From: Marie Rapport [mailto:JMRapport@brokerpower.com]
Sent: Tuesday, December 20, 2011 12:46 PM
To: DDTC Response Team
Subject: Brokering Rule Comments

Dear Sir,

I note that your proposed rule (P/N 7732) would broaden the ITAR definition of broker. That proposed change, alongside the proposed revised description of brokering activities and the continuing specific exemption for freight forwarding and transportation, create a need for a specific exemption for customs brokers that is similar to the exemption for freight forwarding and transportation. Otherwise, there is ambiguity in your proposed regulatory language which might lead readers to believe that you no longer want to exempt customs brokerage as such from ITAR-regulated brokers and brokering activities.

Most sincerely,

Marie Rapport
President
Broker Power, Inc.
7000 Infantry Ridge Road, Suite 104
Manassas, VA 20109
703.257.7700

Huntington Ingalls Industries

February 6, 2012

U.S. Department of State
Daniel Cook
Chief, Compliance and Registration Division
Office of Defense Trade Controls
2401 E Street, NW
Washington, DC 20037

Subject: RIN 1400-AC37 - Brokering Rule Comments

Dear Mr. Cook:

Huntington Ingalls Industries, Inc. (HII) respectfully provides the following inputs to Federal Register Notice of Proposed Rule, dated December 19, 2011.

Changes to § 122.4(a)(2) and the new supplemental Note

HII welcomes the clarifications to §122.4(a)(2). The removal of 'material' changes and the further clarification of which changes require written notification will limit the number of times a company must submit amendments to its annual registration. This should significantly reduce the amount of updates submitted by industry to DDTC.

HII requests clarification from DDTC on one aspect to notification of changes: if a company began manufacturing or exporting products/technologies found in a new USML Category not previously identified in its registration, the rule should state that DDTC Licensing Operations will process the request normally and will not suspend processing if the company's most recent annual registration does not list the additional USML Category.

Changes to § 126.13(c) – revised

HII respectfully requests the removal of this paragraph (c) as Required Information for any license request. This proposed paragraph requires companies to include in each license application to DDTC a list of brokers involved and a description of their activities. This requirement would appear to negate any exemption from prior approval. If a brokering activity is exempt from prior approval, adding a requirement to provide information to any license request would presumably supersede the prior approval exemption. Furthermore, this information requirement could confuse companies as to what truly constitutes prior approval. Finally, this proposed paragraph could result in apparent double licensing of brokering activity. It is our belief that the proposed regulations on when a broker is exempt

from prior approval are clear and that this proposed paragraph (c) will unnecessarily obscure the process.

Changes to § 129.2(b) – definition of "brokering activities"

HII respectfully requests that DDTC not adopt the proposed definition. Although the definition more closely tracks the AECA, we believe it does not provide the clarity intended. By removing the language tying brokering activities to "acting on the behalf of others," with no further qualifiers, this revised definition classifies everyone who makes an export under the ITAR as a broker. This proposed definition is far reaching and does not focus on persons who would normally be considered brokers. As written, the only entities not subject to this proposed definition would be manufacturers of defense articles who do not export.

Moreover, the proposed definition covers "….any action to facilitate the manufacture, export, reexport, import transfer, or transfer of a defense article or defense service." [Emphasis added.] By using such broad, sweeping language, the definition now appears to apply to all activity covered by export licenses and exemptions under the ITAR. HII does not believe the revised definition aligns with DDTC's stated intent, and encourages DDTC to include clarifying language as to which activities and entities DDTC wishes to cover.

Changes to § 129.3(b)(3) – inclusion of foreign brokers in our US registration

HII respectfully seeks clarification on what is meant by "exclusive broker." That is, does "exclusive" mean that the broker performs such activities for only one company, or does it mean that the company only retains this particular broker for the indentified activity or product?

If you have any questions regarding these comments, please contact me at (228) 935-0518 or at sandra.cross@hii-co.com.

Sincerely,

Sandra Cross

Sandra R Cross
Corporate Director, International Trade Compliance
Huntington Ingalls Industries, Inc.

ATK
Washington Operations
1300 Wilson Boulevard
Suite 400
Arlington, VA 22209

www.atk.com

10 February 2012

Mr. Daniel Cook
Chief, Compliance and Registration Division
Office of Defense Trade Controls Compliance
U.S. Department of State
2401 E Street NW, SA-1, 12th Floor
Washington, DC 20037

Subject: **RIN 1400-AC37, Brokering Rule Comments**

Dear Mr. Cook:

Alliant Techsystems Inc. (ATK) appreciates the opportunity to comment on the subject advanced notice of proposed rulemaking (ANPR) on revisions to the ITAR related to Brokers and Brokering Activities. Changes and clarity to Part 129 have been sought after by the defense community and the content of the ANPR demonstrates the careful consideration and deliberation taken by the DDTC. ATK believes the proposed rule can be clarified and enhanced and to follow are ATK's comments and recommendations to that end:

- **Summary of Major Changes**
  The DDTC states that the intent of revising the definition of broker and brokering activities is to "more closely track the statutory definition…" But given the very broad nature of the proposed definitions, the DDTC has gone beyond the original intent – to regulate the brokering activities of U.S. and Foreign Persons not otherwise regulated. The proposed regulations, as do the current regulations, include duplicative licensing; whereby the registered US exporter identifies the broker as a party to the transaction and the broker identifies the registered US exporter in their Brokering Prior Approval Request. Additionally, if the broker is paid a fee, commission or other consideration, the registered US exporter is providing that information in accordance with ITAR Part 130. Therefore, ATK recommends the DDTC provide exemptions from the Brokering Prior Approval for brokers that are registered and engaged in activities that are otherwise subject to the licensing requirements of the DDTC.

- **Paperwork Reduction Act, Estimated Burden Hours**
  Under the proposed rule, the DDTC estimates 2 hours per registrant to generate the Annual Brokering Report and for each Brokering Prior Approval request. ATK believes these estimates are grossly understated. Under the current regulations, ATK estimates at least 50 man-hours and 10 man-hours to gather all the required documents and generate our Annual Brokering Report and each Brokering Prior Approval request, respectively. These estimates are based on all the individuals that have a direct role in generating the

Annual Brokering Report and Brokering Prior Approval requests. Based on the additional requirements being imposed in the proposed rule, ATK does not foresee a reduction in the number of man-hours needed to prepare the Report or Prior Approval request.

Based on the expanded scope, definitions and requirements in the proposed rule, ATK requests the DDTC allow 12 months from the publication of the final rule until the rule becomes effective. This time will allow the DDTC to provide outreach and education on the new requirements, post information, guidance, 'frequently asked questions' and prepare for and process the increase in requests for guidance and registrants. Also, this will provide registrants time to consolidate their Statements of Registration, modify systems and implement new procedures to comply with the proposed Reporting and Prior Approval requirements.

- **Examples 1, 3, 4 and 6 – when did brokering activities begin**
  The seven examples provided in the ANPR are helpful in identifying scenarios of brokering activities and requirements. ATK requests the DDTC to include as part of the examples that would require prior approval under proposed §129.6 (examples 1, 3, 4, and 6), clarification as to at what point in the transaction would the broker need to obtain prior approval?

- **§129.2(a) – removal of the phrase "who acts as an agent for others"**
  With the removal of "who acts as an agent for others" from the definition of Broker, the proposed definition of "Brokering activities" now reads "any action to facilitate the manufacture…of a defense article." By that definition, every supplier of items (CCL or USML controlled) incorporated into a defense article would be deemed a broker; and therefore required, at a minimum, to register and report. ATK requests the DDTC to reconsider the proposed definition of broker and brokering activities and clarify those actions subject to and excluded from the definitions.

- **§129.3(b)(3) – use of "full-time" to describe regular employee**
  Proposed §129.3(b)(3), in-part, states: "…covered in their Statement of Registration, their bona fide and full-time regular employees, and their eligible…" The Fair Labor Standards Act, administered by the US Department of Labor, does not define 'full-time'. The definition is left to the discretion of the employer, resulting in inconsistent application of the term 'full-time'. Additionally, throughout proposed Part 129, "regular employee" is used several times but only in §129.3(b)(3) is 'full-time' placed in front of it. Therefore, ATK recommends removal of full-time so the subparagraph reads, in-part: "…covered in their Statement of Registration, their bona fide regular employees, and their eligible…"

- **§129.3(b)(3) versus §129.3(b)(4) – clarification of example 2**
  Example 2 in the ANPR involves a foreign person promoting, receiving, warehousing and distributing US origin SME defense articles. It goes on to state that the foreign person is engaged in brokering activities but exempt from the registration, licensing and reporting requirements because the US person included the foreign person on their Part 122 registration as an affiliate; therefore qualifying under §129.3(b)(3). ATK requests the

DDTC clarify: if the foreign person was not included on the US person's Part 122 registration, would the foreign person still qualify under §129.3(b)(4) and still be excluded from registration, licensing and reporting under Part 129?

