

**[Billing Code 4710-25]**

**DEPARTMENT OF STATE**

**22 CFR 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. 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 30 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 60 days from the date of publication.

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

- E-mail: [DDTCResponseTeam@state.gov](mailto: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,” 13<sup>th</sup> 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>.

**FOR FURTHER INFORMATION CONTACT:** (Name), Director, Office of Defense Trade Controls Compliance, Department of State, 12<sup>th</sup> 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](mailto: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) (Sec. 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 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 Sec. 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 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. 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.

#### Brokering and U.S. Government Employees

A proposed new paragraph (d) of Sec. 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. This paragraph would also 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.

#### Registration Requirements and Exemptions

Editorial and technical revisions would be made to certain registration and related registration exemption provisions in Section 129.3. A new paragraph (b)(3) 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.

A new paragraph would be added as Sec. 129.3(d) to correspond with the current Sec. 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 Sec. 129.6 for prior approval for brokering activities, as well as reporting and record-keeping requirements. Proposed new paragraph (c) to Sec. 129.3 would confirm, however, that brokers who are exempt from registration are subject nevertheless to the policy on embargoes and other proscriptions in Sec. 129.5.

#### Registration statement and fees

The revision would consolidate all registration requirements in Sec. 129.4 rather than referring to certain requirements 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.

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 Sec. 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 Sec. 129.8(a)).

A new paragraph would be added as Sec 129.4(d) to recognize expressly the discretion of Directorate of Defense Trade Controls (DDTC) to permit a U.S. or foreign person registered as a broker under Part 129 to include its U.S. or foreign parent or subsidiaries in its registration documentation. To qualify for such a registration, the parent or subsidiaries must be listed in the registered broker's Statement of Registration and satisfy other criteria as described in this new paragraph.

### Policy on Embargoes and Other Proscriptions

Sec. 129.5 would be amended to make some clarifications, including the condition that exemptions for prior approval in Sec. 129.7 do not apply to brokering activities involving countries or other persons subject to embargoes and other proscriptions cited in Sec. 129.5 (e.g., those involving countries or other persons referred to in Sec. 126.1 or subject to a restriction published in the Federal Register).

### Exemptions for Prior Approval Requirement

A new exemption would be added in a revised Sec. 129.7(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 Sec. 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 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 Sec. 120.1(c) (see Sec. 129.7(c)(1)).

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 Sec. 129.7(c)(2)).

The list of excluded items in 129.7(c)(3) 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 Sec. 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 Sect. 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 Sec. 129.8(a) and (b).

A provision adding a certification consistent with Sec. 126.13 would be added in Sec. 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 Sec. 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 Sec. 129.4 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 Sec. 129.8 recognizes that some of the information required by Section 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



Sec. 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 Sec. 126.9 of the ITAR.

### Reports

Sec. 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 of Brokering Activities and License Application or Other Approval Requirements

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.

Example 1: 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 and would be required to register with and obtain approval from DDTC under Part 129 prior to initiating such activities.

Example 2: A foreign person signs an agreement with a U.S. manufacturer/exporter registered with the DDTC under Part 122 of the ITAR. 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 (or sales representative) 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 or 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. company. The foreign person/sales representative is engaged in brokering activities and would be required to register with the 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 Section 129.7(d) are met.

Example 3: A foreign person signs an agreement with a U.S. manufacturer/exporter registered with DDTC under Part 122 of the ITAR. The agreement obligates the foreign person to purchase and distribute (or resell) 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 and a Warehouse & Distribution Agreement authorizing the foreign person to receive and present technical data to promote sales and to warehouse and distribute 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 Section 129.7(d) are met.

Example 4: A foreign person seeks buyers for certain U.S. 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 in the U.S. or and overseas 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 and would be required to register with and obtain approval from DDTC under Part 129 prior to initiating such activities. In addition, the foreign government seller would be required to obtain a re-export authorization under ITAR Sec. 123.9(d) before reselling or re-exporting such defense articles.

Example 4: 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 and 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.

Again, 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. 129.11 would provide additional guidance on brokering records that must be maintained in addition to the requirements in the current Sec. 122.5. 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 sections 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: Secs. 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 FR 4311; E.O. 13284, 68 FR 4075; 3 CFR, 1977 Comp. p.79; 22 U.S.C. 2651a; Pub. L. 105-261, 112 Stat. 1920.

