

DEFENSE TRADE ADVISORY GROUP

Brokering Reporting

December 2024 Plenary
White Paper

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I. TASKING

Background: The Directorate of Defense Trade Controls (DDTC) has observed an increase in brokering activities over the past few years. DDTC regularly receives annual brokering reports with little to no structure regarding required information, and the information itself is routinely outdated. DDTC is interested in improving the brokering reporting process to facilitate the accurate, consistent, and timely submission of annual brokering reports.

Tasking: DDTC proposes that the DTAG analyze and propose alternative brokering reporting approaches that address all the reporting requirements under ITAR§ 129.10(b). DDTC seeks to obtain accurate, consistent, and timely brokering reports with goal of expediting the review process.

DDTC Consultation on the Tasking: The DDTC point of contact for this tasking was John Foster, Acting Director of Compliance. The Working Group also discussed the tasking with Brian Rissing, Transaction Analysis and Mitigation Division Chief in the Office of Defense Trade Controls Compliance.

II. WORKING GROUP APPROACH

To accomplish the Tasking and provide alternative brokering reporting approaches, the Working Group determined it must first identify the core issues and challenges that industry and DDTC face under the current reporting requirements. We did this by surveying the greater DTAG membership and with follow-up discussions with DTC Compliance. We also reviewed prior DTAG recommendations related to ITAR reporting requirements.¹ We present the issues in section II below.

Once we identified the core issues and challenges, we researched the origins and underlying authority for the current reporting requirements in Part 129 of the ITAR. This included a review of the brokering provisions in the Arms Export Control Act and the corresponding 1996 Congressional reports, and the development and subsequent revisions to Part 129 of the ITAR. For comparison, we also reviewed the federal reporting requirements under the Foreign Agents Registration Act (FARA). We present our findings in section III.²

Finally, we identified possible solutions to address the issues and formulated our recommendations accordingly. Section IV contains our analysis and recommendations for each of the core issues.

¹ The Working Group reviewed for historical context the following DTAG white papers that addressed ITAR reporting issues and challenges: “*Relook at ITAR Part 130 Reporting*” (May 14, 2020); “*Part 130 Reporting* (May 20, 2021); and “*Export Authorization Recordkeeping and Reporting Requirements*” (Nov. 2021).

² FARA was enacted in 1938 to promote transparency with foreign influence on American public opinion, policy and laws. It required individuals and entities to register with the Department of Justice if they are acting on behalf of foreign interest in the United States. Like ITAR Brokering, FARA requires registration and reporting; however, after reviewing the FARA, it was determined that there was not sufficient overlap with the Part 129 requirements or reporting approach to continue such review.

III. THE ISSUES

A. *The Reporting Requirement and Existing Guidance*

The ITAR requires any person required to register as a broker to provide DDTC annually with a report of its brokering activities for the previous year. Section 129.10 (b) specifies the information required for each report 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 describe each of the brokering activities, including the number assigned by the Directorate of Defense Trade Controls to the approval or the exemption claimed; and
- (2) For each of the brokering activities, the report shall identify all persons who participated in the activities, including each person’s name, address, nationality, and country where located and role or function; the quantity, description, and U.S. dollar value of the defense articles or defense services; the type and U.S. dollar value of any consideration received or expected to be received, directly or indirectly, by any person who participated in the brokering activities, and the source thereof.

If there are no brokering activities to report, the ITAR requires a certification from the registrant that no activities occurred. Other than identifying the frequency and the required informational elements, the ITAR does not contain any information regarding report format or organization. The current guidelines do not add any color or clarity either. For example, there is only one FAQ that addresses the brokering reporting requirements and process:

FAQ: What are the Broker Report procedures?

Answer: Broker reports are due with broker renewal submissions (i.e., for persons already registered as brokers). The report must cover all brokering activity not the subject of a prior broker report. Broker reports must cover all brokering activity up to three months prior to the expiration of your broker registration. For example, if your registration expires at the end of November 30, 2013, then your broker report would cover the period from January 1st *[sic]* August 31st. For subsequent years, your broker report would include a trailing 12 month period, e.g., September 1, 2013 *[sic]* August 31, 2014.³

³ Available at

https://www.pmdrtc.state.gov/ddtc_public/ddtc_public?id=ddtc_search&t=ddtc_public_portal_faq_search_source&q=brokering (visited Dec. 20, 2024).