- **§129.3(b)(3) and §129.3(d) – inclusion of "foreign subsidiaries"**
  Proposed (b)(3) identifies "Persons registered pursuant to part 122 of this subchapter, their U.S. person subsidiaries, joint ventures, and other affiliates listed…" and includes their foreign person brokers; while (d) has similar language but includes "foreign subsidiaries". ATK requests clarification on why "foreign subsidiaries" were excluded from (b)(3) and asks the DDTC include "foreign subsidiaries" as part of (b)(3).

- **§129.3(e) – when is registration not required for prior approval**
  Proposed §129.3(e) states, in-part: "Registration under this section is generally a precondition for the issuance of prior approval for brokering activities…or use of exemptions…" ATK recommends deletion of the word "generally" from the sentence or requests the DDTC clarify and provide examples of when registration would not be a precondition for the issuance of a prior approval or exemption use.

- **§129.4(e)(1) – citation correction**
  The first sentence of the proposed subparagraph contains a typographical error. The proposed subparagraph states, in-part: "Any of the persons referred to in §129.4(b)(1) of this subchapter…" The citation should be corrected to read "§129.4(c)(1)".

- **§129.4(b) – calculating annual registration fee**
  Will brokering licenses and amendments be part of the calculation for the annual registration fee paid by persons registered pursuant to Part 122 that identify themselves as brokers within their Statement of Registration? ATK requests the DDTC expressly provide that brokering licenses and amendments will not be part of the annual registration fee calculation.

- **§129.8(b) – requirements of requests for prior approval**
  Proposed §129.8(b)(2) requires "[t]he name, nationality and country where located of all persons who may participate…" This could result in the need to identify dozens of regular employees of the applicant. If an applicant identifies all known persons 'who may participate' at the time of the application, would it require the applicant to then amend the approval in the future to identify additional regular employees 'who may participate'? ATK requests the DDTC limit this requirement to the name, address and country of the registered person, their US or foreign subsidiaries, joint ventures, or affiliates which will be engaged in brokering activities under the approval.

  Proposed §129.8(b)(4) requires the request to identify if the sale will be through DCS, FMS or other activity in support of the US Government. The applicant may intend for the sale to be through one mode but may ultimately go through another decide that the sale should be through FMS or other activity in support of the US Government. Given the certification requirement under §129.8(c) and the addition of 'brokering activities' under

§127.2(b)(13); would the applicant be viewed as making a misrepresentation by stating the sale will be through one method but eventually utilizing another?

Proposed §129.8(b)(5) requires the request to identify "[t]he type of consideration received or expected to be received, directly or indirectly…" and include the "dollar value amount and source thereof." Many brokering arrangements are commission based and dependent on the contacts received. Therefore, providing a dollar value amount, as required in (5)(iii), would be a guess or approximation, at best. ATK requests the DDTC revise the language under (5)(iii) to read as follows: "the estimated U.S. dollar value amount and source thereof." The 'estimated' value aligns with the estimated quantity and value requested in §§129.8(b)(3)(iv) and (v), respectively.

- **§129.10 – reporting unsuccessful brokering activities**
  The annual brokering report requires identification of, amongst other things, "the quantity…and U.S. dollar value of the defense articles or services; the type and U.S. dollar value of any consideration received or expected to be received…" If the broker is paid a commission, engaged in brokering activities but no sales occurred during the report year; the broker would not be able to provide quantities, types or values because no sales occurred. What information should the report include, so the Empowered Official can "certify that the report is complete and accurate"? ATK requests the DDTC revise §§129.10(b)(1) and (2) to read, in-part, as follows:

  "(1)…The report shall describe each of the brokering activities, which resulted in a sale, including the number of the prior approval or the exemption claimed; and"

  "(2) For each of the brokering activities, which resulted in a sale, the report shall identify all persons…"

ATK again wants to thank the Directorate for the opportunity to comment on the ANPR and applauds the Directorate's continued efforts to clarify and update the Regulations.

Sincerely,

Robert Schuettler
Director, Corporate Export Licensing
Alliant Techsystems Inc.

Operating under the joint auspices of:

c/o A|D|S
"ShowCentre"
ETPS Road
Farnborough
Hampshire GU14 6FD
United Kingdom

Tel: +44 20 7091 7822
Fax: +44 20 7091 4545
E-Mail: Brinley.Salzmann@adsgroup.org.uk
URL: www.egad.org.uk

16th February 2012

U.S. Department of State
Office of Defense Trade Controls Policy
PM/DDTC, SA-1. 12th Floor
2401 E Street, NW, (SA-1)
Washington, D.C. 20037
USA

Dear Sir,

Regulatory Changes — Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions: Brokering Rule Comments

On 19th December 2011 the US Federal Register requested that interested parties feed any comments into the US State Department on the proposed regulatory changes to Part 129 of the ITAR pertaining to US Brokering Regulations for your consideration, by Friday 17th February 2012.

This response is provided by the Export Group for Aerospace and Defence (EGAD), on behalf of UK Industry, to these proposals. EGAD is a not-for-profit making special interest industry group focusing exclusively on all aspects of export and trade control matters, and is the only dedicated national industrial body in the UK dealing exclusively with export control issues. EGAD operates under the joint auspices of the ADS Group Ltd (ADS), the British Naval Equipment Association (BNEA), INTELLECT and the Society of Maritime Industries (SMI), and also liases closely on export control issues with the Confederation of British Industry (CBI).

We have been watching from the UK as the plans have been announced and progressed for the on-going overhaul of US export controls with considerable interest. We strongly support the plans for the proposed reforms, from the viewpoint of UK Industry, and are aware that other Industry trade bodies, in other EU Member States (and I am convinced further afield) have equally been watching what has been happening with equally great interest.

Introduction

This note addresses two principal issues arising from the proposals (as published) which are: the definition of "brokering" (as set out at 129.2), and the exemption set out in 129.3(b)(4).

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Definition of Brokering

As the DoS concedes, the brokering regulations have been under review since 2003. It is, therefore, unfortunate that the proposed new rule falls at the very first fence by failing to produce a remotely clear, concise and acceptable definition of what exactly constitutes an act of "brokering".

We, here in the UK, have experienced the practical effect of this inability to define in clear, legal terms exactly what constitutes an act of "trafficking and brokering", when the UK Government sought to introduce and implement our own "Trade Controls", back in May 2004; this resulted in one Industry observer commenting at the time that "If it was the UK Government's intention to draft the legislative equivalent of a precision-guided munition to target the activities of actual brokers, they have, in fact, come up with the legislative equivalent of carpet bombing!" We all know that it is that we are trying to control and curtail, but this is one area in which it is hard to come up with a clear legal definition to use to differentiate between what we do want to control, and what we do not need to try to control.

The definition of brokering now proposed in 129.2(b) covers, in effect, any action whatsoever by any party, US or foreign, to 'facilitate' the transfer (broadly defined) of any US-origin defense article or service, plus any action by any US person, wherever located, or any foreign person in the US, similarly to facilitate the transfer of non US-origin defence articles or services.

This far-reaching redefinition prompts three observations:

First, it is argued that the new definition "tracks more closely the statutory definition in the Arms Export Control Act" – however, this is highly disingenuous. The AECA contains no definition of "brokering". To reproduce in full what the AECA actually says:

"(ii) 206 (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."

Thus, the proposed definition wrenches out of context, and considerably expands, the language of (II) above without taking into account the qualifications ('brokering activities with respect to…') in (I). At the same time, and contrary to the literal reading of the text on which the new definition purports to insist, the activities listed in (II) are, in fact, exempt from registration, under 129.3(b)(2)!

Secondly, and consequently, the proposed definition chooses to treat 'facilitation' as a synonym for 'brokering' - **it is not**. 'Facilitation' contains none of the sense of acting as an agent, intermediary or middleman essential to the definition of a 'broker'.