- 2. Sec. 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 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 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 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.

\* \* \* \* \*

■ 3. Sec. 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 permits the 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, or brokering activities or any other written authorization issued pursuant to this subchapter.

■ 4. Sec. 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) Enquire into any aspect of a proposed export or temporary import or brokering activity by the applicant, and

\* \* \* \* \*

(b) For the purposes of a broker who is a foreign person, the empowered official may be a foreign person who otherwise meets the criteria for an empowered official in paragraph (a) of this section.



(c) A person who is ineligible within the meaning of §120.1(c)(2) of this subchapter, or 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, or 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 who is a citizen or national or other person of a country referred to in §126.1 may not be an empowered official.

**PART 122 – REGISTRATION OF MANUFACTURERS AND EXPORTERS**

■ 5. The authority citation for part 122 continues to read as follows:

AUTHORITY: Secs. 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.

■ 6 Sec. 122.2 is amended by revising paragraph (b)(2) to read as follows:

**§122.2 Submission of registration statement.**

\* \* \* \* \*

(b)(2) The transmittal letter shall also declare whether the intended registrant is owned or controlled (as defined in § 122.2(c)) by foreign persons (as defined in § 120.16 of this subchapter). If the intended registrant is owned or controlled by foreign persons, the letter shall include an explanation of such ownership or control, including the identities of all foreign persons who ultimately own or control the registrant.

\* \* \* \* \*

■ 7. Sec. 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 five days of the event, provide the Directorate of Defense Trade Controls a written notification, signed by a senior officer (e.g., Chief Executive Officer, President, Secretary, Partner, Member, Treasurer, General Counsel), if:

\* \* \* \* \*

*(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.)*

(2) There is a change in the information contained in the Statement of Registration to include: registrant name, address or legal organization structure or the establishment, acquisition or divestment of a U.S. or foreign subsidiary or affiliate engaged in ITAR-controlled activity. All other changes in the Statement of Registration must be provided as part of annual registration renewal.

\* \* \* \* \*

## **PART 126 – GENERAL POLICIES AND PROVISIONS**

■ 8. The authority citation for part 126 is revised to read as follows:

AUTHORITY: Secs. 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; Sec. 1225, Pub. L. 108-375.

■ 9. Sec. 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 §129.5 which imposes restrictions on brokering activities similar to those in this section.).

(b) *Shipments.* A defense article licensed for export under this subchapter may not be shipped on a vessel, aircraft, or other means of conveyance which is owned or operated by, or leased to or from, any of the proscribed countries, areas or other persons.

\* \* \* \* \*

■ 10. Sec. 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 export* 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.

■ 11. Sec. 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 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**

■12. The authority citation for part 127 continues to read as follows:

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

■ 13. Sec. 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 and omission of facts.**

■ 14. Sec. 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.

■ 15. Sec. 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.

\* \* \* \* \*

- 16. Sec. 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 section may therefore need to be revised.)*

- 17. The table of contents for part 129 is revised to read as follows:

*Section Contents*

§ 129.1 Purpose.

§ 129.2 Definitions.

§ 129.3 Requirement to Register.

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

§ 129.5 Policy on embargoes and other proscriptions.

§ 129.6 Requirement for prior approval.

§ 129.7 Exemptions from prior approval.

§ 129.8 Procedures for obtaining prior approval.

§ 129.9 Guidance.

§ 129.10 Reports.

§ 129.11 Maintenance of Brokering Records by Registrants.

- 18. The authority citation for part 129 continues to read as follows:

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



- 19. Sec. 129.2 is amended by revising paragraphs (a), (b) and (c) and adding paragraph (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 to facilitate the manufacture, export, re-export, import, transfer or retransfer of a defense article or defense service. Such action includes, but is not limited to:

(1) Financing, transporting or freight forwarding defense articles and defense services,

(2) Soliciting, promoting, negotiating, contracting for, or arranging a purchase, sale, transfer, loan or lease of a defense article or defense service,

(3) Acting as a finder of potential suppliers or purchasers of defense articles or defense services, or

(4) Taking any other action to assist a transaction involving a defense article or defense service. For the purposes of this subchapter, engaging in the business of brokering activities requires only one action as described above.

