

[Billing Code 4710-25]

DEPARTMENT OF STATE

Chapter - 22

Subchapter - M

Parts 120, 122, 126, 127, and 129

[Public Notice RIN 1400-AC37]

Amendments to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, Related Provisions, and Other Technical Changes

AGENCY: Department of State.

ACTION: Proposed Rule.

SUMMARY: This is a notice of proposed amendments to Part 129 of the International Traffic in Arms Regulations (ITAR) (22 CFR Part 129) relating to brokers and brokering activities. Amendments are also made to related provisions of the ITAR (22 CFR Parts 120, 122, 126, and 127). The proposed revisions are intended to clarify, among other things, registration requirements, the scope of brokering activities, prior approval requirements and exemptions, procedures for obtaining prior approval and guidance, reporting and record-keeping of such activities.¹ Conforming and technical changes would be made to other parts of the ITAR that affect export, as well as brokering activities. This amendment involves a foreign affairs function of the United States and, thus, is excluded from the major rule procedures of Executive Order 12291 (46 FR 13193) and the procedures of 5 U.S.C. 553 and 554. Nevertheless, it is being published as a proposed rule to provide the public with an opportunity to comment. The period for submission of comments will close sixty (60) days after publication of this proposed rule. In addition, this rule affects collection of information subject to the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.). The relevant information collection is to be reviewed by the Office of Management and Budget under Control Nos. 1405-0142 and 1405-0141.

DATES: The Department will accept comments from the public up to sixty (60) days from the date of publication.

ADDRESSES: Interested persons may submit comments by any of the following methods:

- E-mail: DDTCResponseTeam@state.gov with the subject line, "Brokering Rule Comments."
- Mail: Department of State, Directorate of Defense Trade Controls, Office of Defense Trade Controls Compliance, ATTN: "Brokering Rule Comments," 13th Floor, SA-1, 2401 E Street, N.W., Washington, DC 20037.
- Fax: 202-663-2994.

Persons with access to the Internet may also view this notice by going to the regulations.gov Web site at: <http://www.regulations.gov/index.cfm>.

¹ DTAG suggests that DDTC publish a "Guidelines for Part 129 Registration and Compliance" that includes these Examples from the Fed. Reg. and a step by step guide for registration, licensing, reporting, FAQs, etc.

FOR FURTHER INFORMATION CONTACT: (Name), Director, Office of Defense Trade Controls Compliance, Department of State, 12th Floor, SA-1, 2401 E Street, N.W., Washington, DC 20037; Telephone 202-663-XXXX or Fax 202-261-8198; or e-mail through DDTCResponseTeam@state.gov, with the subject line “Brokering Rule Comments, ATTN: (Name).”

SUPPLEMENTARY INFORMATION: This proposed rule would make several changes to Part 129 and other related sections of the ITAR that regulate brokers and brokering and implement the Brokering Amendment to the Arms Export Control Act (AECA) (§38(b)(1)(A)(ii) of the AECA, 22 U.S.C. §2778(b)(1)(A)(ii)).

Background

The Arms Export Control Act was amended in 1996 (Public Law 104-164) to provide for the regulation of brokering. The AECA was expanded and ITAR Part 129 was drafted to establish a statutory and regulatory framework for tracking the gray arms market and to make U.S. persons who facilitate the sale of foreign origin defense articles subject to the AECA. Brokers are to be held accountable for their activities via a legally mandated mechanism.

The following year, implementing regulations were added to the International Traffic in Arms Regulations (ITAR) in Part 129. These regulations have remained unchanged except for two minor technical changes.

In a 2003 mandated report to Congress, the Department of State noted that it was beginning a review of the brokering regulations. The purpose of the review was to assess the need to modify the regulations in light of the experience gained in administering them. The changes proposed in this notice were also shaped by comments from other agencies and industry, including a working group of the Defense Trade Advisory Group.

Revisions Relevant to Industry Concerns

Changes are proposed to key provisions involving definitions, registration, licensing, exemptions and reporting to reduce the potential for duplicative licensing, to simplify procedures and to reduce unnecessary burdens on industry. New exemptions are proposed, requirements for prior notification would be eliminated and detailed guidance on obtaining a brokering authorization is provided. The proposed changes also provide additional specificity regarding the applicability of these regulations to foreign brokers operating overseas.

Summary of Major Changes

Definitions of Broker and Brokering Activities

The definitions in current §§129.2(a) and (b) would be amended to clarify the terms “broker” and “brokering activities.” The revision also would more closely track the statutory definition of brokering activities, which includes any action that facilitates the manufacture, export, import or transfer of a U.S. or foreign defense article or defense service. The proposed regulation also is amended to conform to the Arms Export Control Act by including financing, transportation and freight forwarding as brokering activities. The proposal would delete the phrase “who acts as an agent for others” that is in the current regulatory definition of “broker,” but is not in the definition of “brokering activities” in the Arms Export Control Act. The proposal would clarify that brokering activities consist of “any action of an intermediary nature” to facilitate a defense article or defense service transaction.

The proposed rule also would clarify which activities are not “broker activities” for the purposes of Part 129. A proposed new paragraph (c)(1) of §129.2 would continue to exclude from the definition of “brokering activities” actions by U.S. persons in the United States that are limited to facilitating U.S. domestic sales or transfers. Paragraph (c)(2) of §129.2 also would add a new exclusion from the definition of “brokering activities” for such

activities by employees of the U.S. Government acting in official capacity. The proposed exclusion would clarify that the U.S. Government and its officers or employees acting in official capacity are not merely exempt from the requirements to register and obtain licenses, but rather are not covered by Part 129 at all.²

The proposed rule would add a new paragraph (c)(3) to §129.2 to clarify that activities that are undertaken by a person for that person's own behalf and that person is otherwise included in a DDTC license or authorization as a party to the transaction are not "brokering activities" for the purposes of Part 129.

The proposed rule also would add a new paragraph (d)(4) and (d)(5) to §129.2 to clarify that activities that are not of an intermediate nature generally are not "brokering activities" for the purposes of Part 129. A list of examples is included in the proposed rule.

These proposed changes to the definitions in §129.2 are intended to clarify which activities are "brokering activities" and subject to Part 129.

Brokering Activities Subject to Part 129

Under current definitions, Part 129 applies to a U.S. person who conducts brokering activities in the U.S. or abroad. It also applies to a foreign person who conducts brokering activities in the U.S., or abroad if subject to U.S. jurisdiction. The proposed revision would clarify when a foreign person's brokering activities abroad are subject to Part 129 by making it clear that brokering activities involving US-origin defense articles or services or brokering activities performed for the benefit of a U.S. person are brokering activities subject to Part 129.

If the brokering activity is subject to Part 129, then the person engaging in such an activity must register with DDTC.³

Registration Requirements and Exemptions

Any person who engages in brokering activities subject to Part 129 must register unless the person is exempt from registration under §129.4(b).

Editorial and technical revisions would be made to certain registration and related registration exemption provisions in §129.4.

A new paragraph (b)(3) would be added to §129.4 to exempt brokering activities relating to commercial communications satellites.⁴

A new paragraph 129.4(b)(4) would be added to exempt U.S. persons registered pursuant to Part 122 of this Subchapter, their U.S. subsidiaries listed in their Statements of Registration, and the bona fide and full-time, regular employees of the registrants whose brokering activities involve only the defense articles or services subject to export licenses obtained by the registrants.

² The unmarked portions of this paragraph are from the original proposed rule but are proposed to be moved to this location in the text so that the discussion of the exclusions from the definition appears immediately after the discussion of the definition.

³ The following paragraph is shown here as deleted but is proposed to be moved to a place earlier in the text. See footnote 1 and the accompanying text.

⁴ In other countries, activities related to commercial communications satellites are not controlled as defense articles, i.e. not the grey arms market – the original focus of the Legislation.

A new paragraph 129.4(b)(5) is proposed to be added to exempt activities involving foreign articles that incorporate USML parts or components, provided that the retransfer or reexport of the USML parts or components are authorized by DDTC.

A new paragraph would be added as §129.4(d) to correspond with the current §122.1(c) and provide that a broker registration is generally a precondition to the issuance of a prior approval for brokering activities or the use of a brokering exemption.

Persons exempt from registration are also generally exempt from the requirement in proposed §129.5 for prior approval for brokering activities, as well as reporting and record-keeping requirements. Proposed new paragraph (c) to §129.4 would confirm, however, that brokers who are exempt from registration are subject nevertheless to the policy on embargoes and other proscriptions in §129.7.

Registration statement and fees

Registration requirements are included in Part 122 (e.g., notification of changes in information in registration submissions, notice of transfer of ownership or control to foreign persons and special provisions for mergers and acquisitions). In addition, the requirements for submissions by foreign person brokers are clarified. A broker would continue to be required to pay a set registration fee of \$2250 per year, if not otherwise registered under Part 122.

The requirements for the transmittal letter would be supplemented with a requirement to disclose whether the registrant or its senior officers or officials have been indicted or otherwise charged (e.g., by information) or convicted by foreign governments of any crimes similar to those listed in §120.27 of the ITAR or are ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country. A similar requirement is added to a broker's application for prior approval of brokering activities (see §129.8(a)).

A new paragraph would be added as §122.2(d) to allow foreign person parents, subsidiaries or affiliates to be registered under the registration of a U.S. person. To qualify for such a registration, the parent, subsidiaries and affiliates must be listed in the registered broker's Statement of Registration and satisfy other criteria as described in this new paragraph, including a certification by the foreign person that they are subject to the requirements of Part 129.

Policy on Embargoes and Other Proscriptions

§129.6 would be amended to make some clarifications, including the condition that exemptions for prior approval in §129.6 do not apply to brokering activities involving countries or other persons subject to embargoes and other proscriptions cited in §129.6(a)(3) (e.g., those involving countries or other persons referred to in §126.1 or subject to a restriction published in the Federal Register).

Exemptions for Prior Approval Requirement

If a person engaging in brokering activities subject to Part 129 is required to register pursuant to §129.4, then prior approval of the activity is required unless exempted pursuant to §129.6.

The exemption paragraphs are renumbered in the proposed rule.