Similarly, the *International Traffic in Arms Regulations (ITAR) Compliance Program Guidelines*⁴ contain very little explanation to the broker reporting requirements. Under the section titled, “Element 2: DDTC Registration, Jurisdiction & Classification, Authorizations, & Other ITAR Activities,” the guidelines offer the following information:

Annual Brokering Activities Report Requirement

Any person who engages in brokering activities is required to provide to DDTC on an annual basis a report of their brokering activities in the previous 12 months. Reports must be submitted along with the broker’s annual renewal submission or, if not renewing, within 30 days after expiration of registration. The information required for these reports can be found in ITAR § 129.10.

DDTC Brokering Suggestions

To reduce the risk of brokering-related ITAR violations, DDTC recommends that brokers take the following actions: • Establish policies and procedures for obtaining prior authorization for brokering activities, reporting brokering activities, and maintaining records regarding brokering activities. • Understand which activities constitute brokering activities under the ITAR and identify whether and to what extent the broker is engaged in such activities. • Review and understand the available exemptions to the brokering authorization requirements. • Submit annual brokering reports to DDTC on time.

B. Core Issues and Challenges

Against the backdrop of the regulatory requirement and agency guidance, we identified the predominant issues and challenges related to the reporting requirement for industry and DDTC. These are:

1. Lack of standardization
2. Outdated or incomplete information
3. Vague reporting requirements
4. Duplicative reporting

We address each of these in turn below.

1. Lack of Standardization

⁴ Last released Sept. 15, 2023 and available as a PDF download at https://www.pmdotc.state.gov/ddtc_public/ddtc_public?id=ddtc_kb_article_page&sys_id=4f06583fdb78d300d0a370131f961913 (visited Dec. 20, 2024).

DDTC: Brokering reports differ significantly among registrants in terms of formatting and organization. This presents challenges for consolidation, internal review, and analysis.

Industry: Neither ITAR § 129.10(b) nor agency guidance specifies the expected structure and content of the annual reports. Consequently, there is no clear understanding of how information should be organized or the preferred format for presentation (such as Word, Excel, chart or pros, etc.). Each registrant uses its own template to satisfy the reporting obligation. Although the elements are similar, the presentation varies across registrants and may even change from year to year.

2. Outdated and Incomplete Information

DDTC: Registrants frequently request extensions for submitting reports or file reports with missing or incomplete information. These cases hinder DDTC’s ability to analyze the data for effective oversight and policy making.

Industry: There is uncertainty about what constitutes required data under ITAR § 129.10(b) (see also “Vague Reporting Requirements” below). Registrants may not collect or otherwise have access to certain information, contributing to delays and/or incomplete submissions. In other cases, reporting may be required at a point in time when the information is not yet determined. For example, arranging meetings during the marketing phase may constitute a “brokering activity” even though consideration may not yet be determined. This issue is tied to the definition and broad scope of the term “brokering activities.” We address this below in our recommendations.

3. Vague Reporting Requirements

Industry: Ambiguity in defining brokering activities creates confusion, particularly when activities do not result in a sale or span across multiple years. Registrants struggle to determine the extent of reporting for indirect participants and activities that cross different approval periods. For example, ITAR § 129.10(b)(2) states “all persons who participated in the activities...” and lists the necessary information to collect. However, this language casts a wide net and may include more persons than DDTC intended. Furthermore, the lack of clarity around the definitions of “direct and indirect consideration” creates significant challenges. Registrants often have limited visibility into indirect consideration received by parties other than themselves involved in brokering activities, which increases the potential for reporting errors.

4. Duplicative Reporting

Industry Perspective: There is uncertainty in how to report when brokering activity involves multiple brokers other than the registrant making the report. In addition, ongoing brokering activity that spans over multiple years may contribute towards duplicative reporting.

The above issues, individually and collectively, hinder a registrant’s ability to gather and maintain records. They affect the accuracy, standardization, consistency, and timeliness of brokering reports which in turn limits DDTC’s ability to perform effective oversight. Clear reporting requirements are essential for the broker and will help ensure DDTC is able to analyze the information for effective controls and policies.