Thirdly, insofar as the above activities relate to US-origin defense articles and defense services, they are already controlled under other parts of the ITAR. Yet the original intention of Congress in passing the brokering amendment back in 1996 was to close a perceived loophole in the AECA. As the House Report put it: "[Currently], *the AECA does not authorise the Department to regulate the activities of US persons (and foreign persons located in the US) brokering defense transactions overseas*…"

Thus, it appears that foreign defence companies using US-origin components (ie almost all of them) will be obliged to register as brokers (except to the extent that they can employ exemptions, which may be altered or reinterpreted) even though the activities which are covered under Part 129.2(b) are already controlled, and even though the DDTC already asserts jurisdiction over them under ITAR 127.1(b). It is unclear why it should be thought to be necessary to duplicate controls which are already in place.

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According to Black's Law Dictionary and Merriam Webster (to name but two of a number of authoritative sources), a "broker" is someone who "acts as an agent" on someone else's behalf. We believe that this tighter definition should be reinserted into the proposals, before they are finalized and published.

The solution seems relatively straightforward. Instead of an unconvincingly broad scope for the regulation, it would surely make sense to confine the scope of Part 129 to blocking the loophole originally identified. This is relatively narrow. On the one hand, transactions covered by other parts of the ITAR would be excluded; on the other, the Courts have ruled (in the Yakou case) that the legislation does not extend to foreign parties outside the US brokering foreign defence articles. This leaves to be covered by Part 129 US parties anywhere in the world, or foreign parties in the US, engaged in facilitation of manufacture, export, re-export etc of defense articles or services.

Exemptions

Given the vast scope of the new definition of brokering, companies will be particularly interested in the exemptions set out in 129.3(b). Foreign companies, in particular, will focus on the exemption at 12.9(3)(b)(4), which provides an exemption for "persons whose activities do not extend beyond acting as an end-user of a defense article or defense service exported pursuant to a license or approval under parts 123, 124, or 125 of this sub-chapter, or subsequently acting as a reexporter or retransferor of such article or service under such licence or approval, or under an approval under 123.9 of this subchapter".

A natural reading of this exemption is that it applies to end-users as defined in documents such as DSP-83s, ie (usually) foreign governments, as distinct from consignees. At the end of Example 7 of the FRN, however, this exemption is also said to apply to a European defence company negotiating the sale of a defence article with US-controlled content to a government end-user in a Middle Eastern country.

The intention and coverage of this exemption is, thus, unclear. On the one hand, it may, indeed, be intended to apply only to end-users, thus sparing foreign governments from the obligation to register as brokers, a requirement which they could be expected to reject out of hand. This interpretation would then be, however, not much more than a restatement of the exemption applied to employees of foreign governments and international organisations and formulated in 129.3(b)(1). On the other, the intention may be to exempt actions already controlled under other parts of the ITAR.

There are, therefore, a number of issues requiring urgent clarification:

First, is Example 7 what is really intended? If so, 123.9(b)(4) requires amendment to avoid ambiguity. As a minimum, 'a consignee or' should be added before 'end user'.

Secondly, does the exemption apply to all aspects of the transaction, including sales negotiation (as indicated in the example), and reexport and retransfer for all purposes, including movement through the supply chain, temporary exports for exhibition and trial, and final disposal or resale?

Thirdly, does it apply to all affiliates and joint ventures, eg one affiliate or partner providing services on behalf of another?

A positive answer to these questions, while no substitute for a satisfactory definition of brokering, would significantly mitigate the impact of the one proposed. A negative answer, on the other hand, would compel foreign companies to register as brokers, even though they were not engaged in activities which were normally considered to be brokering, and even though the resulting transfers were controlled under other parts of the ITAR. Clarification of these issues is therefore critical from the point of view of foreign companies and their governments.

We sincerely believe that the export activities of legitimate UK companies are more than adequately controlled under the UK's own laws (eg the Export Control Act 2002 and the Bribery Act 2010, to name but two), and that the existing ITAR imposes more than adequate controls on re-exports and re-transfers of USML items, such that there is no need to duplicate them, by imposing controls on foreign companies for 'facilitation' of the same items. Consequently, exemption from registration should apply to all UK companies, and any legal action should be subject to bilateral protocols, as agreed between the two governments in the diplomatic Exchange of Notes covering the application of ITAR 126.18 in the United Kingdom.

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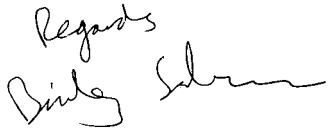
Clarification and consistency, especially on definitions, are essential. There is a lot that is positive going on in the overall US export control reform effort but much of it is based on a simple reinterpretation of existing policy and not on any substantive change. If this amendment is allowed to pass, on the basis that any future interpretation/implementation will be done on a "sensible" basis, Industry (both US and overseas) runs the risk that a future administration may turn back the tide and take a less “sensible” and more stringent approach.

In our view, the new proposed drafting is so broadly drawn as to raise a significant need for detailed legal interpretation even for Industry’s own highly experienced practitioners – especially given the extended gestation period for these proposals, we had been expecting something with far greater clarity to be produced than this.

We hope that the above comments may assist the US State Department in its endeavours on this, but we would earnestly request that time is taken to undertake some form of Government-to-Government and US Government-to-US/non-US Industry discussion to take place, during which clarification can be sought and provided on the above (and many other) issues, before the new rule is finalised and published for implementation.

Regards



Brinley Salzmann - Secretary, EGAD

NATIONAL SHOOTING SPORTS FOUNDATION, INC.
11 Mile Hill Road • Newtown, CT 06470-2359 • Tel (203) 426-1320 • Fax (203) 426-7182
E-mail lkeane@nssf.org • www.nssf.org

LAWRENCE G. KEANE
SENIOR VICE PRESIDENT
& GENERAL COUNSEL

February 16, 2012

Directorate of Defense Trade Controls
Attn: Daniel L. Cook, Chief
Compliance and Registration Division

RE: Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions. 76 Fed. Reg. 78578 (Dec. 19, 2011). Public Notice 7732.

Dear Mr. Cook:

The National Shooting Sports Foundation (NSSF), the trade association for America's firearm industry, respectfully submits comments concerning the Department of State's proposal to amend part 129, and related provisions in parts 120 and 122, of the International Traffic in Arms Regulations (ITAR) relating to brokers and brokering activities. The NSSF is proud of its working relationship with the Department of State through its participation in our annual Firearms Industry Importer, Exporter and Manufacturer Conference, its attendance at our Import/Export Committee meetings and through my role on the Defense Trade Advisory Group (DTAG). We support President Obama's export control reform and look forward to increasing our nation's exports.

The NSSF has concerns with four parts of the proposed language, which would cause significant changes. First, the new definitions of "broker" and "brokering activities" in §129.2 of the ITAR are too broad and are unduly restrictive. Second, the addition of "joint venture" to the list of entities whose eligibility must be certified by the registrant in §122.2 is a considerable burden. Third, the addition of "or are otherwise charged (e.g. by information)" to the ineligibility criteria in §120.1 lowers the threshold to include persons who have not had a ruling or judgment against them. Fourth, the addition of "source or manufacturer" to the list of ineligible persons in §120.1 could cause an export license denial even when a denied manufacturer is not otherwise involved in an export transaction.

1. The Notice of Proposed Rulemaking (NPR) changes the definitions of "broker" and "brokering activities" to more closely conform to the definitions found in the Arms Export Control Act (AECA) (22 USC 2778). Specifically, the deletion of the language "…person who acts as an agent for others…" from the definition of "broker" significantly increases the scope of who must be registered and the activities for which approval must be sought. This will cause an undue burden on exporters, which will hinder President Obama's efforts to increase our nation's exports. In addition, it seems entirely inconsistent with the objectives of the President's Export Control Reform Initiative, which is intended to focus export regulation on the protection of key technologies. In particular, the expansion of the scope of the proposed brokering regulations would include activities that do not substantially contribute to export transactions and will restrict export progress.

"Broker"
Current definition – §129.2(a)
Broker means any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration.
Proposed definition –
Broker means any person (as defined by §120.14 of this subchapter) who engages in brokering activities.