A new exemption would be added in a revised §129.6(f) (formerly §129.2(d)) for brokering activities performed by a broker for a manufacturer or exporter registered under Part 122 of this Subchapter. Certain conditions must be met. There must be a representation or other written agreement between the broker and the Part 122 registrant

that meets certain criteria. The brokering activities must involve only the Part 122 registrant's defense articles or defense services. Also, the Part 122 registrant must have obtained a license or other approval to authorize the broker to participate in the export of such defense articles or defense services associated with the brokering activities, and the brokering activities must be in accordance with the license or other approval. If a license or other approval is not required because the broker will use only public domain information, the Part 122 registrant must obtain a license or other approval prior to the export of any defense articles or defense services (e.g., to implement any sale generated by the broker). An amendment adding a new paragraph (d) to §126.13 would make it clear that a license application or request for approval must identify all brokers and describe the brokering activities involved in the transaction subject to the license authorization.

The exemption for brokering activities undertaken for an agency of the U.S. Government would be amended to make clear that the exemption applies only to persons under direct contract with a U.S. Government agency for the sole use by the U.S. Government agency or for carrying out a foreign assistance or sales program authorized by law and subject to the control of the President by other means. In the latter case, use of this exemption requires either prior concurrence from DDTC or acknowledgment by the contracting authority of the U.S. Government agency that the exemption applies.

The §129.6(c)(1) exemption for brokering activities arranged within the North Atlantic Treaty Organization (NATO) , NATO member countries, Japan, Australia, New Zealand and South Korea would be amended to make it clear that the brokering activities must be undertaken wholly within these countries, the defense articles and services must be located within and destined for NATO or such countries, and that all persons participating in such activities (including defense article and service transactions) are nationals exclusively of such countries and eligible pursuant to §120.1(c) (see §129.6(c)(2)).

A new exemption would be added for brokering activities outside of NATO countries, Japan, Australia, New Zealand or South Korea that involve U.S.-origin, defense articles that are not significant military equipment (SME) where the end-use is limited to foreign government and international organization end-users (see §129.6(c)).

The list of excluded items in §129.6(e) would be expanded to cover certain sensitive defense articles and services (e.g., man-portable air defense systems or “MANPADS,” night vision equipment, spacecraft items that are SME, submersible vessels, direct energy weapons, and miscellaneous articles in U.S. Munitions List Category XXI.)

Prior Notification

The proposed revision would delete the requirement for prior notification in its entirety in the current §129.8. While nominally a notice provision, this Section had the effect of being a prior approval and proved to be confusing and difficult to administer. The revisions would re-title §129.8 and modify procedures for obtaining prior approval.

Procedures for Obtaining Prior Approval

The information required in a request for prior approval submitted by a broker is revised and clarified in proposed §129.8(a) and (b).

A provision adding a certification consistent with §126.13 would be added in §129.8(a) so that a request must include a statement as to whether the broker applicant or its senior officers or officials have been indicted or otherwise charged (e.g., by information) or convicted by foreign governments for violating any national statutes similar to those listed in §120.27 of the ITAR or are ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in defense trade under the laws of a foreign country. (See similar requirement in §122.2(b) for a broker’s registration transmittal letter.)

The proposal would provide more specific guidance as to the information required in a request (e.g., identities of all entities and individuals who would participate in the brokering activities, information regarding the defense articles and services and any fee, commission or other consideration). In this connection, the requirement for brokers to disclose fees, commissions or other consideration is separate from and additional to the disclosure requirements imposed on exporters, suppliers and vendors under Part 130 of the ITAR.

Proposed §129.8 recognizes that some of the information required by §129.8 may not be available at the time a request for prior approval is submitted (e.g., the quantity and value of defense articles or services to be brokered). The broker would be required to identify what information is omitted and explain why. DDTC has the discretion to take such circumstances into account in deciding whether to approve the request with or without conditions or to deny the request.

A provision would be added specifying that the validity period of a prior approval may not exceed four years.

Guidance

§129.9 would be re-titled and would revise the provision that enables persons to seek guidance from DDTC regarding the applicability of Part 129 to their activities. It would specify the procedures for obtaining guidance and that such guidance shall not substitute for prior approval when required under §129.8 of this Subchapter. As revised, this provision would be self-contained and would no longer reference the provision for advisory opinions in §126.9 of the ITAR.

Reports

§129.10 would be re-titled and revised to require that reports be submitted by January 31 of each year for brokering activities the preceding year or at the time of broker registration renewal for the preceding twelve month period and to clarify the information required in the reports.

Examples

Described below are several examples of conduct that constitute brokering activities and how the ITAR applies to such activities. These examples are illustrative only and are by no means exhaustive. These and other examples will be published in the Brokering Guidance to be made available to the public on the DDTC website.

Example 1 – A U.S. manufacturer of commercial avionics equipment contracts with a CSF (Customer Service Facilities) located in Singapore. The CSF provides maintenance and spares to aircraft operators around the world. The U.S. company sells its commercial avionics equipment to the CSF at a discounted price and the CSF can choose the price to re-sell the parts to an aircraft operator. The CSF has meetings with various aircraft operators related to service and support. The activity of the CSF is not a brokering activity because it does not involve either a defense article or a defense service.

2. A US manufacturer of a defense article enters into a sales contract with a government customer in a South American country. The US manufacturer employs a US based freight forwarder to arrange the pickup, containerization, transportation and delivery of the defense article to the customer. The freight forwarding activity is a brokering activity, as defined in the AECA and the proposed regulations. ITAR §129.2(b)(1). The brokering activity is subject to Part 129 because it is being conducted by a U.S. person. However, the freight forwarder is not required to register because the activities are limited to freight forwarding. ITAR §129.4(b)(2).

Example 3 – A Cayman Islands bank approaches a US manufacturer of a defense article and proposes to finance the sale of the manufacturer’s defense articles through letters of credit issued by the bank. As an inducement to hire the bank, the bank offers to arrange introductions to the procurement officials of several African governments. The financing activity is a brokering activity. ITAR §129.2(b)(1). The brokering activity is subject to Part 129 because it involves both U.S. defense articles and is for the benefit of a US person. ITAR §129.3(a)(3) and(4). The Cayman bank is not exempt from registration under §129.4(b)(2) because the bank is directly involved in arranging the sales transaction and therefore must register. The issue of whether the Cayman bank must receive prior approval for its brokering activities depends on whether the defense articles are SME, whether the articles are listed in §129.6(e)(2) or whether the value of the articles is greater than \$50 million. ITAR §129.6(d)(2).

Example 4 – A manufacturing company located in Great Britain manufactures troop carriers that incorporate U.S.-origin parts and components. The manufacturing company hires an Egyptian national to perform translation services during the negotiation of a sales contract of troop carriers to the Egyptian military. The translation services are not a brokering activity because the activity is a service customarily performed for one of the parties to the transaction. ITAR §129.2(c)(4).

Example 5 – Assume the same facts as in Example 3 except that the manufacturing company hires a Jordanian national located in Egypt to arrange introductions to local politicians, identify procurement officers of the Egyptian military who might have a need for or be involved in procurement of troop carriers. The Jordanian national is prohibited from contacting any of the politicians or officers so identified. The activities of the Jordanian representative are not brokering activities because they involve only services to the manufacturer and are not intermediary. ITAR §129.2(c)(3).

Example 6 – Assume the same facts as in Example 4 except that the Jordanian national is not prohibited from contacting politicians and military officers and is authorized to negotiate contracts and to otherwise represent the interests of the manufacturer in Egypt. The Jordanian representative's activities are conducted in accordance with the laws of Great Britain, Jordan and Egypt and the activity results in the sale of the troop carriers to the Egyptian military. All sales to the Egyptian military are contingent on DDTC authorization to reexport/retransfer the U.S.-origin parts and components incorporated into the aircraft and the manufacturer obtains the required retransfer/reexport authorizations from DDTC. The activities of the Jordanian representative are brokering activities. The brokering activities are subject to Part 129 because the troop carriers incorporate U.S.-origin parts and components. The Jordanian representative is not required to register in the US because the retransfer of the U.S.-origin parts and components is authorized by DDTC. ITAR §129.4(b)(5).

Example 7 – A London based law firm is hired to represent a consortium of middle-eastern countries in the purchase of a commercial communications satellite from a U.S. satellite manufacturer. The attorney is expected to participate directly in the negotiations on behalf of the consortium. The activities of the attorney are brokering activities because they are intermediary and do not just involve advice to the purchaser. The brokering activities are subject to Part 129 because they involve a U.S. defense article. However, the attorney is not required to register because the activity involved only a commercial communication satellite. ITAR §129.4(b)(3).

Example 8 - A manufacturing company located in the United States manufactures military aircraft. The US manufacturing company is owned by an Italian holding company. The Italian holding company has an Italian subsidiary that markets internationally all of the products of the subsidiaries of the Italian holding company. The Italian marketing company has an employee located in the UAE who markets the military aircraft produced by the US manufacturer in the UAE. The exports of the aircraft from the US to the UAE are the subject of a license obtained from DDTC by the US manufacturer. The activities of the employee in the UAE are brokering activities. The brokering activities are subject to Part 129 because they involve U.S.-origin defense articles. The Italian marketing company and its employee in the UAE are not required to register because the activities conducted by an affiliate of the US manufacturer. ITAR §129.4(b)(5)

Example 9 – A Swedish company manufactures military aircraft, which are sold to Air Forces of various NATO member nations and South Africa. The aircraft incorporate U.S.-origin defense articles. The Swedish company maintains a logistics support center that provides maintenance and spares to the Air Force customers, including spares of the U.S.-origin defense articles. The Swedish company has periodic meetings with the South African Air Force for the purpose of increasing sales of the aircraft and increase sales from the logistic support center. The activities of the Swedish manufacturer are not brokering activities because they are conducted for their own account. ITAR §129.2(c)(6).

Example 10 - A German company manufactures military aircraft in Germany. The aircraft incorporate U.S.-origin defense articles, the total value of which U.S.-origin defense articles. The German manufacturer hires a national of Pakistan located in Pakistan to market the aircraft to the Air Force of Pakistan. All sales of the aircraft to Pakistan are contingent on DDTC authorization to reexport/retransfer the U.S.-origin parts and components incorporated into the aircraft. The activities of the Pakistan national are brokering activities and those brokering activities are subject to Part 129 because the aircraft incorporate U.S.-origin defense articles. The Pakistan national is not required to register because the retransfer/reexport of the U.S.-origin defense articles are authorized by DDTC. ITAR §129.4(b)(5).