(c) Brokering activities include any such activities by any U.S. person wherever located, by any foreign person located in the United States, by any foreign person located outside the United States who engages in brokering activities involving a U.S.-origin defense article or defense service, by any foreign person located outside the United States who engages in brokering activities involving the import into the United States of any defense article or defense service, or by any foreign person located outside the United States who on behalf

of a U.S. person engages in brokering activities involving any defense article or defense service. Brokering activities do not 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.

(d) The term “foreign defense article or defense service” means any non-U.S.-origin article or service of a nature described on the United States Munitions List. Unless otherwise provided, the terms “defense article” and “defense service” refer to both U.S. and foreign origin defense articles and defense services of a nature described on the United States Munitions List.

*(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.)*

■ 20. Sec. 129.3 is amended by revising paragraphs (a), (b)(1), (b)(2), (b)(3), and by adding paragraph (c) and (d) to read as follows:

**§129.3 Requirement to register.**

(a) Any person who engages in brokering activities, as defined by §129.2, is required to register with the Directorate of Defense Trade Controls.

(b) \* \* \* \* \*

(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 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 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 which 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.

(c) Persons exempt from registration are subject to the policy on embargoes and other proscriptions in §129.5 of this subchapter.

(d) Registration under this section is generally a precondition for the issuance of prior approval for brokering activities required under part 129 of this subchapter or the use of exemptions from prior approval.

■ 21. Sec. 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 §129.4(b) of this section, and payment by check payable to the Department of State of a registration fee of \$2,250 per year. The check shall bear the registrant's legal name and address, be drawn against the registrant's account and be payable in U.S. currency through a U.S. financial institution. The Statement of Registration and transmittal letter must be signed by a senior officer (e.g., Chief Executive Officer, President, Secretary, Partner, Member, Treasurer, General Counsel) who is a U.S. person and who has been empowered by the intended registrant to sign such documents, except that, in the case of an intended registrant who is a foreign person, the senior officer may be a foreign person. 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). 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 with payment.

(b) *Transmittal letter.* A letter of transmittal, signed by an authorized senior officer 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 section:

(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 broker that is the parent or subsidiary of a person registered under part 129 may be deemed by the Directorate of Defense Trade Controls to be covered by the registrant's Statement of Registration provided that the broker is listed in the parent or subsidiary's Statement of Registration and meets the same transmittal letter requirements in §129.4(b) of this section as the registrant. If the broker is a foreign person, it must provide the registrant with a written certification signed by a senior officer acknowledging that it will be subject to the requirements of this subchapter, to include part 129. The registrant must maintain the letter as part of its record-keeping requirements in § 129.11. The foreign person broker is subject to the same eligibility criteria in the transmittal letter as the registrant.

(e) A registrant must, within five days of the event, provide the Directorate of Defense Trade Controls a written notification, signed by a senior officer (e.g., Chief Executive Officer, President, Secretary, Partner, Member, Treasurer, General Counsel) 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 information contained in the Statement of Registration to include: registrant name, address or legal organization structure or the establishment, acquisition or divestment of a U.S. or foreign subsidiary or affiliate engaged in ITAR-controlled activity. All other changes in the Statement of Registration must be the provided as part of annual registration renewal.

(f) A U.S. or foreign registrant must provide written notification to the Directorate of Defense Trade Controls 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. 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 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.

■ 22. Sec. 129.5 is amended by revising paragraphs (a), (b), (c) and (d) and removing paragraph (e) to read as follows:

**§129.5 Policy on embargoes and other proscriptions.**

(a) This section applies to brokering activities defined in §129.2 of this subchapter, regardless of whether the person involved in such activities has registered or is exempt from registration under §129.3 of this subchapter. The exemptions in §129.7 of this subchapter from the requirement for prior approval are not applicable to brokering activities subject to this section.

(b) No person may engage in brokering activities or make a proposal to engage in brokering activities involving 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.

(c) No person may engage in brokering activities 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 pursuant to §127.7 of this subchapter). (See §127.1(c) of this subchapter for additional disclosure and approval requirements applicable to brokering activities.)

(d) 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 (b) or (c) of this section. Any person who knows or has reason to know of brokering activities involving such countries or other persons must immediately inform the Directorate of Defense Trade Controls.

■ 23. Sec. 129.6 is amended by revising the title and text to read as follows:

**§129.6 Requirement for prior approval.**

No person who is required to register as a broker pursuant to §129.3 of this subchapter may engage in the business of brokering activities without the prior approval of the Directorate of Defense Trade Controls, except as provided in §129.7 of this subchapter.