"Brokering Activities"
Current definition – §129.2(b)
Brokering activities means acting as a broker as defined in §129.2(a), and includes 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, irrespective of its origin. For example, this includes, but is not limited to, activities by U.S. persons who are located inside or outside of the United States or foreign persons subject to U.S. jurisdiction involving defense articles or defense services of U.S. or foreign origin, which are located inside or outside of the United States. However, this does not include activities by U.S. persons that are limited exclusively to U.S. domestic sales or transfers (e.g., not for export or re-transfer in the United States or to a foreign person). For the purposes of this subchapter, engaging in the business of brokering activities requires only one action as described above.
Proposed definition –
Brokering activities means any action 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, insuring, transporting, or freight forwarding defense articles and defense services, or
(2) **Soliciting, promoting** (emphasis added), negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service.

There are limited exemptions, with caveats:

a. The proposed language states that brokering does not include: "Activities that do not extend beyond administrative services, such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, or **activities by an attorney that do not extend beyond providing legal advice to a broker**." Under this definition, an attorney who takes any action on behalf of an exporter beyond legal advice, such as in the preparation of export licenses or authorizations, or in auditing the client's export records, would be considered a broker. This is clearly too restrictive as these types of activities by an attorney do not substantively contribute to the export transaction and should not be considered brokering activities.

b. Under §129.3 (b)(3), "Requirement to Register," there is a proposed exemption for "bona fide and full-time regular employees," which does not include part-time, contract or temporary employees. This would be an added burden to the exporter or manufacturer since it is usual and likely for a company to have employees with a variety of statuses (e.g. part-time or temporary), yet still perform tasks similar or identical to those of full-time employees. For example, if a manufacturer hires a contract employee for a period of six months to work in the International Sales Department, the proposed wording would include person in the definition of "broker" since his/her activities would be "soliciting or promoting" an export transaction. Yet a full-time employee performing the same tasks in the same department would be exempt under §129.3(b)(3).

c. The proposed language in §129.3(b)(3) limits the employee exemption to include only employees "whose brokering activities: (1) involve only such registered persons' defense articles or defense services that are currently subject to an export approval under this subchapter obtained by the part 122 registrant or will require such an approval prior to their export, or (2) are on behalf of the part 122 registrant and involve only defense articles and defense services that are located and obtained from a manufacturer or source in the United States for export outside the United States under an export approval under this subchapter"

This proposed wording would cause activities of the exporter's personnel that do not result in a subsequent export approval (e.g. unsuccessful bid or proposal) to be defined as brokering. Further, if a manufacturer's employees source foreign made accessories or components to be included with its end-item, are those employees ineligible for this exemption because the articles were not "located and obtained from a manufacturer or source in the U.S.?"

d. The proposed language for the §129.3(b)(4) end-user exemption requires clarification. It states: "Persons (including their bona fide regular employees) whose activities do not extend beyond acting as an end-user of a defense article or defense service ..... or subsequently acting as a re-exporter or re-transferor of such article or service ... are exempt from registration." A clarification should be added to specifically cover commercial distributors. In many firearm export transactions, the foreign distributor is shown on the export license as a Foreign End-user because the exact end-user is unknown at the time of export. The foreign distributor subsequently acts as a "re-transferor" when selling the articles to dealers within their country.

2. The NPR proposes additions to part 122.2 "Submission of Registration Statement," which would require the registrant to certify the eligibility of its "joint venture, or other affiliate" in addition to the other persons or entities already required to be listed in the Statement of Registration." Although there is a new definition of "affiliate" in part 120.4, there is no definition of "joint venture." The addition of "joint venture" to the list of persons or entities whose eligibility must be certified could be a considerable burden. For example, if a manufacturer partners with a foreign government agency or a state-owned organization in a joint venture project, the manufacturer would be required to certify that no officers or officials of the organization are ineligible. Yet in that case, the manufacturer or exporter clearly has no control over the foreign person and has no way to ensure that the required certifications are valid.

3. In part 120.1, "General authorities, receipt of licenses, and ineligibility," the proposed ineligibility criteria is stricter. The current language makes a person ineligible only when they have been either convicted of violating the criminal statutes in §120.27, debarred pursuant to part 127 or 128, or if they are the subject of an indictment involving the criminal statutes in §120.27. Para. 120.1(c)(2) of the NPR adds "or are otherwise charged (e.g. by information)" which lowers the bar as to when a person become ineligible. This wording is also inserted in relevant sections of parts 126, 127, and 129.

This change would mean that any person who is charged with an export violation may not apply for, obtain, or use an export control document, including an export license. Without having a formal ruling or judgment against the person, DDTC's proposed change excludes them from export transactions.

The addition of "charged (e.g. by information)" to the ineligibility criteria would require that a charged person be added to the government lists to check (e.g. debarred list or similar mechanism). DDTC must provide exporters with a way to determine when a person is "charged," or compliance with this provision will be extremely difficult.

4. Para. 120.1(d) of the NPR states that exemptions do not apply to transactions with ineligible persons, and specifically adds "source or manufacturer" to the list of ineligible persons. This new addition could cause a significant burden.

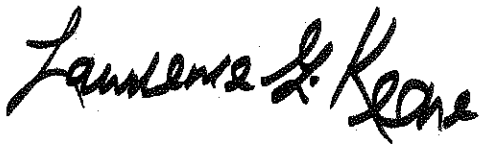
For example, if an exporter is using the exemption for spare parts (§123.16), or for temporary import for repair (§123.4), how will they know if a particular manufacturer (source) is ineligible? This would require more extensive screening of export transactions for ineligible persons.

This also raises the question of whether or not DDTC will be denying licenses when the manufacturer or source, who is not otherwise involved in the export transaction, is an ineligible party. This will definitely increase the compliance burden for an exporter who buys a variety of products for export, or a manufacturer who combines accessories with their end-item if the accessory source manufacturer is ineligible.

For the above reasons, we ask you to reconsider parts of the proposed amendments to part 129 and related provisions in parts 120 and 122 of the ITAR relating to brokers and brokering activities.

We appreciate this opportunity to address our industry's concerns and welcome any questions or comments you may have.

Sincerely yours,



Lawrence G. Keane

LGK/rc/mas

TechAmerica
WHERE THE FUTURE BEGINS
THE ASSOCIATION OF COMPANIES DRIVING INNOVATION WORLDWIDE

February 16, 2012

Sent via email to: DDTCResponseTeam@state.gov

Directorate of Defense Trade Controls
Office of Defense Trade Controls Policy
ATTN: Regulatory Changes—Brokering Rule Comments
Bureau of Political Military Affairs
U.S. Department of State
Washington, DC 20522-0112

RE: Federal Register: December 19, 2011 (Volume 76, Number 243)
RIN 1400-AC37

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

Dear Sir or Madam:

TechAmerica would like to thank the Department of State for the opportunity to comment on this rule which proposes to amend Part 129 of the International Traffic in Arms Regulations (ITAR) relating to brokers and brokering activities. The proposed revisions are intended to clarify registration requirements, the scope of brokering activities, prior approval requirements and exemptions, procedures for obtaining prior approval and guidance, and reporting and recordkeeping of such activities. Conforming and technical changes would be made to other parts of the ITAR that affect export as well as brokering activities.

TechAmerica provides the following comments:

- TechAmerica cannot support the proposed brokering rule in its current form given its extraordinary expansion of regulatory authority. The proposed rule if implemented will have a strong negative impact on the aerospace and defense industries, and companies that provide information technology products and services for these sectors.

- TechAmerica strongly supports the Administration's Export Control Reform initiative and the President's National Export Initiative that are designed to strengthen national

security and promote export growth. The expansive scope of the proposed brokering rule undermines the Administration's stated goals of enhancing US national security and global competitiveness.

- The rule exceeds the original intent of Congress to address unregulated "grey market" arms sales. If implemented, the proposed rule will not deter illicit brokering activities, but would encourage further development of foreign-origin products free of content controlled by the ITAR.

- Fundamental definitions for "broker" and "brokering activities" are problematic in that they unnecessarily capture activities over which the Directorate of Defense Trade Controls already has oversight through current ITAR export licensing and enforcement mechanisms and which are in conflict with the legal and commonly understood definitions of these terms. The statute says that a broker is someone "who engages in the business of brokering activities...." The proposed definition simply states that a broker is anyone who engages in brokering activities. The "business" element is gone, and TechAmerica believes this is in conflict with common practices.

- Lack of clarity regarding the concept of "facilitation" could lead to confusion and misinterpretation of how ancillary business activities are regulated. For example, it appears consultants who offer business assessments could be classified as brokers undertaking brokering activities even though these activities are advisory in nature.