Example 11: A U.S. person learns of an upcoming U.S. Government solicitation for a contractor to procure foreign defense articles that are significant military equipment (SME) and located abroad and to deliver them to a foreign government in South America. The solicitation will not be in support of a U.S. Government foreign assistance or sales program otherwise authorized by law. In advance of the solicitation, the U.S. person contacts several foreign manufacturers, personally visits their facilities to assess their capabilities to meet product specifications, and obtains guidance on the export procedures of the governments of the countries where the defense articles are manufactured. Upon being awarded the contract by the U.S. Government, the U.S. person arranges for delivery from the manufacturers in the foreign countries to the South American government identified in the U.S. Government contract. The U.S. person is engaged in brokering activities because the activities are of an intermediary nature; the brokering activities are subject to Subpart 129 because the broker is a US person; registration is required because none of the exemptions from the requirement to register apply; and prior approval is required because none of the exemptions from prior approval apply.

Example 12: A foreign person signs an agreement with a U.S. manufacturer/exporter registered with the DDTC under Part 122 of the ITAR. The agreement meets the requirements of §129.6(f)(4); *i.e.*, the agreement describes the brokering activities, describes the defense articles and defense services involved, lists the persons and countries involved, and describes the fee, commission or consideration. The agreement obligates the foreign person to market or promote the sale of the Part 122 registrant's SME defense articles to several governments in the Middle East. The foreign person uses personal contacts to identify sales opportunities. The foreign person holds meetings with foreign government representatives and briefs them on the U.S. company's defense articles using public domain information and technical data for which the Part 122 registrant has obtained an export license authorizing the foreign person to receive and present such technical data to prospective buyers. The foreign person does not have authority to negotiate on behalf of the U.S. person. The U.S. manufacturer/exporter obtains approval from DDTC of a marketing DSP-5 that names the foreign person as a broker for the transaction. The foreign person is engaged in brokering activities because the actions are of an intermediary nature that will facilitate the transaction; the activities are subject to Subpart 129 because the foreign person is acting on behalf of a U.S. person and because U.S.-origin defense articles and technical data are involved; registration of the foreign person is required because none of the exemptions from the registration requirement apply; and prior approval may not be required if all of the conditions of ITAR §129.6(d) are met.

Example 13: A foreign person signs a representational agreement with a U.S. manufacturer/exporter registered with DDTC under Part 122 of the ITAR. The agreement obligates the foreign person to act as an intermediary to market to specified foreign governments in the Middle East the SME defense articles of the Part 122 registrant. The Part 122 registrant has obtained a DSP-5 license for technical data authorizing the foreign person to receive and present technical data to promote sales of the defense articles. The foreign person is engaged in brokering activities and would be required to register with DDTC under Part 129 of the ITAR prior to initiating such activities. The foreign person/sales representative would be exempt from the requirement for prior approval assuming all of the conditions of ITAR §129.6(f) are met.⁵

Example 14: A foreign person seeks buyers for certain U.S.-origin SME defense articles previously exported through commercial channels to a foreign government of a NATO-member country. The foreign person enters into a representational arrangement with the foreign government to find a buyer. The foreign person contacts potential buyers and -ultimately identifies a foreign government in Southeast Asia that wishes to procure the defense articles. The foreign person arranges for an in-country demonstration of the defense articles and negotiates the terms of the sale. The foreign person has engaged in brokering activities subject to Subpart 129 because his activities involve the transfer of U.S.-origin defense articles and the foreign person would be required to register with and obtain approval from DDTC under Part 129 prior to initiating such activities. In addition, the

⁵ Inclusion of the WDA confuses the example because it suggests that the foreign persons is acting on his/her own behalf and not as an intermediary.

foreign government seller would be required to obtain a re-export authorization under ITAR §123.9(d) before reselling or re-exporting such defense articles.

Example 15: A U.S. manufacturer/exporter, registered with DDTC under Part 122, provided U.S. SME defense articles for export by the U.S. Department of Defense through the Foreign Military Sales Program to a foreign government in the Middle East. Several years later, the foreign government asks the U.S. manufacturer/exporter to find buyers for the defense articles. The foreign government will use proceeds from the sale to upgrade its inventory with more modern defense articles from the same U.S. manufacturer. The U.S. company solicits and identifies a foreign government buyer in a sub-Saharan African country and negotiates the terms of sale on behalf of the Middle Eastern government. The U.S. manufacturer/exporter company is engaged in brokering activities that are subject to Subpart 129 because the activity involves both a U.S. person and U.S.-origin defense articles. The U.S. manufacturer/exporter would be required to register with and obtain approval from DDTC under Part 129 prior to engaging in such activities. The Middle Eastern government owner would also be required to obtain re-export authorization for the FMS-origin defense articles from the Department of State's Office of Regional Security and Arms Transfers prior to reselling or re-exporting such defense articles.

The above examples are not exhaustive of the possible conduct that would or would not constitute brokering activities. Determinations would be based on the particular facts and circumstances. In this connection, brokering activities generally do not include administrative assistance such as arranging for office space and equipment, providing clerical services, help in obtaining visas, translation, consultative or research services. A person providing such services, however, might also perform other functions that would constitute brokering activities (e.g., assisting a prospective sale of defense articles by contacting potential buyers for the seller or its broker).

Records

A new Sec. 129.9 would provide additional guidance on brokering records that must be maintained in addition to the requirements in the current §129.11. Such records include documentation relating to any brokering activities. These requirements apply whether or not a defense article or defense service transaction resulted from such activities.

Other Revisions

Conforming and other amendments would be made to a number of other parts of the ITAR related to brokering.

REGULATORY ANALYSIS AND NOTICES:

Administrative Procedure Act

This proposed amendment involves a foreign affairs function of the United States and, therefore, is not subject to the procedures required by 5 U.S.C. §553 and §554.

Regulatory Flexibility Act

Since this proposed amendment is not subject to the notice-and-comment procedures of 5 U.S.C. §553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Act of 1995

This proposed rule does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not affect significantly or uniquely small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, this proposed amendment does not have sufficient federalism implications to require consultation or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding inter-governmental consultation on Federal programs and activities do not apply to this proposed amendment.

Executive Order 12866

This proposed rule is exempt from review under Executive Order 12866, but has been reviewed internally by the Department of State to ensure consistency with the purposes thereof.

Executive Order 12988

The Department of State has reviewed the proposed regulations in light of §3(a) and §3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Paperwork Reduction Act.

This proposed rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects*22 CFR Part 120*

Arms and munitions, Classified information, Exports.

22 CFR Part 122

Arms and munitions, Exports, Reporting and record-keeping requirements.

22 CFR Part 126

Arms and munitions, Exports.

22 CFR Part 127

Arms and munitions, Crime, Exports, Penalties, Seizures and forfeitures.

22 CFR Part 129

Arms and munitions, Exports, Technical assistance.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, Parts 120, 122, 126, 127, and 129 are amended as follows:

PART 120 – PURPOSE AND DEFINITIONS

- 1. The authority citation for Part 120 continues to read as follows:

AUTHORITY: Sections 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. §§2752, 2778, 2797); 22 U.S.C. §2794; E.O. 11958, 42 F.R. 4311; E.O. 13284, 68 F.R. 4075; 3 C.F.R. 1977 Comp. p.79; 22 U.S.C. §2651a; Pub. L. 105-261, 112 Stat. 1920.

- 2. Section 120.1 is amended by revising the title and paragraphs (a) and (c) and adding paragraphs (c)(1), (c)(1)(i), (c)(1)(ii), (c)(1)(iii), and (c)(2) to read as follows:

§120.1 General authorities, receipt of licenses, and ineligibility.

(a) Section 38 of the Arms Export Control Act (22 U.S.C. §2778) authorizes the President to control the export and import of defense articles and defense services. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 11958, as amended. This Subchapter implements that authority, as well as other relevant authorities in the Arms Export Control Act (22 U.S.C. §2751 et seq.). By virtue of delegations of authority by the Secretary of State, these regulations are primarily administered by the Deputy Assistant Secretary for Defense Trade and the Managing Director of Defense Trade Controls, Bureau of Political-Military Affairs.

(b) * * * * *

(c) Receipt of Licenses and Eligibility.

(1) A U.S. person may receive a license or other approval pursuant to this Subchapter. A foreign person may not receive such a license or other approval, except as follows:

(i) A foreign governmental entity or international organization⁶ in the United States may receive an export license or other export approval;

(ii) A foreign person may receive a re-export or retransfer approval; and

(iii) A foreign person may receive a prior approval for brokering activities.

Requests for a license or other approval other than those enumerated in (i) or (ii) of this § 120.1(c)(1)⁷ will be considered only if the applicant has registered with the Directorate of Defense Trade Controls pursuant to Part 122 or 129 of this Subchapter, as appropriate.

(2) Persons who have been convicted of violating the criminal statutes enumerated in §120.27 of this Subchapter, who have been debarred pursuant to Part 127 or 128 of this Subchapter, who are subject to indictment or are otherwise charged (*e.g.*, by information) for violating the criminal statutes enumerated in §120.27 of this Subchapter, who are ineligible to contract with, or to receive a license or other form of authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive an export license or other approval from any agency of the U.S. Government, or

⁶ Example of international organization *e.g.* United Nations Peacekeepers

⁷ This change is proposed to make the paragraph consistent with the preceding text. The effect of the text as proposed would be to require foreign governmental entities as well as foreign persons filing retransfer or reexport requests to register. It is long-established practice that foreign persons may file a general correspondence for reexport or retransfers without registering.

who are subject to a Department of State policy of denial, suspension or revocation under §126.7(a) of this Subchapter, or to interim suspension under §127.8 of this Subchapter, are generally ineligible.

(d) The exemptions provided in this subchapter do not apply to transactions in which the exporter or any party to the transaction (as defined in §126.7 (e) of this Subchapter) is generally ineligible as set forth above in paragraph (c) of this section, unless an exception has been granted pursuant to §126.7(c) of this Subchapter.⁸

* * * * *

■ 3. 120.20 is revised to read as follows:

§120.20 License or other approval.

