viewed as only applying to partnerships, or could extend to joint venture arrangements or other "partners" in an informal sense.

Recommendation: AIA urges DDTC to provide a clear definition of the terms "legal organizational structure" and "partners" in the final rule.

§129.9: Clarifying Request for Guidance Procedures

Comment: Under Sec. 129.9, any person "desiring guidance on whether an activity constitutes a brokering activity within the scope of this part 129 may request in writing guidance from the Directorate of Defense Trade Controls. The request for guidance shall identify the applicant and registrant code (if applicable) and describe fully the activities that will be undertaken, including. . .

- "(3) A description of each defense article or defense service that may be involved, including:
- (i) The U.S. Munitions List category and sub-category for each article;
 - (ii) The name or military nomenclature of each defense article;
 - (iii) Whether the defense article is significant military equipment;
 - (iv) Estimated quantity of each defense article;
 - (v) Estimated U.S. dollar value of defense articles and defense services; and
 - (vi) Security classification;"

However, this list of requested information may not be available at the time of request or is irrelevant to the determination as to whether an activity constitutes a brokering activity. In particular, a person in search of guidance may not have answers to (iv) and (v) until well into the negotiation stage and (iii) and (vi) are not required to make a determination.

Recommendation: Delete subparagraphs (iii) through (vi) in sec. 129.9.

Best Regards,

A handwritten signature in black ink, appearing to read 'Remy Nathan', with a long horizontal flourish extending to the right.

Remy Nathan
Vice President, International Affairs
Aerospace Industries Association