IV. THE RULES GOVERNING BROKERING REPORTING

A. *Historical Timeline of ITAR’s Brokering Regulations*

In 1996, the Arms Export Control Act (AECA) was amended to include the registration and licensing of brokers under Section 38 of the AECA. The intent behind the AECA amendment and subsequent inclusion of brokering requirements in the ITAR was “to close a perceived loophole in U.S. defense trade control involving the participation of U.S. parties – specifically third-party middlemen – involved in foreign arms deals.”⁵ House committee reports from the 104th Congress reveal the overriding concern relating to such offshore brokering activity:

[T]he AECA does not authorize the Department to regulate the activities of U.S. persons (and foreign persons located in the U.S.) brokering defense transactions overseas (except for transactions involving a small number of terrorist countries). Nor does the AECA authorize the Department to regulate the brokering of non-U.S. defense articles or technology.

This provision provides those new authorities to ensure that arms exports support the furtherance of U.S. foreign policy objectives, national security interests and world peace. More specifically, in some instances U.S. persons are involved in arms deals that are inconsistent with U.S. policy. Certain of these transactions could fuel regional instability, lend support to terrorism or run counter to a U.S. policy decision not to sell arms to a specific country or area. The extension of U.S. legal authority under this provision to regulate brokering activities would help to curtail such transactions.⁶

Congress amended Section 38 of the AECA by adding new registration and licensing requirements for brokers in 22 U.S.C. 2778(b)(1)(A):

§2778. Control of arms exports and imports

* * *

(b) Registration and licensing requirements for manufacturers, exporters, or importers of

⁵ John Pisa Relli, *Am I My Broker’s Keeper? And Other ITAR Brokering Questions Inspired by the BAE Case*, 6 GLOBAL TRADE AND CUSTOMS JOURNAL 248 (2011).

⁶ H.R. REP. NO. 104-128 at 66-67 (identical language is in H.R. Rep. No. 104-519 at 11-12); see also John Pisa Relli, *supra* n.5 at 248.

designated defense articles and defense services

(1)(A) * * *

(ii)(I) As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in official capacity) who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of any defense article or defense service designated by the President under subsection (a)(1), or in the business of brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article or defense service (as defined in subclause (IV)), shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations.

(II) Such brokering activities shall include the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service.

(III) No person may engage in the business of brokering activities described in subclause (I) without a license, issued in accordance with this chapter, except that no license shall be required for such activities undertaken by or for an agency of the United States Government-

(aa) for use by an agency of the United States Government; or

(bb) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(IV) For purposes of this clause, the term “foreign defense article or defense service” includes any non-United States defense article or defense service of a nature described on the United States Munitions List regardless of whether such article or service is of United States origin or whether such article or service contains United States origin components.

The following year, in 1997, brokering regulations were added to the ITAR under part 129.⁷ Although the regulations introduced an annual reporting requirement for brokering activities at § 129.9, they did not specify the filing date for such reports.

In 2003, DDTC initiated an internal review of the existing 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.”⁸ Subsequently, in 2011, DDTC published proposed rules revising the ITAR’s brokering regulations. As DDTC notes in the proposed rule, the proposed changes to part 129 stemmed from DDTC’s experience in administering the brokering controls and comments it received from other

⁷ See 62 Fed. Reg. at 67274 (Dec. 24, 1997).

⁸ 76 Fed. Reg. at 78578 (Dec. 19, 2011).

agencies and industry, including DTAG.⁹ The proposed rule would move the brokering reporting requirements to § 129.10 and would require “that reports be submitted annually with the registration renewal submission, or within 30 days after expiration of registration if not renewing, for brokering activities the preceding year and to clarify the information required in the reports.” DDTC proposed this new reporting schedule “to consolidate registration renewal with report submission, which we believe will improve reporting accountability and lessen the burden on industry.”¹⁰

B. Current Reporting Requirements under ITAR § 129.10

In 2013, DDTC issued an interim final rule amending the ITAR’s brokering regulations.¹¹ The interim final rule tied the brokering report submission process directly to the registration renewal process and clarified the information required in annual brokering reports. However, it did not prescribe a specific format for the annual brokering report.