License means a document bearing the word “license” issued by the Directorate of Defense Trade Controls or its authorized designee, which document permits the temporary export, permanent export or temporary import of a specific defense article or defense service controlled by this Subchapter. *Other Approval* means a document issued by the Directorate of Defense Trade Controls that approves a manufacturing license agreement, technical assistance agreement, retransfer or reexport of defense articles brokering activities or any other written authorization issued pursuant to this Subchapter or any exemption set forth in this Subchapter.⁹

■ 4. 120.25 is amended by revising paragraphs (a)(1), (a)(4)(i) and (b) and adding paragraph (c) to read as follows:

§120.25 Empowered Official.

(a) Empowered Official means a U.S. person who:

* * * * *

(4) Has the independent authority to:

(i) Inquire¹⁰ into any aspect of a proposed export or temporary import or brokering activity by the applicant, and

* * * * *

⁸ The word “transaction” is proposed to be substituted for the word “export” to make it consistent with the change proposed in §126.7(c)

⁹ This change is proposed to more precisely describe what is covered by a “license or other approval”. The definition of “approval” as proposed does not include “exemptions” that exist under the ITAR – e.g., sections 123.16, 125.4, 126.4, 126.5. This would appear to be an oversight, and recommend that “approval” be defined to include any authorization granted by DDTC under the ITAR, including exemptions. Otherwise, for example, persons who conduct brokering in connection with articles exported under an exemption, and who meet the requirements for being exempt from registration requirements under section 129.3(b)(3) may still need to register; whereas those same persons who broker with regard to articles that are explicitly licensed for export will not need to register. There does not appear to be any policy or regulatory reason to make a distinction between those who broker articles that are exported using a license versus those who broker articles exported under an ITAR exemption.

¹⁰ Although “enquire” is a variant of “inquire”, it is suggested that “inquire” would be a better choice.

(b) Section 120.25(a) notwithstanding, a foreign person who otherwise meets the criteria for an empowered official set forth in paragraph (a) of this Section may qualify as an empowered official for a broker who is a foreign person.

(c) The following persons may not act as an empowered official:

(i) A person who is ineligible within the meaning of §120.1(c)(2) of this Subchapter;

(ii) A person who is the subject of an indictment or has otherwise been charged (e.g., by information) for or has been convicted of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in §120.27 of this Subchapter;

(iii) A person who is ineligible to contract with any foreign government agency, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country; or

(iv) A foreign person who is a national of a country referred to in §126.1.

■ 5. Sections 120.26 and 120.27 are added to Part 120 (and renumbering the subsequent sections of Part 120) to read as follows:

§120.26 Senior Officer.

Senior Officer means the Chief Executive Officer, President, Secretary, Partner, Member, Treasurer, General Counsel, or other officer responsible for export licensing or compliance who is formally delegated to act on behalf of the Registrant.

§120.27 Affiliate.

Affiliate means a person who shares a common ownership, either directly or indirectly, with another person. The two or more persons sharing common ultimate ownership are affiliates and each such person is an affiliate of the others.

[Due to renumbering above “§120.26 which is Presiding Official becomes 120.28 et seq. to 120.33

PART 122 – REGISTRATION OF MANUFACTURERS AND EXPORTERS

■ 6. The authority citation for Part 122 continues to read as follows:

AUTHORITY: §2 and 38, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. §§2752, 2778); E.O. 11958, 42 FR 4311; 1977 Comp., p. 79; 22 U.S.C. §2651a.

■ 7 Section 122.1 is amended to read as follows:

(a) Any person who engages in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services is required to register with the Directorate of Defense Trade Controls. For the purpose of this subchapter, engaging in the business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service. Manufacturers who do not engage in exporting must nevertheless register.

(b) Any person who engages in brokering activities subject to Part 129 of this Subchapter is required to register with the Directorate of Defense Trade Control unless such person is exempted from registration by §129.4.

(c) *Exemptions.* Registration for manufacturers and exporters pursuant to §129.1(a) is not required for:

- (1) Officers and employees of the United States Government acting in an official capacity.
- (2) Persons whose pertinent business activity is confined to the production of unclassified technical data only.
- (3) Persons all of whose manufacturing and export activities are licensed under the Atomic Energy Act of 1954, as amended.
- (4) Persons who engage only in the fabrication of articles for experimental or scientific purpose, including research and development.

The exemptions from the requirement to register as a broker are set forth in §129.4.

(d) *Purpose.* Registration is primarily a means to provide the U.S. Government with necessary information on who is involved in certain manufacturing, exporting and brokering activities. Registration does not confer any rights or privileges. Registration is generally a precondition to the issuance of any license or other approval under this Subchapter.

■ 8 Section 122.2 is amended to read as follows:

§ 122.2 *Submission of Registration Statement*¹¹

(a) *General.* The Department of State Form DS-2032 (Statement of Registration)¹² and the transmittal letter required by paragraph (b) of this section must be submitted by an intended registrant with a payment by check, wire or bank transfer [insert bank or wire transfer instructions.] payable to the Department of State of the fee prescribed in § 122.3(a) of this subchapter. The Statement of Registration and transmittal letter must be signed by a senior officer. The intended registrant also shall submit documentation that demonstrates that it is incorporated or otherwise authorized to do business in the United States except that, in the case of an intended registrant registering as a broker and that is a foreign person outside the United States, such registrant shall provide information that is substantially similar in content as that which a person in the U.S. would provide under this provision (*e.g.*, foreign business license or similar authorization to do business).. The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package. Registrants may not establish new entities for the purpose of reducing registration fees.

(b) *Transmittal letter.* A letter of transmittal, signed by an senior officer of the intended registrant, shall accompany each Statement of Registration.

¹¹ DDTTC has published guidance, "Preparing a Registration Package," at <http://www.pmdtcc.state.gov/registration/package.html> on submitting registration packages and material changes to registration. A complete package consists of a DS-2032, Transmittal Letter, Legal Documentation and other attachments as needed. Updated Nov. 25, 2008.

¹² A copy of the DS-2032 may be downloaded at <http://www.pmdtcc.state.gov/registration/documents/DS2032.pdf>.

(1) The letter shall state whether the intended registrant, chief executive officer, president, vice presidents, other senior officers or officials (*e.g.* comptroller, treasurer, general counsel) or any member of the board of directors or of any parent, subsidiary or affiliate included in the registration:

(i) Has ever been indicted for or convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(ii) Is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government.

(2) The transmittal letter shall identify the direct and indirect legal or beneficial ownership or control of the intended registrant, including the identities of all foreign persons who ultimately own or control twenty five percent or more of the voting securities or other ownership interest of the intended registrant.

(c) *Definition.* For purposes of this Part 122, any person owning or exercising voting power, either directly or indirectly, for more than fifty percent (50%) of the outstanding voting securities of the intended registrant shall be deemed to have ownership of the intended registrant. Any foreign person that owns, either directly or indirectly, an ownership interest of twenty five percent (25%) or more of the intended registrant shall be deemed to have control of the intended registrant unless a U.S. person holds, either directly or indirectly, an equal or larger interest. For the purpose of this Section, any person that has the authority or ability, either directly or indirectly, to establish or direct the general policies or day-to-day operations of the intended registrant shall be deemed to have control of the intended registrant.

(d) A Statement of Registration may include –

(1) Persons owned or controlled, directly or indirectly, by the registrant;

(2) Persons who own or control the registrant, directly or indirectly; and

(3) Persons who are an affiliate of the registrant.

No foreign person, other than the registrant, shall be included in a Statement of Registration unless such foreign person provides the registrant with a written certification signed by an empowered official acknowledging that its brokering activities are subject to the requirements of Part 129 of this Subchapter. The registrant must maintain the certificate as part of its record-keeping requirements.

- 9. Section 122.4 is amended by revising paragraph (a) to read as follows:

§ 122.4 Notification of Changes in Information Furnished by Registrants

(a) A registrant must, within fourteen (14) days¹³ of the event, notify the Directorate of Defense Trade Controls by registered mail if:

(1) Any of the persons referred to § 122.2(b) are indicted for or convicted of violating any of the U.S. criminal statutes enumerated in §120.27 of this subchapter, or become ineligible to contract with, or to receive a license or other approval to export or temporarily import defense articles or defense services from any agency of the U.S. government; or

(2) There is a material change in the following information contained in the Statement of Registration:

(i) registrant's name;

(ii) registrant's address;

(iii) registrant's legal organization structure;

(iv) the establishment, acquisition or divestment of a subsidiary, owner or affiliate who is either engaged in brokering activities subject to Part 129 or who is otherwise listed on any Statement of Registration filed under this Part 122; or

(v) addition of new category of defense article or defense service manufactured or exported.

All other changes in the Statement of Registration must be the provided as part of annual registration renewal.

(b) A registrant must notify the Directorate of Defense Trade Controls by registered mail at least 60 days in advance of any intended sale or transfer to a foreign person of ownership or control of the registrant or any entity thereof. Such notice does not relieve the registrant from obtaining the approval required under this subchapter for the export of defense articles or defense services to a foreign person, including the approval required prior to disclosing technical data. Such notice provides the Directorate of Defense Trade Controls with the information necessary to determine whether the authority of § 38(g)(6) of the Arms Export Control Act regarding licenses or other approvals for certain sales or transfers of defense articles or data on the U.S. Munitions List should be invoked (see §§ 120.10 and 126.1(e) of this subchapter).

(c) The new entity formed when a registrant merges with another company or acquires, or is acquired by, another company or a subsidiary or division of another company shall advise the Directorate of Defense Trade Controls of the following:

(1) The new firm name and all previous firm names being disclosed;

(2) The registration number that will survive and those that are to be discontinued (if any);

¹³ DTAG believes more than 5 days needed to advise DDTC of such information which is sensitive with the SEC.

(3) The license numbers of all approvals on which unshipped balances will be shipped under the surviving registration number, since any license not the subject of notification will be considered invalid; and

(4) Amendments to agreements approved by the Directorate of Defense Trade Controls to change the name of a party to those agreements. The registrant must, within 60 days of this notification, provide to the Directorate of Defense Trade Controls a signed copy of an amendment to each agreement signed by the new U.S. entity, the former U.S. licensor and the foreign licensee. Any agreements not so amended will be considered invalid.