- The imposition of substantial new registration and reporting requirements on foreign subsidiaries of US companies is problematic and will result in increased production costs and schedule. Substantial new compliance costs will be imposed on every facet of the global supply chain to include manufacturing, functional support, consultants and trade associations.

- The rule poses jurisdictional concerns as US industry will be forced to assume increased compliance liability without the affected companies having the ability to control or enforce regulations by other countries. The proposed expansion envisions many more overseas brokers who will be obligated to comply with the regulations, while at the same time they are clearly outside US jurisdiction. If the US company is today in full compliance with the regulations when it obtains the proper licenses, then having a foreign broker who has been already identified in the scope of the license register independently creates added burden for industry and the regulators for no appreciable increase in national security.

Again, TechAmerica would like to thank the Department of State for the opportunity to provide comments on this proposed rule.

Sincerely,

Ken Montgomery
Vice President, International Trade Regulation

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MITSUBISHI ELECTRIC & ELECTRONICS USA, INC.
5665 PLAZA DRIVE, PO BOX 6007
CYPRESS, CALIFORNIA 90630-0007
PHONE: 714.220.2500

February 16, 2012

Sent via email to: DDTCResponseTeam@state.gov

Directorate of Defense Trade Controls
Office of Defense Trade Controls Policy
Bureau of Political Military Affairs
U.S. Department of State
Washington, DC 20522-0112

Subject: Brokering Rule Comments

Dear Sir or Madam.

Mitsubishi Electric & Electronics USA, Inc. ("MEUS") appreciates the opportunity to submit the following comments with respect to the proposed brokering rule published at 76 Fed. Reg. 78578

MEUS is an indirect wholly-owned subsidiary of Mitsubishi Electric Corporation in Japan ("MELCO"), a major developer and manufacturer of consumer electronics and communications and industrial products, including satellites. MEUS sells, markets and supports an extensive line of products, including semiconductor devices, elevators, escalators, heating and air conditioning systems and solar panels. In addition, MEUS, through its International Purchasing Division ("MEUS-IPD"), procures systems, products, components, parts and materials (collectively, "parts and materials") from suppliers in North, Central and South America for resale to MELCO and its affiliates for use in the manufacture of the various Mitsubishi Electric products. A small percentage of these parts and materials are on the United States Munitions List ("USML") (or, in some cases, would be if US-origin), and MEUS-IPD provides procurement engineering services in connection with these parts and materials. MEUS is registered with the Directorate of Defense Trade Controls ("DDTC") and obtains, as needed, export licenses and technical assistance agreements, as well as change of end use and re-export authorizations for its parent, MELCO, and MELCO's affiliates. MEUS-IPD does not procure parts and materials or obtain change of end use and/or re-export authorizations for any entity that is not part of the Mitsubishi Electric group of companies.

After analyzing the proposed brokering regulations, MEUS believes that the proposed regulations extend far beyond regulating the activities of persons engaged in the business of brokering that Congress sought to regulate in the Arms Export Control Act ("AECA"), Section 38, Pub. L. 104 164, 110 Stat. 1437, (22 U.S.C. 2778), do not further DDTC's stated purposes for these regulations, create duplicative recordkeeping requirements for transactions previously approved by DDTC and, MEUS submits, do not further protect the United States national security interests.

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5665 PLAZA DRIVE, PO BOX 6007
CYPRESS, CALIFORNIA 90630-0007
PHONE: 714.220.2500

I. The Definition of Broker

ITAR Section 129.2(a) currently defines a "broker" as "any person who acts as an agent for others in negotiating or arranging contracts purchases, sales or transfers of defense articles or defense services in return for a fee, commission or other consideration" The proposed regulations significantly expand the definition of broker by deleting the agency and compensation requirements and broadening the definition of brokering activities. In the proposed regulations, the State Department states that "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." 76 Fed. Reg. 78578

This proposed change is not consistent with the legal and common definition of a broker It is well established that a broker must be an agent and is an intermediary, not a principal to a transaction.[1] Without an agency requirement, the proposed definition of broker will include principals (as well as agents) in transactions, and any entity that purchases, sells or transfers defense articles or defense services or facilitates the sale thereof becomes a broker This results in the situation where a US supplier, who could be a manufacturer as well, selling defense articles to a foreign customer is both exporter and broker in that transaction.

The proposed regulations would impact US subsidiaries, such as MEUS, of foreign manufacturers, such as MELCO, who supply parts and materials to their affiliates and assist their affiliates with US legal compliance requirements. These activities should not be considered to be "brokering activities" As noted above, MEUS does not sell defense articles or provide procurement services except to its parent, MELCO, and Mitsubishi Electric affiliates, pursuant to DDTC licenses and technical assistance agreements. MEUS assists (*i.e.*, facilitates) MELCO by obtaining change in end-use and/or re-export authorizations as a service by a subsidiary to its parent. These activities should not be deemed to transform MEUS into a broker [2]

II. The Scope of the Proposed Brokering Regulations Exceeds the Scope of the AECA's Mandate

The proposed expansion of the definition of broker is also not consistent with Congressional intent in enacting the brokering provisions of the AECA. The proposed brokering regulations cite Part 129 AECA Section 38 (76 Fed Reg. 78578, 78587) as authority for the proposed revisions. Section 38 of the AECA requires the registration (and licensing) only of persons who

[1] Black's Law Dictionary, 9th Edition 2009; Webster's Ninth New Collegiate Dictionary, 1986.

[2] Although proposed Section 129 9(b)(3) seems to exempt these transactions from the registration, approval and reporting requirements, MEUS would continue to be identified as a "broker" despite the fact that MEUS is not engaged in brokering activities. As an alternative to clarifying the broker definition, MEUS proposes a clear exemption from the broker definition that would address this concern.

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engage in the business of brokering activities, more specifically requiring the registration of:

> 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 services designated by the President under subsection (a)(1) of this section, or *in the business of* brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article or defense service.

22 U.S.C. § 2778(b)(1)(A)(ii)(I) (emphasis added).

By truncating the "engaging in the business of brokering activities" language, an entity need only engage in a single activity that falls within the proposed 129.2 definition to be subject to the proposed brokering regulations. The intent of AECA Section 38 is to regulate entities engaging in the business of brokering activities as their primary business, not entities that occasionally engage in an activity that is considered to be brokering activities.

The legislative history of the brokering provisions of AECA Section 38 regarding persons who engage in the business of brokering activities indicates that Congress was concerned that the AECA, as it existed at that time, did not authorize the State Department to regulate activities of U.S. persons (and foreign persons located in the U.S.) brokering defense transactions overseas and brokering non-U.S defense articles or technology overseas. The legislative history further indicates that Congress was concerned about U.S. persons involved in arms deals inconsistent with U.S policy. Specifically, the legislative history provides:

> The Arms Export Control Act provides the Department of State with the authority to regulate the destination and use of U.S origin and U.S.-made defense commodities. However, *the 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

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5665 PLAZA DRIVE, PO BOX 6007
CYPRESS, CALIFORNIA 90630-0007
PHONE: 714 220.2500

help to curtail such transactions.

House Report No 104-128 at pp 66 - 67 (emphasis added) Congress' concern was focused upon U.S. and foreign persons who were not "exporters" under the AECA, were not registered with DDTC or did not obtain DDTC export authorizations, and, consequently, their activities were not vetted to ascertain that they were consistent with US national interests and policies. In contrast to Congress' intent, the proposed regulations would require registered exporters and manufacturers, who in any way facilitate the sale of defense articles, to be identified as brokers and to comply with the brokering requirements – even where the registered entity obtains DDTC export authorizations. These entities already comply with the AECA. Thus, this proposed expansion of the definition of broker does not further Congress' intent. The AECA legislative history makes clear that principals to transactions who are already "captured" by the licensing process are not persons whose activities Congress intended to the State Department to regulate.