In response to its 2011 Proposed Rule, DDTC received public comments urging it to “require prior brokering approval only when no other U.S. export authorization would be applicable for regulation.” The rationale was that “the brokering prior approval requirement effectively results in multiple authorizations for the same transaction.... Because the export or retransfer of U.S. origin defense articles, defense services, and technical data stemming from brokering activities still requires prior written authorization, the Department’s review or enforcement authority will not be diminished.”¹² In response to these comments, with which DDTC partially agreed, it adopted the new ITAR § 129.4, which specifies which items on the U.S. Munitions List require prior approval for brokering (consistent with U.S. international commitments or obligations). Regardless of whether brokering activity requires prior approval or is exempt from approval per § 129.5, all brokering activity must be reported in accordance with § 129.10.

V. RECOMMENDATIONS

Before we discuss our recommendations, we note that the AECA does not contain specific language requiring brokering reporting. However, DDTC has explained the need to collect brokering reports regularly to provide policy and enforcement oversight for the brokering of regulated activities.¹³ As the statute does not restrict brokering reports to a particular form or content, DDTC has flexibility to revise its regulations to clarify the reporting requirements based on DDTC’s needs or goals.

A. Recommendation 1: Reduce the Scope of Activities Generating Reporting Requirement

We note that not all brokering activities require advance approval from DDTC in the form of a license.

⁹ See *Id.*

¹⁰ *Id.*

¹¹ See 78 Fed. Reg. at 52694 (Aug. 26, 2013).

¹² *Id.*

¹³ See, e.g., DDTC supporting statement provided for Paperwork Reduction Act submission to OMB No. 1405-0141.

Specifically, § 129.4 delineates only specified situations in which advance approval is required. In other situations – as well as limited exemptions available under § 129.5 - no such advance approval is required. The situations in which advance approval is required include the following:

- Foreign defense article or defense service § 129.4(a)(1)
- Enumerated U.S. origin defense articles or defense services § 129.4(a)(2)

Despite the exclusion of some U.S. origin requirements from the advanced approval requirement, the regulations currently require reporting of activities that received or were exempt from the approval process. Given the government oversight and screening intrinsic to the prior approval process, we recommend assessing whether the scope of reporting should be limited to those instances in which no advance approval is required under § 129.4. In those cases where advance approval is required, DDTC has already collected information through the application that serves to address the risks that the reporting requirement seeks to address.¹⁴

While the Working Group recognizes that some of the data is prospective, such as with use of the word “estimated,” many of the elements are the same as the reporting requirements in § 129.10. Additional benefits of this approach will also include a reduction in paperwork.

B. Recommendation 2: Clarify the definition of “brokering activity;” only require reporting associated with brokering activities that successfully result in a sale or other transfer.

The Working Group also identified challenges in interpreting the broad definition of “brokering activity.” The term “brokering activities” is currently defined under § 129.2(b) to include “any action on behalf of another to facilitate the manufacture, export, permanent import, transfer reexport, or retransfer of a U.S. or foreign defense article or defense service, regardless of its origin.” While § 129.2(b)(1) provides examples of brokering actions, it also notes that these are not limited to those enumerated, and includes “(s)oliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense

¹⁴ 22 C.F.R. § 129.6(b) requires the brokering approval request include a full description of the brokering activities, including:

- (1) Action to be taken by the applicant to facilitate the manufacture, export, import, or transfer of a defense article or defense service;
- (2) Name, nationality, address, and place of business of all persons who may participate in the brokering activities;
- (3) Description of each defense article or defense service that may be involved, including:
 - (i) U.S. Munitions List (or Import List) category and sub-category;
 - (ii) Name or military nomenclature of each defense article;
 - (iii) Whether the defense article is significant military equipment;
 - (iv) Estimated quantity of each defense article;
 - (v) Estimated U.S. dollar value of defense articles and defense services;
 - (vi) Security classification; and
 - (vii) End-user and end-use; and
- (4) Statement whether the brokering activities are related to a sale through direct commercial sale or under the FMS, or other activity in support of the U.S. Government.

service.”

Despite the broad, non-exhaustive definition, the Working Group noted that not every brokering activity results in the sale of a defense article or provision of a defense service. Brokers may be uncertain – and reach different conclusions – with respect to their reporting obligations. This will generate potentially conflicting reports and inhibit the ability of DDTC to align multiple instances of reporting concerning the same transaction.