(d) Prior approval by the Directorate of Defense Trade Controls is required for any amendment making a substantive change. *(Editor's note, draft FRN addressing certain changes to 122 – including changes in information furnished by registrants, under review. The below section may not be necessary at the time of publication.)*

PART 126 – GENERAL POLICIES AND PROVISIONS

■ 10. The authority citation for Part 126 is revised to read as follows:

AUTHORITY: §2, 38, 40, 40A, 42, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2781, 2791, and 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p.79; 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; §1225, Pub. L. 108-375.

■ 11. Section 126.1 is amended by revising the title and paragraphs (a) and (b) to read as follows:

§126.1 Prohibited exports and sales.

(a) *General.* It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. This policy applies to Belarus, Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela. This policy also applies to countries with respect to which the United States maintains an arms embargo (e.g., Burma, China, Liberia, and Sudan) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. Information regarding certain other embargoes appears elsewhere in this Section. Comprehensive arms embargoes are normally the subject of a State Department notice published in the Federal Register. The exemptions provided in the regulations in this Subchapter, except §123.17(c)-(f) of this Subchapter, do not apply with respect to articles originating in or for export to any proscribed countries, areas, or other persons in this §126.1 or to brokering activities involving such countries, areas or persons. (See §129.9 which imposes restrictions on brokering activities similar to those in this Section.)

(b) *Shipments.* A defense article licensed or authorized for permanent export, temporary export, reexport, retransfer or temporary import under this Subchapter may not be shipped on a vessel, aircraft, spacecraft or other means of conveyance that is owned by, operated by, leased to, or leased from a person proscribed in this §126.1 or from a foreign person who is a national of a country proscribed by this §126.1 or in any vessel, aircraft, spacecraft or other means of conveyance registered in any of the countries or areas proscribed in this §126.1.

* * * * *

■ 12. Section 126.7 is amended by revising paragraph (e), (e)(1), (e)(2), (e)(3) and adding (e)(4) to read as follows:

§126.7 Denial, revocation, suspension, or amendment of licenses and other approvals.

* * * * *

(e) *Special definitions.* For the purposes of this Subchapter, the term *party to the transaction* means:

- (1) The chief executive officer, president, vice-presidents, other senior officers and officials (e.g., comptroller, treasurer, general counsel), and any member of the board of directors of the applicant;
- (2) The freight forwarders or designated exporting agent of the applicant;
- (3) Any consignee or end-user of any defense article or defense service to be exported; and
- (4) Any person who engages in brokering activities on behalf of the applicant or on behalf of any other person identified in paragraphs (e)(1), (e)(2) and (e)(3) above with respect to the defense article or defense service to be exported.

■ 13. Section 126.13 is amended by re-designating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

§126.13 Required information.

* * * * *

(Editor’s note, draft FRN under review to delete 126.8 in its entirety. This section may therefore need further editing.)

(c) All applications for licenses or other approvals under this Subchapter and amendments thereto and all thirty (30) day prior notifications of sales of significant military equipment under §126.8 of this Subchapter shall identify all brokers and describe the brokering activities involved in the transaction subject to such application or prior notification.

PART 127 –VIOLATIONS AND PENALTIES

■14. The authority citation for Part 127 continues to read as follows:

AUTHORITY: §§2, 38, and 42, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. §§2752, 2778, 2791); E.O. 11958, 42 F.R. 4311; 3 C.F.R. 1977 Comp., p.79; 22 U.S.C. §401; 22 U.S.C. §2651a; 22 U.S.C. §2779a; 22 U.S.C. §2780.

■ 15. Section 127.1 is amended by revising paragraphs (b), (c)(1), and (c)(2) to read as follows:

§127.1 Violations.

* * * * *

(b) Any person who is granted a license or other approval or makes use of an exemption under this Subchapter is responsible for the acts of employees, agents, brokers, and all authorized persons to whom possession of the defense article or technical data has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad. All persons abroad subject to U.S. jurisdiction who obtain custody of a defense article exported from the United States or produced under an agreement described in Part 124 of this Subchapter, and irrespective of the number of

intermediate transfers, are bound by the regulations of this Subchapter in the same manner and to the same extent as the original owner or transferor.

(c) A person who is ineligible pursuant to §120.1(c)(2) of this Subchapter, or a person with knowledge that another person is ineligible pursuant to §120.1(c)(2) may not, directly or indirectly, in any manner or capacity, without prior disclosure of the facts to and written authorization from the Directorate of Defense Trade Controls:

(1) Apply for, obtain or use any export control document as defined in §127.2(b) for such ineligible person; or

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any manner in any transaction which may involve any defense article or the furnishing of any defense service or engage in brokering activities that are subject to this Subchapter where such ineligible person may obtain any benefit therefrom or have any direct or indirect interest therein.

* * * * *

§127.2 Misrepresentation, omission of facts, and false statements.

■ 16. Section 127.2 is amended by revising paragraph (b) (13) to read as follows:

* * * * *

(b) * * * * *

* * * * *

(13) Any other document used in the regulation or control of a defense article, including technical data, defense service or brokering activities regulated by this Subchapter.

■ 17. Section 127.7 is amended by revising paragraph (a) to read as follows:

§127.7 Debarment.

(a) *Debarment.* In implementing §38 of the Arms Export Control Act, the Assistant Secretary of State for Political-Military Affairs may prohibit any person from participating directly or indirectly in the export of defense articles, including technical data, in the furnishing of defense services, or in brokering activities that are subject to this Subchapter for any of the reasons listed below. Any such prohibition is referred to as a debarment for purposes of this Subchapter. The Assistant Secretary of State for Political-Military Affairs shall determine the appropriate period of time for debarment, which shall generally be for a period of three years. Reinstatement is not automatic, however, and in all cases the debarred persons must submit a request for reinstatement and be approved for reinstatement before engaging in any export or brokering activities subject to the Arms Export Control Act or this Subchapter.

* * * * *

■ 18. Section 127.8 is amended by revising paragraph (a) to read as follows:

§127.8 Interim suspension.

(a) The Managing Director of the Directorate of Defense Trade Controls or the Director of the Office of Defense Trade Controls Compliance is authorized to order the interim suspension of any person when the Managing Director or Director of Compliance believes that grounds for debarment (as defined in §127.7 of this Part) exist and where and to the extent the Managing Director or Director of Compliance, as applicable, finds that interim suspension is reasonably necessary to protect world peace or the security or foreign policy of the United States. The interim suspension order prohibits that person from participating directly or indirectly in the export of any defense article or defense service or in brokering activities subject to this Subchapter. A copy of the interim suspension order will be served upon the suspended person in the same manner as provided in §128.3(b) of this Subchapter. The interim suspension order may be made immediately effective, without prior notice. The order will state the relevant facts, the grounds for issuance of the order, and describe the nature and duration of the interim suspension. No person may be suspended for a period exceeding 60 days, absent extraordinary circumstances, (e.g., unless proceedings under Part 128 of this Subchapter, or criminal proceedings, are initiated).

* * * * *

PART 129 -- REGISTRATION AND LICENSING OF BROKERS

(Editor's note: Section 122 is the subject of a draft FRN which, among other things, will address electronic payment. Portions of this Part may therefore need to be revised.)

- 19. The table of contents for Part 129 is revised to read as follows:

Section Contents

- §129.1 Purpose.
- §129.2 Definitions.
- §129.3 Jurisdiction
- §129.4 Requirement to Register
- §129.5 Requirement for Prior Approval
- §129.6 Exemptions from Prior Approval
- §129.7 Procedures for Obtaining Prior Approval
- §129.8 Policy on Embargoes and other Proscriptions
- §129.9 Guidance.
- §129.10 Reports.
- §129.11 Maintenance of Brokering Records by Registrants.

- 20. The authority citation for Part 129 continues to read as follows:

AUTHORITY: Section 38, Pub. L. 104-164, 110 Stat. 1437, (22 U.S.C. §2778).

- 21. Section 129.2 is amended by revising paragraphs (a) and (b), removing paragraph (c) and adding paragraphs (c) and (d) to read as follows:

§129.2 Definitions.

(a) *Broker* means any person (as defined by §120.14 of this Subchapter) who engages in brokering activities.

(b) *Brokering activities* means any action of an intermediary nature undertaken by one person on behalf of another person, and which action materially facilitates the manufacture, export, re-export, import,

transfer or retransfer of a defense article or defense service.¹⁴ Actions that facilitate the manufacture, export or import of a defense article or defense service include any of the following:

- (1) Financing, transporting or freight forwarding defense articles and defense services; or
- (2)¹⁵For the benefit of another person, negotiating, contracting for, or concluding an arrangement of a purchase, sale, transfer, loan or lease of a defense article or defense service; or
- (3) Interacting with potential suppliers or purchasers of defense articles or defense services on behalf of another person, or
- (4) Taking an other action of an intermediate nature and for the benefit of another person¹⁷ to [directly] assist a [direct]¹⁸ transaction involving a defense article or defense service.¹⁹

²⁰(c) Brokering activities not subject to Part 129 include:

- (1) Activities by a U.S. person in the United States that are limited exclusively to U.S. domestic sales or transfers (e.g., not for export or for transfer in the United States to a foreign person); or
- (2) Activities by employees of the United States Government acting in an official capacity; or
- (3) Activities that are for the person's own benefit, when not acting as an intermediary for others, such as a distributor who acquires title to defense articles or provides after sales support service or warranty services for defense articles; provided that such person is a party to the transaction (as defined in §126.7(e)) that is licensed or otherwise authorized under this Subchapter; or²¹
- (4) A foreign sales representative working on behalf of a U.S. person and specifically prohibited from, or authorized to, negotiate, contract for or conclude an arrangement of a purchase, sale, transfer, loan or lease of a defense article or defense service; or
- (5) Activities that are not of an intermediate nature and are customarily performed for one of the parties to the transaction such as routine business consulting, research or administrative

¹⁴ The proposed change tracks the language of the statute: “. . . taking any action that facilitates the manufacture, export, or import of a defense article or defense service.” 18 U.S.C. § 2778 (b)(1)(A)(ii)(II). Additional language suggested by a DTAG member is shown in brackets.

¹⁵ It is suggested that the terms “soliciting” and “promoting” are too broad and capture activities that should not be considered as brokering. For example, persons who prepare copy or artwork for advertisements or pamphlets should not be considered as brokers.