III The Proposed Brokering Regulations Impose Additional Reporting Requirements Without Any Corresponding Benefit to DDTC

As currently drafted, the proposed regulations will apply to entities that are already registered with DDTC as an exporter or manufacturer pursuant to ITAR Part 122. MEUS, a registered exporter, obtains DDTC approval of licenses and technical assistance agreements, re-export authorizations and change in end use authorizations as required to permit the export of ITAR-controlled parts and materials and to perform defense services. As required by ITAR 122.5, MEUS maintains records concerning the acquisition and disposition of the parts and materials and any related technical data exported as well as the furnishing of defense services, and information on political contributions, fees, or commissions furnished or obtain as required by ITAR Part 130

Exporting and manufacturing activities do not fall within the scope of the brokering provisions of Section 38 of the AECA. Manufacturers and exporters of defense articles are not "brokers" as that term is used commonly and legally Nevertheless, under the proposed brokering regulations many if not all entities that currently export ITAR-controlled products and technical data and furnish defense services, as well as merely facilitate these transactions, would fall within the proposed definition of "broker "

Because the Office of Defense Trade Controls Licensing already authorizes exports, making an exporter (as well as each entity already identified in the license application) a "broker" under the proposed regulations would do nothing to address Congress' concern about U.S persons being "involved in arms deals that are inconsistent with U.S policy, certain of which 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." House Report No 104-128 Through the Office

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of Defense Trade Controls Licensing license approval process, DDTC already ensures that no export pursuant to a license or agreement would run afoul of Congress' stated concerns. So, again, the proposed brokering regulations add unnecessary burdens without any benefit to DDTC or, MEUS submits, more broadly, U.S. national security or foreign policy interests.

Similarly, if an end user or foreign consignee requested assistance from a US exporter in changing the end use of a defense article or in re-exporting a defense article, any assistance provided by the US exporter would subject that exporter to these proposed brokering reporting requirements. Although, again, in that situation DDTC would have all the requisite information needed to approve the authorization for a change end use/reexport, that entity would have to include that information in an annual brokering report to DDTC because it obtained such authorization on a customer's behalf In MEUS' case, the effect of these additional requirements is especially harsh since MEUS would be providing that service -- obtaining re-export and/or change of use authorizations -- on behalf of its parent and affiliates.

Although the proposed regulations contains an exemption from registration and reporting in 129.3(b)(3) that would seem to apply in this situation, these entities would still be deemed to be "brokers." We respectfully suggest that considering these entities to be "brokers" is not appropriate and that it is more appropriate to exclude them from the broker definition.

US companies are already struggling to compete in selling defense articles in the international marketplace, particularly where "ITAR-free" products are increasingly common. The proposed brokering regulations' reporting requirement will simply add more overhead and cost to every US-procured part or material for use in a foreign product. The increased cost would act as a disincentive to foreign customers to source parts and materials in the United States. This is directly contrary to the Administration's goal of increasing exports from the United States to increase employment and stimulate the sluggish U.S. economy.

V The Proposed Brokering Regulations Run Contrary to the Administration's Export Control Reform Initiative

In an April 20, 2010 speech, former US Defense Secretary Gates noted that a major perceived weakness to the current U S export control system is the "overly broad definition of what should be subject to export classification and control The real-world effect is to make it more difficult to focus on those items and technologies that truly need to stay in this country" Gates' prescription for rectifying these problems with the current export control regime was to erect higher and better fences around fewer goods.

The Administration's Export Control Reform initiative has proceeded apace since former Secretary Gates' speech, with State, Commerce and Defense Department officials now

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5665 PLAZA DRIVE, PO BOX 6007
CYPRESS, CALIFORNIA 90630-0007
PHONE: 714.220.2500

reportedly having completed their review of nearly all twenty-one USML categories, with plans to publish draft revisions to the USML categories for public comment as early as March.

Although the above statements by former Secretary Gates and the present on-going USML review are primarily directed towards the present overly broad definitions of what should be subject to ITAR control, the proposed brokering regulations run directly contrary to the spirit of the Administration's Export Control Reform initiative of erecting higher and better fences around fewer items. The definition of broker and brokering activities in the proposed regulations will not only make MEUS a broker, but, if finalized in their present form, will regulate and increase the regulatory burden on possibly hundreds of similarly situated exporters.

V Suggested Revision to Proposed Brokering Regulations

Amend 129.2(a) of the proposed brokering regulations as follows.

Broker means any person (as defined by § 120 14 of this subchapter) who acts as an agent for others and engages in brokering activities in return for a fee, commission or other consideration.

Amend 129.2(e) of the proposed brokering regulations to include a new subsection (4):

Activities by a US Person in the United States registered with DDTC as an exporter that are limited to sales of defense articles to, furnishing of defense services with respect thereto and/or facilitating compliance with applicable ITAR requirements for any affiliate of the US Person.

VI. Conclusion

MEUS hopes that these comments will guide drafting of any final regulation regarding brokering to eliminate unnecessary burdens on MEUS and other US exporters in today's challenging international marketplace.

Sincerely yours,

Perry A. Pappous
Executive Vice President

aerospace
defence
security
space

U.S. Department of State
Office of Defense Trade Controls Policy
PM/DDTC, SA-1. 12th Floor
2401 E Street, NW, (SA-1)
Washington, D.C. 20037
USA

16 February 2012

Subject: ITAR Amendments – Part 129
Brokering Rule Comments

Dear Sir,

We would like to thank the US Department of State for constructively seeking public comments relating to proposed reform of its existing Part 129 International Traffic in Arms Regulations (ITAR) on the activities of "Brokers", which were published on 19th December 2011, and we would like to submit the following comments, in response.

ADS is a not-for-profit UK national trade organization, directly representing the interests of over 900 British firms involved in the civil aviation, defence, security and space industries, with a further 3,000+ similar firms associated with us through our links to a number of regional trade bodies scattered across the UK. We also include, within our group as a wholly-owned subsidiary, Farnborough International Ltd, which is the organizer of the World-famous biennial Farnborough International Airshow, as well as being involved in the organization of a number of other events around the World (eg the biennial Bahrain International Airshow).

Whilst the existing US regulations to control brokering are not as well-defined as many would like, we feel that the new proposals are dangerously open to even wider interpretation. As such, they carry significant risk to UK Industry's competitiveness. We are aware that these concerns are also shared by wider EU Industry. Four broad areas of concern arise from the new proposal:

- The term "Broker" includes any person engaged in brokering activities and is no longer limited to those "who act as an agent for others". This is much wider than any definition used by the UK and in the EU;
- A much broader range of activities are defined as brokering, including the taking of **any other action** that facilitates the manufacture, export, or import of a defence article or defence service;
- Foreign persons outside the US would be subject to this new ruling where the above activities involve a US origin defence article, even if these articles are already covered by an existing US export authorisation. This would include any marketing, including potentially, the activities of ADS, in support of UK industry, as well as FIL in support of international (and especially US) exhibitors;
- Registration with the US Department of State of any "Broker" will be required (currently) at an annual cost of $2,250, and the identification of all participating parties in a transaction together with their names, addresses and other information that may be restricted under UK and EU data protection laws.

The fact that, as outlined in the second bullet point above, these new proposals cover the taking of "**any other action** to facilitate the manufacture, export, re-export, import, transfer, or retransfer of a defense article or defense service" concerns us greatly, as the potential impact on all relevant trade organizations around the World of this loose definition could seemingly be enormous. We have heard that Mr Bob Kovac has personally commented orally at an export controls conference in Singapore, at the start of this month, that "he would NOT regard the organiser of an Airshow, Exhibition, Trade Mission, etc, etc as a broker, on the basis that what are they doing to facilitate a specific deal".

…2/

ADS London
Salamanca Square, 9 Albert Embankment, London, SE1 7SP, **t:** +44(0) 207 091 4500 **f:** +44 (0) 20 7091 4545
www.adsgroup.org.uk

However, whilst this is somewhat reassuring, we would ask that Bob Kovacs' personal interpretation of these new proposals to be specifically included, as an exemption, in the final version of the new regulations, when they come out, just to remove any element of doubt or potential threat of different interpretation by another US Government official, and ensure clarity and consistency of interpretation. We would also be much more comfortable if this exemption could include specific reference to the other, peripheral activities in which organizations such as our own also get involved in during the course of organizing such events, such as facilitating meetings between companies and specific potential overseas customers/delegations, etc.

We are also deeply concerned at the proposals - at 129.3(b)(4) - for any non-US firms seeking to export military equipment to the USA to have to register as "brokers" with the US DoS, and the potential adverse impact that such a rule would have on UK (and non-UK) firms. We believe that definitive clarification is needed from the US DoS on whether this might undermine the potential benefits of the UK and Australia Treaties, for those non-US Members of the "Approved Community" under these Treaties who want to seek to export materiel to the US.