The Working Group recommends that DDTC only require reporting associated with brokering activities that successfully result in a sale or other transfer during the reporting period. We note that if this approach is adopted, DDTC could still have visibility into prospective brokering activities via the approval process.

C. Recommendation 3: Better delineate the scope of all persons who participated in the “brokering activities”

Another challenge identified by the Working Group is the lack of clear definition regarding the requirement to report “all persons who participated in the [brokering] activities[.]” The Working Group recommends that DDTC consider setting parameters on the parties that must be included in reporting (e.g., seller, manufacturer, purchaser, source, customer, and end user).

The Working Group suggests the reporting focus be on the parties with whom the registrant has direct contact. This will enhance accuracy since the registrant will have better knowledge of the existence, role, and ability to obtain the information required for the report. The Working Group notes that this is similar to the type of information requested in other export authorizations. Finally, the Working Group believes that this change could potentially reduce delays as reporters seek to obtain information from non-direct parties.

D. Recommendation 4: Limit duplicative reporting by requiring registrants to report brokering activity only once.

There are multiple instances when duplicative reporting may occur including:

- Instances where more than one registered broker is involved in a transaction;
- Brokering activities that last multiple years with only one approval; and
- Brokering activities that span multiple licenses (ex. in cases where the approval period is limited to a short timeframe).

While difficult to eliminate duplicative reporting (especially in instances where multiple registered brokers are reporting on the same activity), through generation of a reporting template (Recommendation 6), the Working Group assesses that the form might facilitate the ability for DDTC to more easily identify duplicate reports across multiple registrants.

To further streamline the reporting requirement and reduce duplicative reporting, we recommend that the reporting requirement be updated to require that registrants report each brokering activity only once (ex. if a brokering activity spans multiple reporting periods, only report the activity in the first reporting period). Alternatively, the template or form could include a mechanism to identify when the brokering activity was previously reported (checkbox or tab).

Reducing duplicative reporting requirements would lessen the burden on DDTC when consolidating information for review and analysis and reduce the burden for industry in preparing the reports.

E. Recommendation 5: Focus on direct consideration received by the registered broker.

The Working Group identified that the registrant may not necessarily have visibility into the consideration received (or expected to be received indirectly) by all persons who participated in the brokering activity. This overly broad requirement can lead to difficulty in fulfilling the reporting requirement, incomplete reports and/or duplicative reporting by different parties.

The Working Group suggests revising the requirement to only require reporting on direct consideration received by the registrant. This applicant is more likely to have clarity/access to consideration they receive as part of a transaction.

F. Recommendation 6: Provide a reporting template

Finally, one of the challenges noted by DDTC is the widely varying format of reporting that inhibits its ability to analyze and consolidate information. The working group requested a sample report from DDTC as part of this tasking. We recommend a variation to the recommended report including all elements provided by DDTC except for the requirement to report “all persons who participated in the activities” (see Recommendation 3 above).

This revised template can either be inputted into DECCS or uploaded to the DDTC website as a template.

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Registration Code: (Manufacturer/Broker)		Subject: (Brokering Report for <i>Insert Subject Name</i>)					Broker Address:			
Registration Code: (Broker)		Brokering Report for _____ Activities from: _____ to _____								
Authorization		Description of Activity			Defense Articles		129.10(b) – All Persons Who Participated in The Activities			
License Number	Exemption	Description of Brokering Activity and Program. Include Contract, delivery order	Contract Value USD	Quantity	Type (Commodity)	USD Dollar Value	Name & Address of Seller	Source (of Commodity) Name, Address, Country Where Located (If an individual add Nationality)	Purchaser Name, Address, Country Where Located (If Individual add Nationality)	End User Name, Address, Country Where Located (If Individual add Nationality)
		Description:								
		Contract:								
		Delivery Order:								
		CLIN:								

VI. CONCLUSION

In summary, the recommendations identified in this white paper are intended to improve the brokering process by facilitating accurate, consistent, and timely submissions of annual brokering reports. Our analysis indicates opportunities to streamline and simplify the brokering reporting requirements while still ensuring DDTC’s access to information to allow for policy and enforcement oversight. Lastly, the working group discussions identified opportunities to clarify other aspects of Part 129. We recommend consideration of future DTAG taskings related to the definition and scope of the term “brokering activities.”