¹⁷ The word “any” of “any action” is subject to overbroad interpretation. Although the proposed definition does closely track the language of AECA Sec. 2778(b)(1)(A)(ii)(II), it is overly broad and imprecise and misses an opportunity to tell the regulated industry what activities clearly fall within the definition. Leaving the word “any” could be viewed as inconsistent with the Federal Register notice itself, which identifies important activities that do not constitute brokering activities. The suggested language is intended to appropriately limit the application of “any” consistent with the other provisions of Part 129.

¹⁸ The bracket shows alternative language suggested to be added by a DTAG members.

¹⁹ This sentence is unnecessary because it is clear that any of these activities would be a brokering activity.

²⁰ This section 129.2(c) is proposed to be moved to a new section 129.3.

²¹ Addition of this language is suggested to make it clear that persons acting for their own benefit are not engaging in activities of an intermediate nature. A person who acquires title to a defense article and uses that article in a manufacturing or assembly process is not engaging in a brokering activity even when the end-item is sold to a third party, provided that all the parties to the transaction are licensed or otherwise authorized pursuant to Subchapter M.

services such as identification of customer's procurement organizations and key personnel, arranging introductions, assistance in collecting accounts receivable, translations, visa services, assistance in understanding and complying with local laws and regulations, creation of promotional material, advertising, logistical support for trade shows and promotional activities, and arranging insurance; or

- (6) Activities that are undertaken by a subsidiary for a parent, by a parent for a subsidiary or by one affiliate for another affiliate; or²²
- (7) Activities that are undertaken by a person on behalf of its employer or the employer's parent, subsidiary, or affiliate.

(d) The term "*foreign defense article or defense service*" means any non-U.S.-origin defense article or defense service of a nature described on the United States Munitions List and as defined in Part 120 of this Subchapter.

(Editor's note, DDTC is reviewing the regulatory status of Internet companies (e.g., e-Bay) that provide an electronic means for persons to market and sell defense articles. This section may therefore require further editing.)

■ 22. New Section 129.3 by moving and amending former Section 129.2(c), and by renumbering subsequent Sections to read as follows:

§129.3 Jurisdiction.

(a) Brokering activities subject to the jurisdiction of the United States include:

- (1) brokering activities by any U.S. person wherever located;
- (2) brokering activities by any foreign person located in the United States;

²² This addition is proposed to make it clear that an activity undertaken on behalf of a parent, subsidiary or affiliate is not an intermediate activity but is an activity for the benefit of the group. See, proposed definition of affiliate in §120.27.

(3) brokering activities involving a U.S.-origin defense article or defense service by any foreign person located outside the United States; or ²⁴

~~(4)~~²⁵

(4) brokering activities by any foreign person located outside the United States acting on behalf of a U.S. person.

■ 23. Section 129.4 is amended by revising paragraphs (a), (b)(1), (b)(2), adding new paragraph (b)(3), revising and renumbering old paragraph(b)(3) as (b)(4), and by adding paragraph (b)(5), paragraph (c) and (d) to read as follows:

§129.4 Requirement to register.

(a) Any person who engages in brokering activities subject to U.S. jurisdiction and subject to Part 129 is required to register with the Directorate of Defense Trade Controls, except as indicated in 124.9(b) below.

(b) Exemptions. Registration under this section is not required for the following persons:

(1) Employees of foreign governments or international organizations acting in an official capacity.

(2) Persons exclusively in the business of financing, transporting, or freight forwarding, whose brokering activities do not extend beyond financing, transporting or freight forwarding. For example, air carriers and freight forwarders who merely transport or arrange transportation for licensed United States Munitions List items are not required to register; nor are banks or credit companies who merely provide commercially available lines or letters of credit to persons registered or required to register in accordance with Parts 122 or 129 of this Subchapter. Banks, firms, or other persons providing financing for defense articles or defense services are, however, required to register under certain circumstances, such as where the bank or its employees are directly involved as intermediaries in arranging transactions involving defense articles or defense services or hold title to defense articles, even when no physical custody of defense articles is involved.

(3) Persons conducting brokering activities relating to the manufacture, export, import or transfer of commercial communications satellites;²⁶

²⁴ The change is suggested to make paragraph (3) parallel to the other numbered paragraphs under §129.3.

²⁵ Brokering activities by definition include import as well as exports so this paragraph is unnecessary as it is redundant to paragraph (3).

²⁶ It is recommended that persons engaging in brokering activities relating to commercial communications satellites not be required to register because commercial communications satellites are a special case. Commercial communications satellites, unlike other defense articles, are sold primarily to commercial customers and the transactions involve sophisticated and complicated arrangements. Attorneys and other specialized advisors regularly are involved in the negotiation and arrangement of the sales, launch and insurance transactions for commercial communications satellites. Specialized insurance brokers handle the placement of insurance with multiple underwriters often involving multiple tiers of insurance and reinsurance with leaders and followers from around the globe. Financing of commercial communication satellite purchases often are complex and may involve sale and leaseback transactions with banks or other financial institutions or specialized leasing companies holding title. Special purpose companies may be formed for the purpose of holding title, while operating companies operate the satellites and communications providers sell the communications capacity; often involving multiple national jurisdictions. Requiring all of these parties to register would not serve any regulatory purpose as none of these transactions involve the brokering of arms or munitions and would only increase the paperwork for DDTC.

(4) Persons registered pursuant to Part 122 of this Subchapter, their U.S. person subsidiaries listed in their Statements of Registration, and their bona fide and full-time, regular employees whose brokering activities involve only defense articles and defense services that are located in and obtained from a manufacturer or source in the United States for export outside the United States under a license or other approval under this Subchapter.

(5) Persons conducting brokering activities involving foreign defense article end-items that incorporate U.S.-origin parts or components on the U.S. Munitions List; provided that the retransfer or reexport of the U.S.-origin defense article parts or components is authorized by DDTC.

(c) Any person who engages in brokering activities subject to the jurisdiction of the United States when such activities involve persons, areas or countries proscribed in §129.7 of this Subchapter must register as a broker and is not exempt from registration.

(d) Registration under this Part is generally a precondition for the use of exemptions from prior approval under §129.7 or the issuance of prior approval for brokering activities under §129.8 of this Subchapter..

■ 24. Section 129.5 is amended by revising the title and text to read as follows:

§129.5 Requirement for prior approval.

(1) Except as provided in §129.6, no person who is required to register as a broker pursuant to §129.4(a) of this Subchapter may engage in brokering activities without the prior approval of the Directorate of Defense Trade Controls.

■ 25. Section 129.6 is amended by revising the title and paragraphs (a), (a)(1), (a)(2), (b), (b)(1), (b)(2), (c), (d), and (e) and adding paragraphs (a)(3), (c)(1), (c)(2), (c)(2)(i), (c)(2)(ii), (c)(3), (c)(3)(i), (c)(3)(ii), (c)(3)(iii), (c)(3)(iv), (c)(3)(v), (c)(3)(vi), (c)(3)(vii), (c)(3)(viii), (c)(3)(ix), (c)(3)(x), (c)(3)(xi), (c)(3)(xii), (c)(3)(xiii), (c)(3)(xiv), (d)(1), (d)(2), (d)(3)(i), (d)(3)(ii), (d)(4), (d)(4)(i), (d)(4)(ii), and (d)(4)(iii), and removing paragraphs (a)(1)(i), (a)(1)(ii), (a)(1)(iii), (a)(1)(iv), (a)(1)(v), (a)(1)(vi), and (a)(1)(vii) to read as follows:

§129.6 Exemptions from prior approval.

(a) The exemptions in this Section from prior approval requirements for certain brokering activities may not be used if:

(1) The broker is not registered as required by §129.4 of this Subchapter,

(2) The broker or any person who has a direct or indirect interest in or may benefit from the brokering activities, including any related defense article or defense service transaction, is ineligible as defined in §120.1(c)(2) of this Subchapter, or

(3) A country or other person referred to in §126.1 of this Subchapter is involved in the brokering activities or such activities are otherwise subject to §129.5 of this Subchapter.

(b) Brokering activities are exempt from the requirement for prior approval if undertaken for an agency of the United States Government pursuant to a direct contract with that agency provided that:

(1) The brokering activities concern defense articles or defense services solely for the direct use of the agency that contracts for the brokering activities; or

(2) The brokering activities are undertaken for carrying out a foreign assistance or sales program authorized by law and subject to control by the President by other means., a

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(c) Brokering activities are exempt from the requirement for prior approval if -

(1) The brokering activities are undertaken wholly within and involve defense articles or defense services located within and destined exclusively for the North Atlantic Treaty Organization (NATO), any member country of that Organization, Japan, Australia, New Zealand, or South Korea; and

(2) All persons participating in such activities, including defense article and defense service transactions, are nationals²⁸ exclusively of such countries and are eligible pursuant to §120.1(c); and

(3) The brokering activities do not pertain to the defense articles or defense services specified in paragraph (e)(1)-(13)²⁹ of this Section.

(d) Brokering activities are exempt from the requirement of prior approval if they involve defense articles or defense services that are not designated as significant military equipment as defined by §120.7 of this Subchapter and are for the ultimate end-use by an international organization or foreign government. This exemption does not apply to brokering activities pertaining to:

(1) Defense articles or defense services specified in paragraph (e) of this Section, or

(2) Defense articles or defense services valued at or greater than \$50³⁰ million.

(e) The exemptions in paragraphs (c) and (d) of this Section do not apply to brokering activities pertaining to the following defense articles or associated defense services:

(1) Firearms and other weapons listed in Category I(a) through (d), Category II(a) and (d) and Category III(a) of Part 121 of this Subchapter;

(2) Rockets bombs and launchers for rockets and bombs listed in Category IV(a), and launch vehicles, missile and anti-missile systems listed in Category IV(b) of Part 121 of this Subchapter;

(3) Naval nuclear propulsion equipment listed in Category VI(e) of Part 121 of this Subchapter;

(4) Night vision-related defense articles and inertial platform, sensor and guidance-related systems listed in Category XII(c) and (d) of Part 121 of this Subchapter;

²⁷ This provision imposes an additional condition (*i.e.*, the explicit contract language) that is not currently required for use of the exemption from export licensing approval found in section 126.4(a). Why should the brokering exemption require language in the USG contract that is not required for purposes of the export licensing exemption? Recommend that subsection (b)(2)(i) & (ii) be removed.