■ 24. Sec. 129.7 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:

**§129.7 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 §129.3 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, as demonstrated by one of the following conditions being met:

(i) The U.S. Government agency contract at issue contains an explicit clause stating the following: “This contract supports a foreign assistance or sales program authorized by law and the contracting agency has established control of the activity covered by this contract

by the other means equivalent to that established under the International Traffic in Arms Regulations,” or

(ii) The Directorate of Defense Trade Controls provides written concurrence in advance that the condition is met.

(c)(1) Brokering activities are exempt from the requirement for prior approval if they 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 all persons participating in such activities, including defense article and defense service transactions, are nationals exclusively of such countries and are eligible pursuant to §120.1(c). This exemption does not apply to brokering activities pertaining to the defense articles or defense services specified in paragraph (c)(3) of this section.

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

(i) Defense articles or defense services specified in paragraph (c)(3) of this section, or

(ii) Defense articles or defense services valued at or greater than \$25 million.

(3) The exemptions in paragraphs (c)(1) and (c)(2) of this section do not apply to brokering activities pertaining to the following defense articles or associated defense services:

(i) Firearms and other weapons of a nature described by Category I(a) through (d), Category II(a) and (d) and Category III(a) of Part 121 of this subchapter;

(ii) Rockets, bombs and grenades as well as launchers for such defense articles of a nature described by Category IV(a), and launch vehicles and missile and anti-missile systems of a nature described by Category IV(b) of Part 121 of this subchapter;

(iv) Naval nuclear propulsion equipment of a nature described by Category VI(e) of Part 121 of this subchapter;

(iii) Night vision-related defense articles and inertial platform, sensor and guidance-related systems of a nature described by Category XII(c) and (d) of Part 121 of this subchapter;

(vi) Chemical agents described by Category XIV(a), (d), and (e) of Part 121 of this subchapter, biological agents and biologically derived substances described by Category XIV(b), and equipment described by Category XIV(f) for dissemination of the chemical agents and biological agents described by Category XIV(a), (b), (d) and (e) of Part 121 of this subchapter;

(vii) Spacecraft of a nature described by Category XV of Part 121 of this subchapter that is significant military equipment;

(viii) Nuclear weapons design and test equipment of a nature described by Category XVI of Part 121 of this subchapter;

(ix) Directed energy weapons of a nature described by Category XVIII of Part 121 of this subchapter; or

(x) Submersible vessels, oceanographic and associated equipment of a nature described by Category XX of Part 121 of this subchapter;

(xi) Miscellaneous articles of a nature described by Category XXI of Part 121 of this subchapter;

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

(xiii) Missile Technology Control Regime Annex items in § 121.16 of this subchapter;

(xiv) Foreign defense articles and defense services of a nature that are described in various categories of Part 121.1 of this subchapter other than those that are involved in brokering activities meeting the criteria of paragraph (c) (1) of this section.

(d) 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;

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

(3)(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

(ii) If the brokering activities involve only use of public domain information, the Part 122 registrant will obtain a license or approval prior to the export of the defense article or defense service;

(4) There is a signed representational agreement between the broker and the Part 122 registrant that describes:

(i) The brokering activities to be performed (including the type and U.S. Munitions List category and sub-category of the defense article and defense service involved),

(ii) The persons and countries involved in the brokering activities, including a defense article or service transaction, and

(iii) The fee, commission or consideration received or expected.

(e) Brokers who use the exemptions in this section must comply with all other provisions of part 129 of this subchapter.

■ 25. Sec. 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)(1) All requests for prior approval of brokering activities must be made to the Directorate of Defense Trade Controls. 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 as defined in § 129.2 of this subchapter 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 (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 identity, nationality and country where located of all U.S. and foreign persons who may participate in the transaction as described in paragraph (b)(1) of this section;

(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.

■ 26. Sec. 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 identity, nationality and country where located of all U.S. and foreign persons who may participate in the activities or any potential defense article or defense service transactions related to such activities;

(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 transaction 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.

■ 27. Sec. 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 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, the report shall identify all U.S. and foreign persons who participated in the 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) Brokering activities are subject to the reporting requirements of this section whether or not a defense article or defense service transaction resulted or consideration was received from the activities. If there were no brokering activities during the preceding year the report shall certify that there were no such activities.

■ 28. Sec. 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 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