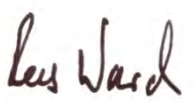
We believe that the proposed amendment would significantly increase the administrative burden on all Industry, around the World, and this is not to be welcomed. On the subject of registration requirements, and the submission of detailed reports to the US DoS, the compilation of detailed data collection (ie each person's name, address, nationality, and country where located and role or function, etc), their recording and transfer to the US Government raise some serious concerns of conflicting legislations - UK/EU data protection privacy legislation do not permit such transfer of detailed data. Meanwhile, the other information sought (ie the quantity, description, and U.S. dollar value of the defense articles or defense services) could be inherently commercially sensitive for the firms concerned, especially if in pursuit of a contract which has yet to be placed, and for which there is a rival US competitor.

We believe that these proposals, as drafted, could result in:

- Those who do not currently regard themselves as being "Brokers", including those who are exporting to the US, or operating in support of their corporate affilliates, being required to register;
- Commercially confidential information being provided to the Department of State before a contract has been concluded because prior approval of brokering activities is required;
- Undermining the UK Government's own stated "Red Tape" commitment to reduce bureaucracy;
- Undermining of the EU's own proposals for the reduction of unnecessary bureaucracy for "intra-community transfers" between EU Member States;
- Further increasing the unwelcome perceived incentive for non-US companies to develop "ITAR-free" products.

UK Industry, therefore, asks for US DoS commitment to grant a pause and to allow adequate time for meaningful Government-to-Government dialogue to take place prior to any final new rule being published, during which further clarification can be sought and the potential ramifications of what is being proposed can be carefully considered.

Yours Sincerely



Rees Ward CB

Chief Executive Officer

ADS London
Salamanca Square, 9 Albert Embankment, London, SE1 7SP, **t:** +44(0) 207 091 4500 **f:** +44 (0) 20 7091 4545
www.adsgroup.org.uk

communications

Washington Operations
1215 South Clark Street
Suite 1004
Arlington, VA 22202
703-412-7195 • Fax: 703-416-1074

17 February 2012

U.S. Department of State
Office of Defense Trade Controls Compliance
PM/DTCL, Suite 1200, SA-1
2401 E Street, N.W.
Washington, D.C. 20037

Attention: Mr. Daniel L. Cook, Chief, Compliance and Registration Division

Subject: Brokering Rule Comments

Dear Mr. Cook:

L-3 Communications Corporation (L-3) has reviewed the proposed "Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities and Related Provisions" provided in Federal Register Vol. 76, No. 243 dated Monday, December 19, 2011.

L-3 respectfully requests consideration that Form 2032 be revised to include an amendment process that enables companies to add brokering to their existing registrations once the new rule is implemented.

Thank you for your assistance and should you have any questions or need additional information, please contact the undersigned at (703) 412-7194 or lois.baily@l-3com.com.

Sincerely,

Lois G. Bailey,
Vice President, International Licensing

From: aiad2 [mailto:aiad2@aiad.it]
Sent: Friday, February 17, 2012 9:21 AM
To: DDTC Response Team
Subject: Brokering Rule Comments.

Prot. 80/CN/sc

You'll find herewith the comments by the Italian Industries Federation for Aerospace, Defense and Security to 22 CFR Part 129, December 19, 2011 proposed rules. The following comments can be made public:

It is Federation understanding that the foreign industry involved in the manufacturing of defense articles is not considered as “broker” taking into account the description per § 129.2 of ITAR amendment.

We would like to assess, by means of a couple of specific examples, that Italian industries that produce military and defense items and are registered in the Italian national registry of enterprises, are not required to register as Broker, and additionally are anyway eligible for exemption, per § 129.7.

- example 1

  An Italian industry that manufacture missiles (category IV and IVb of ITAR) seeks by means of its internal office of Marketing & Sales, to get a contract to an End-User located in Argentina.

  This industry is exempt from registering as Broker

  Is That Correct ?

- example 2

  An Italian industry that manufacture satellites (category XV of ITAR) is negotiating and subsequently is awarded a contract by the Ministry of Defense of Italy and Ministry of Defense of France, for a joint program for military telecommunications.

  The satellite to be realized use US components of USML, and in doing so, these items are imported in Italy and France, for end-use by the respective ministries.

  This industry is exempt from registering as Broker, because already registered as defense industry under Italian system, although, for the nature of its business, this industry does action to “action to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article”

  Is That Correct ?

Furthermore, the current ITAR amendment to registration and Licensing of Brokers is in conflict with European Union law defining Broker and Brokering activities. Our concern is that all European industry will face with a dramatically increase of administrative burden.

Best regards

AIAD SECRETARY GENERAL
CARLO FESTUCCI

Perry A. Smith
Director, Export and Import Compliance
Office of the General Counsel

Rockwell Collins

400 Collins Road NE
Cedar Rapids, IA 52498
319.295.5396 Fax 319.295.6966
pasmith@rockwellcollins.com

February 17, 2012

Mr. Daniel Cook
Chief, Compliance and Registration Division
Office of Defense Trade Control Compliance
U.S. Department of State
2401 E Street NE, SA-1, 12th Floor
Washington, DC 20037

Subject: **Brokering Rule Comments (RIN 1400-AC37)**

Dear Mr. Cook:

Rockwell Collins appreciates the opportunity to provide comments related to the Department of State's proposed rule (RIN 1400-AC37) which would amend the International Traffic in Arms Regulations as they pertain to the registration and licensing of brokers, brokering activities and related provisions. Please note that while we support the stated intent of the proposed regulatory amendment: "[Clarification of] registration requirements, the scope of brokering activities, prior approval requirements and exemptions, procedures for obtaining prior approval and guidance, and reporting and recordkeeping of such activities", we have identified portions of the proposed rule that could be clarified and/or tailored more narrowly, while continuing to support United States national security interests. As described in detail below we recommend that the proposed rule be further clarified to eliminate the ambiguities that exist in the current draft.

I. Corporate Background and Interest in Rulemaking Process

Rockwell Collins, Inc. is a leader in the design, production and support of communications and aviation electronics for commercial and military customers worldwide. While our products and systems are primarily focused on aviation applications, our Government Systems business also offers products and systems for ground and shipboard applications. The integrated system solutions and products we provide to our served markets are oriented around a set of core competencies: communications, navigation, automated flight control, displays/surveillance, simulation and training, integrated electronics and information management systems. We also provide a wide range of services and support to our customers through a worldwide network of service centers, including equipment repair and overhaul, service parts, field service engineering, training, technical information services and aftermarket used equipment sales.

We are headquartered at 400 Collins RD NE, Cedar Rapids, Iowa 52498 and employ approximately 20,000 individuals worldwide. Our 2011 sales totaled almost $5 billion. While our global service and support network spans 27 countries, a significant portion of our products are manufactured in the United States. In fact, our U.S. operations employ more than 3,400 hourly manufacturing and warehouse workers.

We believe our success, like that of other U.S. defense companies, is a critical element to the strength of our country's defense industrial base. However, we are concerned that the proposed rule would negatively impact our international sales and marketing efforts for ITAR controlled products. Therefore, we are strongly interested in the outcome of this rulemaking process.

II. Comments

a. Applicability of the Proposed ITAR § 129.3(b)(3) to Wholly Owned Foreign Subsidiaries of a U.S. Corporation

i. Types of Entities Included in the Exemption

As written, it is unclear whether wholly owned foreign subsidiaries would qualify to be excluded from the registration, prior approval and reporting requirements under the proposed 22 C.F.R. § 129.3(b)(3) exemption. The exemption applies to registrants as well as their

> . . .U.S. person subsidiaries, joint ventures, and other affiliates listed and covered in their Statement of Registration, their bona fide and full-time regular employees, and their eligible . . . foreign person brokers listed and identified as their exclusive brokers in their Statements of Registration . . . .

First, while "U.S. subsidiaries" are explicitly included, "foreign subsidiaries" are not. This is in contradistinction to the much more limited proposed § 129.3(d) exemption (exemption from registration but not prior approval and reporting). The new § 129.3(d) calls out both U.S. and foreign subsidiaries directly.

However, despite the more explicit language used in § 129.3(d), foreign subsidiaries would seem to be covered as "other affiliates" in § 129.3(b)(3), unless the reference to "U.S. person" was intended to apply to "subsidiaries, joint ventures and other affiliates . . .". Also, a foreign subsidiary of a U.S. ITAR Part 122 registrant could be considered a "foreign person broker", if it is identified as an "exclusive broker" on a registrant's Statement of Registration and thereby qualify for the exemption.