²⁸ [Is this intended to cover employees of brokers? If so, why not have language consistent with 126.14?]

²⁹ (e)(14) is excluded to stop a circular reference between §129.7(c)(2) and §129.7(e)(14).

³⁰ To align with the threshold for Congressional Notification.

(5) Chemical agents listed in Category XIV(a), and (e) of Part 121 of this Subchapter, biological agents and biologically derived substances listed in Category XIV(b), and equipment listed in Category XIV(f) for dissemination of the chemical agents and biological agents listed in Category XIV(a), (b) and (e) of Part 121 of this Subchapter;

(6) Spacecraft listed in Category XV(a) and (f) related to SME equipment³² of Part 121 of this Subchapter that are significant military equipment;

(7) Nuclear weapons design and test equipment listed in Category XVI (a) – (c) of Part 121 of this Subchapter;

(8) Directed energy weapons listed in Category XVIII(a) and (b) of Part 121 of this Subchapter;
or

(9) Submersible vessels, oceanographic and associated equipment listed in Category XX(a) of Part 121 of this Subchapter;

(10) Miscellaneous articles of a nature listed in Category XXI of Part 121 of this Subchapter;

(11) Classified defense articles, related technical data and defense services;³³

(12) Foreign defense articles and defense services³⁴ other than those that are involved in brokering activities meeting the criteria of paragraph (c) (1) of this Section or those that are the subject of a reexport or retransfer authorization issued pursuant to this Subchapter.

(f) Brokering activities are exempt from the requirement for prior approval in §129.6 of this Subchapter if the following conditions are met:

(1) The brokering activities are to be performed only by an eligible and registered broker and its bona fide and regular, full-time employees for an eligible and registered Part 122 manufacturer or exporter; and

(2) The brokering activities involve only the defense articles and defense services of a Part 122 registrant; and

(3) If the requirements of either (i) or (ii) below apply:

(i) The Part 122 registrant has obtained a license or other approval to authorize the broker to participate in the export of such defense articles or defense services associated with the brokering activities, and the brokering activities are carried out in accordance with the license or other approval; or

³² If spacecraft that are SME are intended to be covered then the correct citation is to Category XV(a) and (m).

³³ It is suggested that references to MTCR should not be used because the list is outdated and some of the items are subject to both the ITAR and the EAR. Furthermore, some of the items are subject only to the EAR. Instead of referencing the MTCR in such a general way it is suggested that the relevant USML categories should be utilized. If MTCR is to be referenced at all, why is the reference expanded beyond Category I?

³⁴ This text can be deleted because the term “foreign defense articles and defense services” are defined in §129.2(d).

(ii) If the information relating to the defense articles or defense services being brokered is only information in the public domain as defined in §120.11 and, in the even of an actual sale, the Part 122 registrant obtains a license or approval prior to the export of the defense article or defense service;³⁵ and

(4) There is a signed brokering agreement between the broker and the Part 122 registrant that includes the following:

- (i) A description of the brokering activities to be performed;
- (ii) A description of the defense articles and defense services involved (including the type and U.S. Munitions List category(ies) and sub-category(ies));
- (iii) A list of the persons and countries involved in the brokering activities; and
- (iv) A description of the fee, commission or consideration received or expected.

(g) Any person who is exempted from registration by §§129.4(c)(1), (2), (3) or (4), may engage in brokering activities subject to Subpart 129 without prior approval; provided that such activities are confined to those described in §§129.4(c)(1), (2), (3) or (4).

(h) Brokers who use the exemptions in this Section must comply with the reporting and recordkeeping requirements set forth in §§129.10 and 129.11.

■ 26. Section 129.7 is amended by removing paragraphs (a) and (e), revising and renumbering paragraphs (b), (c) and (d) as paragraphs (a), (b) and (c) and removing paragraph (e) to read as follows:

§129.7 Policy on embargoes and other proscriptions.

(a) No person may engage in or make a proposal to engage in brokering activities subject to this Part 129 if such activity involves any country, area or other person referred to in §126.1 of this Subchapter without first obtaining the approval of the Directorate of Defense Trade Controls.³⁷

(b) No person may engage in or make a proposal to engage in brokering activities without the prior approval of the Directorate of Defense Trade Controls if such activities involve other countries or persons identified from time to time by the Department of State through notice in the Federal Register, with respect to which certain limitations on defense articles or defense services are imposed for reasons of U.S. national security or foreign policy or law enforcement interests (e.g., an individual subject to debarment

³⁵ There may be instances where after a Part 122 registrant has provided public domain information to the broker, and the brokering activity has occurred, that there will be no subsequent export of a defense article or service – i.e., the brokering activity fails to create a market opportunity or lead to a sale. In such circumstances, the Part 122 registrant will NOT “obtain a license or approval prior to the export of the defense article or defense service.” Does that mean that DDTC will find a violation by the broker for using the public domain information? This would appear to be an unintended result; or if not unintended, it creates an unmanageable compliance trap for the broker (and perhaps the Part 122 registrant).

³⁶ It is suggested that paragraph (a) is not required. In §129.3 it is very clear that persons engaging in brokering activities subject to Part 129, which activities involve any country, area or person proscribed by §126.1 are not exempt from the requirement to register. Furthermore, §129.7(a)(3) makes it clear that the exemptions from prior approval may not be used if the activity involves any country, area or person proscribed by §126.1.

³⁷ Addition of the phrase “subject to this Part 129” is suggested to be added to make it clear that the prohibition on the performance of brokering activities is not being extended to activities that are not covered by §129.2(c).

pursuant to §127.7 of this Subchapter). (See §127.1(c) of this Subchapter for additional disclosure and approval requirements applicable to brokering activities.)

(c) It is the policy of the Department of State to deny requests for approval of brokering activities or proposals to engage in brokering activities involving the countries or other persons referred to in paragraph (a) or (b) of this Section. Any person who knows or has reason to know of brokering activities subject to this Part 129 involving such countries or other persons must immediately inform the Directorate of Defense Trade Controls.³⁸

- 27. Section 129.8 is amended by revising the title and paragraphs (a), (b) and (c) and adding paragraphs (a)(1), (a)(2), (a)(2)(i), (a)(2)(ii), (a)(2)(iii), (b)(1), (b)(2), (b)(3)(i), (b)(3)(ii), (b)(3)(iii), (b)(3)(iv), (b)(3)(v), (b)(3)(vi), b(3)(vii), (b)(4), (b)(5), (b)(5), (b)(6), (d) and (e) to read as follows:

§129.8 Procedures for obtaining prior approval.

(a) All requests for prior approval of brokering activities must be made to the Directorate of Defense Trade Controls and must include the following information.

(1) The request must identify the applicant's name, address and registration code and must be signed by an empowered official of the applicant.

(2) All requests for prior approval must include a certification signed by an empowered official certifying whether:

(i) The applicant or chief executive officer, president, vice presidents, other senior officers or officials (e.g., comptroller, treasurer, general counsel) or any member of the board of directors is the subject of an indictment or has been otherwise charged (e.g., by information) for, or has been convicted of violating any of the U.S. criminal statutes enumerated in §120.27 of this Subchapter since the effective date of the Arms Export Control Act, Public Law 94-329, 90 Stat. 729, or is the subject of an indictment or has been otherwise charged (e.g., by information) for or has been convicted of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in §120.27 of this Subchapter.

(ii) The applicant or the chief executive officer, president, vice-presidents, other senior officers or officials (e.g., comptroller, treasurer, general counsel) or any member of the board of directors is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government, or is ineligible to contract with any foreign government agency, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country; and

(iii) To the best of the applicant's knowledge, any person involved in the brokering activities that are the subject of the request for prior approval is the subject of an indictment or has been otherwise charged (e.g., by indictment) for or has been convicted of violating any of the U.S. criminal statutes enumerated in §120.27 of this Subchapter since the effective date of the Arms Export Control Act, Public Law 94-329, 90 Stat. 729

³⁸ It is suggested that the phrase "subject to this Part 129" be added to make it clear that the affirmative requirement to report does not include a requirement to report on brokering activities that are not subject to the jurisdiction of the United States.

(June 30, 1976), or is the subject of an indictment or has been otherwise charged (e.g., by indictment) for or has been convicted of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in §120.27 of this Subchapter, or is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from any agency of the U.S. Government, or is ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in defense trade under the laws of a foreign country.

(b) The request for prior 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”);
- (2) The name, nationality and country where located of each person who is a party to the transaction;
- (3) A description of the defense article or defense service that may be involved, including:
 - (i) The U.S. Munitions List category and sub-category,
 - (ii) Name or military nomenclature of the defense article,
 - (iii) Whether the article or service is significant military equipment,
 - (iv) Estimated quantity of defense articles,
 - (v) Estimated U.S. dollar value of defense articles and defense services,
 - (vi) Security classification,
 - (vii) End-user and end-use.
- (4) A statement whether the brokering activities are related to a sale through commercial channels or under the U.S. Foreign Military Sales Program or other activity in support of the United States Government; and
- (5) The type of consideration received or expected to be received, directly or indirectly, (consideration includes, e.g., any fee, commission, loan, gift, donation, political contribution, or other payment made, or offered or agreed to be made directly or indirectly, in cash or in kind),
 - (i) by the applicant,
 - (ii) by other persons who may participate in such brokering activities from or at the direction of the applicant, and the identity of such other persons, and
 - (iii) the U.S. dollar value amount and source thereof.

(c) The empowered official in signing the request for prior approval shall include a certification that the request is complete and accurate.

(d) If at the time of submission certain information required by paragraph (b) is not yet available, this fact must be stated and explained in the certification required by paragraph (c) of this Section. The Directorate of Defense Trade Controls will take any such explanation into account in deciding whether or not to approve the request.

(e) The period of validity for a prior approval may not exceed four years.

- 28. Section 129.9 is amended to revise the title and paragraph and insert (a), (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7) and (b) to read as follows:

§129.9 Guidance.

(a) Any person desiring guidance on whether an activity constitutes brokering activities within the scope of Part 129 may request 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:

(1) The specific activities to be undertaken by the applicant and any other U.S. or foreign person;

(2) The name, nationality and country where located of each person who may be a party to the transaction;

(3) A description of the item, including name or military nomenclature, or the service and a complete copy of the data that may be involved in potential transactions;

(4) End-user and end-use;

(5) The type of consideration offered, expected to be made, paid or received, directly or indirectly, to or by the applicant in connection with such activity, and the amount and source thereof (consideration includes, for example, any fee, commission, loan, gift, donation, political contribution, or other payment, in cash or in kind); and

(6) A copy of any agreement or documentation between or among the requester and other persons who will be involved in the activity or related transactions that describes the activity to be taken by such persons.

(7) If at the time of submission certain information is not yet available, this fact must be stated and explained. The Directorate of Defense Trade Controls will take the completeness of the information into account in providing guidance whether or not the activity or activities constitutes brokering activities. The guidance will constitute an official determination by the Department of State. The guidance shall not substitute for prior approval when required under §129.8 of this Subchapter.

(b) Persons desiring guidance on other aspects of Part 129 may also request guidance from the Directorate of Defense Trade Controls in a similar manner by submitting a description of the relevant facts or copies of relevant documentation.

- 29. Section 129.10 is amended by revising the title and paragraph and adding paragraphs (a), (a)(1), (a)(2), and (b) to read as follows:

§129.10 Reports.

(a) Any person required to register under this Part 129 shall provide the Directorate of Defense Trade Controls, by January 31, a report of all of its brokering activities in the previous calendar year. For brokers renewing their registration, the report may be provided for the preceding twelve month period. The report must include brokering activities that received or were exempt from prior approval, as follows:

(1) The report shall identify the broker's name, address and registration code and be signed by an empowered official who shall certify that the report is complete and accurate. The report shall identify each of the brokering activities and the number of the prior approval or exemption claimed for each of such brokering activities. If an exemption is claimed based on §129.7(d)(3)(i) of this Subchapter, the number of the export license or approval shall also be provided; and

(2) For each of the brokering activities requiring approval,³⁹ the report shall identify all U.S. and foreign persons who participated in the brokering activities including name, address, nationality and country where located and the person's role or function; the quantity, description and U.S. dollar of the defense article or defense service; the type and U.S. dollar value of any consideration and the source thereof, received or expected to be received, directly or indirectly by any person who participated in the brokering activities.

(b) All brokering activities that are subject to this Part 129 are subject to the reporting requirements of this Section whether or not a sale or transfer/retransfer of a defense article or defense service has taken place or whether or not a payment or other consideration has been paid or received. If there were no brokering activities during the preceding year the report shall certify that there were no such activities.

- 30. Section 129.11 is added to read as follows:

§129.11 Maintenance of Brokering Records by Registrants.

(a) A person who is required to register pursuant to this Part must maintain records concerning brokering activities including, but not limited to, copies of all documentation on or related to registration, prior approval, use of exemptions, guidance related to brokering activities, actual or potential brokering activities and defense article and defense service transactions, consideration received or expected, and annual reporting. Records in an electronic format must be maintained using a process or system capable of reproducing all records on paper. Such records when displayed on a viewer, monitor, or reproduced on paper, must exhibit a high degree of legibility and readability. (For the purpose of this section, "legible" and "legibility" mean the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. "Readable" and "readability" means the quality of a group of letters or numerals being recognized as complete words or numbers.) This information must be stored in such a manner that none of it may be altered once it is initially recorded without recording all changes, who made them, and when they were made. For processes or systems based on the storage of digital images, the process or system must afford accessibility to all digital images

³⁹ General information about brokering activities involving exemptions shall be provided per 129 (a)(1), so there is no need for DDTC to monitor more specific information in brokering reports; as a policy matter, DDTC should be obtaining such data for items brokered that require approval and are not exempt, i.e., certain SME.

in the records being maintained. All records subject to this section must be maintained for a period of five years from the expiration of the registration, approval or use of an exemption. The Managing Director, Directorate of Defense Trade Controls, and the Director of the Office of Defense Trade Controls Licensing, may prescribe a longer or shorter period in individual cases.

(b) Records maintained under this section shall be available at all times for inspection and copying by the Directorate of Defense Trade Controls or a person designated by the Directorate of Defense Trade Controls (e.g., the Diplomatic Security Service) or U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection. Upon such request, the person maintaining the records must furnish the records, the equipment, and if necessary, knowledgeable personnel for locating, reading, and reproducing any record that is required to be maintained in accordance with this section.

(Date)

Under Secretary of State
Arms Control and International Security
U.S. Department of State

[Note to DDTC, if 122.2 changes are not accepted then the proposed 129.4 text should be edited as follows and will become 129.12 and Table of Contents should be edited accordingly.]

■ 21. Section 129.4 is amended by revising the title of the section, revising paragraphs (a), (b), and (c), and adding paragraphs (d), (e), (e)(1), (e)(2), (f), (g), (h)(1), (h)(2), (h)(3) and (i) to read as follows:

§129.4 Submission of registration statement, registration fees and notification of changes in information furnished by registrants.

(a) A person required to register as a broker must do so on an annual basis by submitting a completed Department of State Form DS-2032 (Statement of Registration), transmittal letter meeting the requirements of this §129.4(b), and payment to the Department of State of a registration fee of \$2,250 per year.

(1) Payment may be made by check, wire or bank transfer to [DDTC to insert wire or bank transfer instructions].

(2) The Statement of Registration and transmittal letter must be signed by senior officer of the registrant..

(3) The intended registrant shall also submit documentation that demonstrates that it is incorporated or otherwise authorized to do business in the United States, except that, in the case of an intended registrant that is a foreign person outside the United States, such registrant shall provide information that is substantially similar in content as that which a person in the U.S. would provide under this provision (*e.g.*, foreign business license or similar authorization to do business).

(b) The Directorate of Defense Trade Controls will provide the registrant with a letter of approval within thirty days of the date of the submission or notify the registrant within thirty days if the Statement of Registration is incomplete either by notifying the registrant of what information is required or by returning the entire registration package with payment.

(c) *Transmittal letter.* A letter of transmittal, signed by an empowered official of the intended registrant, shall accompany each Statement of Registration.

(1) The transmittal letter shall indicate whether the applicant or the chief executive officer, president, vice-presidents, other senior officers or officials (*e.g.*, comptroller, treasurer, general counsel) or any member of the board of directors of the applicant, or of any parent or subsidiary deemed to be registered pursuant to this §129.4:

(i) Is the subject of an indictment or otherwise has been charged (*e.g.*, by information) for or has been convicted of violating any U.S. criminal statutes enumerated in §120.27 of this Subchapter or foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in §120.27 of this Subchapter.

(ii) Is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government or is ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country.

(2) The transmittal letter shall also declare whether the intended registrant is owned or controlled (as defined in §129.2(b)(3)) by a foreign person (as defined in §120.16 of this Subchapter). The letter shall include an explanation of such ownership or control, including the identity of the foreign person or persons who ultimately own and control the registrant. This requirement applies to a registrant who is a U.S. person and is owned or controlled by a foreign person. It also applies to a registrant who is a foreign person and is owned or controlled by a foreign person from the same country or a foreign person from another country.

(3) Definition. For the purposes of this Section, ownership means that more than 50 percent of the outstanding voting securities of the firm are owned by one or more foreign persons. Control means that one or more foreign persons have the authority or ability to establish or direct the general policies or day-to-day operations of the firm. Control is presumed to exist where a foreign person or persons own 25 percent or more of the outstanding voting securities if no U.S. persons control an equal or larger percentage.

(c) A U.S. person required to register under Part 129 who is already registered as a manufacturer or exporter in accordance with Part 122 of this Subchapter must also separately register as a broker by submitting to the Directorate of Defense Trade Controls a Statement of Registration, a transmittal letter and payment of an additional fee as required by paragraph (a) of this Section.

(d) A Statement of Registration may include –

- (1) Persons owned or controlled, directly or indirectly, by the registrant;
- (2) Persons who own or control the registrant, directly or indirectly; and
- (3) Persons who are an affiliate of the registrant.

No foreign person, other than the registrant, shall be included in a Statement of Registration unless such foreign person provides the registrant with a written certification signed by an empowered official acknowledging that its brokering activities are subject to the requirements of Part 129 of this Subchapter. The registrant must maintain the certificate as part of its record-keeping requirements set forth in §129.11.

(e) A registrant must, within 5 (five) days of any event described in (1) or (2) below, provide the Directorate of Defense Trade Controls a written notification, signed by an empowered official if:

- (1) Any of the persons referred to in §129.4(b) are indicted or otherwise charged (e.g., by information) for or convicted of violating any of the U.S. criminal statutes enumerated in §120.27 of this Subchapter or foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in §120.27, or become ineligible to contract with, or to receive a license or other approval to export or temporarily import defense articles or defense services from any agency of the U.S. government; or are ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country; or
- (2) There is a change in the following information contained in the Statement of Registration: (i) registrant's name, (ii) registrant's address, (iii) registrant's legal organization structure, or (iv) the establishment, acquisition or divestment of a subsidiary, owner or affiliate who is either engaged in brokering activities subject to Part 129 or who is otherwise listed on any Statement of Registration filed under this Part 129. All other changes in the Statement of Registration must be provided as part of the annual registration renewal.

(f) A U.S. or foreign registrant must provide written notification to the Directorate of Defense Trade Controls at least 60 (sixty) days in advance of any intended sale or transfer to a foreign person of ownership or control of the registrant or any entity thereof. This requirement applies to a foreign person required to register pursuant to this Part who intends to sell or transfer ownership or control to a foreign person from the same country or to a foreign person from another country. Such notice does not relieve the registrant from obtaining any prior approval required under this Subchapter.

(g) The new entity formed when a registrant merges with another company or acquires, or is acquired by, another company or a subsidiary or division of another company shall advise the Directorate of Defense Trade Controls of the following:

- (1) The new firm name and all previous firm names being disclosed;
- (2) The registration number that will survive and those that are to be discontinued (if any); and
- (3) The numbers of all approvals for brokering activities under the surviving registration number, since any approval not the subject of notification will be considered invalid.

(h) A registrant whose registration lapses because of failure to renew and, after an intervening period, seeks to register again must pay registration fees for any part of such intervening period during which the registrant engaged in the business of brokering activities.