Industry should not be left to speculate about whether foreign subsidiaries of U.S. ITAR Part 122 registrants qualify for the exemption in § 129.3(b)(3).
We strongly encourage the Department of State to revise the language of the proposed § 129.3(b)(3) exemption to clearly include foreign subsidiaries of a Part 122

registrant. This will eliminate the confusion that currently exists when comparing the language of this exemption with that of §129.3(d). Moreover, allowing such subsidiaries to qualify for the exemption would appear to be consistent with U.S. security interests, while relieving DDTC of the burdensome paperwork associated with the registration, prior approval and reporting requirements for these subsidiaries. Since §129.3(b)(3) currently allows *unaffiliated* foreign person brokers to qualify for the exemption, it is difficult to understand why a Part 122 registrant's foreign subsidiaries should be excluded. A Part 122 registrant will have more management oversight, corporate control, and ITAR-related training and compliance authority over a foreign subsidiary as compared to an unaffiliated foreign person broker. Therefore, including a foreign subsidiary along with a foreign person broker within this exemption will not result in DDTC losing oversight of a more risky class of foreign brokers.

Our other comment is that we see no reason to limit the exemption to brokers who are listed and identified as "their exclusive brokers" in their Statements of Registration. The requirement for "exclusivity" is unclear, and we believe this (a) will substantially reduce the utility of this exemption and therefore run counter to DDTC's intention, and (b) is an unnecessary limitation for purposes of regulating brokering activity. With regard to the first point, it is a rare occasion when a foreign person broker will be engaged by a single Part 122 registrant. Most foreign person brokers assist more than one U.S. ITAR exporter or manufacturer, thus the requirement for exclusivity could result in a very small set of brokers who could qualify under this exemption. Moreover, the concept of exclusivity is unclear. If this requirement was also intended to exclude foreign person brokers who represent foreign defense contractors, we are concerned that no foreign broker could qualify.

We also do not believe the exclusivity requirement is needed in order to ensure that DDTC has visibility and comfort with regard to a foreign person's brokering activity. If a foreign person broker is assisting more than one U.S. Part 122 registrant, each registrant using this broker will need to identify the broker on its registration statement. No foreign person broker seeking to qualify under this exemption will go unnoticed. And such non-exclusive brokers will still need to abide by the limitation on their brokering activities in order to qualify for the exemption -- i.e., the broker can only support the defense articles of the Part 122 registrant or sourced from the United States, such that DDTC will have visibility through the export licensing process on the broker's activities for each Part 122 registrant it supports.

ii. Types of Activities Included in the Exemption

Additionally, even if (as requested above) foreign subsidiaries were included in the types of entities covered under the proposed § 129.3(b)(3), it remains doubtful whether their *actions* would necessarily be covered. The proposed § 129.3(b)(3) exemption purports to cover two types of brokering activities: "(a)" and "(b)". Part "(a)" includes activities for which export licenses have been, or will be, obtained by

the registrant. Under part "(b)", brokering activities qualify for the exemption if they are ". . . on behalf of the part 122 registrant . . . ."

Even if foreign subsidiaries were covered under the § 129.3(b)(3) exemption, we fear that these conditions may limit the ability of our foreign subsidiaries and affiliates to partner with other U.S. companies without our direct involvement. For our foreign subsidiary to qualify under part "(a)" we would need to obtain any required export licenses (even for other U.S. companies' products) and for our foreign subsidiaries to qualify under part "(b)" we would seemingly need to lead the program efforts. For clarification purposes, we suggest that the following sentence be added to the end of part "(b)": *Brokering activities conducted by subsidiaries or affiliates of a registrant are considered to be on behalf of that registrant."*

b. Prior Approval under the Proposed § 129.3(d)

If, as described above, the proposed § 129.3(b)(3) is not applicable to foreign subsidiaries, these entities would be covered by the proposed § 129.3(d). However, the § 129.3(d) exemption is more limited. It merely exempts those who qualify from submitting a separate broker registration letter and paying separate registration fees. As drafted, § 129.3(d) would not exempt foreign subsidiaries, joint ventures or affiliates from the prior approval requirement. Foreign subsidiaries and affiliates, even if included as a broker on a U.S. corporation's registration would therefore, be required to apply for prior approval, as described in the proposed § 129.8, before conducting certain types of brokering activities. The prior approval requirement would include any brokering activities touching non-NATO (plus four) countries (*see* proposed § 129.7(c)(1)) related to significant military equipment ("SME") (*see* proposed § 129.7(d)).

The prior approval requirement would be a heavy burden for our foreign subsidiaries and affiliates as well as for the Department of State review team. A significant number of our products are categorized under the ITAR as "[c]ommand, control and communications systems . . ." (category XI(a)(5)) which is SME and therefore, would not qualify for the § 129.7(d) exemption. Additionally, many growing markets are not members of NATO (plus four) (i.e. India and Brazil) and therefore, would also fail to qualify for the § 129.7(c)(1) exemption.

As written, § 129.3(d) would eliminate the ability of our foreign subsidiaries and affiliates to "promote" our SME products in non-NATO (plus four) regions on an impromptu basis (*see generally* § 129.2(b)(2) *broker* definition). Additionally, there is no specifically articulated de minimis level at which "promotion" would not require prior approval. Even promotion using non-technical, public domain information could be considered brokering. Thus, high-level conversations focused on the functionality of products (information typically available on the websites of defense contractors) could be included, if those conversations may promote a sale. Furthermore, discussions of price and availability would clearly require a prior approval letter to be filed.

We encourage the Department of State to eliminate the prior approval requirement in this exemption. The parameters under which the requirement is triggered would result in a massive inflow of prior approval requests. Also, during the initial promotional stage of a program, little may be known about the scope of a potential sale. Estimates related to "quantity" and "consideration", as required to be filed by § 129.8 (b), would be speculative at best. In general, the accuracy of such submission will be poor. Therefore, the requirement would add significant and arguably conflicting/erroneous data and offer little useful information in return.

Furthermore, the requirement is redundant. A State Department approved export authorization would be required prior to the export of ITAR controlled technical data, defense services or hardware. In response to this fact, industry will self-regulate its promotional efforts. Companies will not promote products to customers if they suspect that exports of the product or related services will not be ultimately approved by the Department of State. This is, in part, why we believe the exemption at section 129.3(b)(3) should be expanded to include foreign subsidiaries of Part 122 ITAR registrants – i.e., to the extent our foreign subsidiaries are brokering our items (or items sourced from the US), the export licensing requirements placed on RCI and the need for robust documentation to support those licenses will ensure that DDTC has visibility on the transactions that our foreign subsidiaries are supporting. If DDTC does not modify section 129.3(b)(3), we believe for the same reason, the prior approval (and reporting, see below) requirement should be eliminated from section 129.3(d), at least for foreign subsidiaries of Part 122 registrants.

c. Reporting under the Proposed § 129.3(d)

In addition to prior approval, the proposed § 129.3(d) also requires reporting. We suggest that this reporting requirement be removed. A more efficient approach would be for the regulations to simply provide a detailed recordkeeping format. This would allow regulators to spend more time working directly with industry (providing guidance, investigating issues) and less time managing reports.

d. Exporter Responsibility/Liability for Broker Actions

The proposed regulation lacks clarity on two aspects of registrant liability for the actions of brokers. First, we ask that the regulations provide additional information related to *when* a registrant may be held accountable for the actions of a broker. We are hopeful that such a discussion would include a distinction between accountability when a broker is included on a company's registration statement vs. independently registered brokers. Second, we ask for clarification on the *type* of liability that may be imposed. Also, we recommend that the proposed regulation be amended to include a section that insulates companies from liability for the actions of brokers included on their registration, when those actions are beyond the scope of the registrant/broker contractual relationship. A company's ability to include other entities (brokers) on their registration would potentially reduce the paperwork, manpower, and financial burdens imposed on brokers and the State Department. However, as written, it is unlikely that prudent registrants will exercise this option.

As alluded to above, doing so may expose companies to ill-defined liability for the actions of other entities (brokers) included on their registration statement.

e. Broker Definition

We ask that the proposed regulations be revised to more narrowly define "Brokering Activities". The term "brokering" is generally tied to "a deal" or "a contract". However, the proposed definition of "brokering activities" includes activities that occur well before the deal-making process. Therefore, we suggest that the terms "Soliciting" and "Promoting" be removed from the proposed § 129.2(b)(2). Thus, "brokering" would begin when negotiations begin. This would allow the State Department to focus its regulatory and enforcement efforts on potential arms sales without being burdened by information related to high-level promotional efforts.

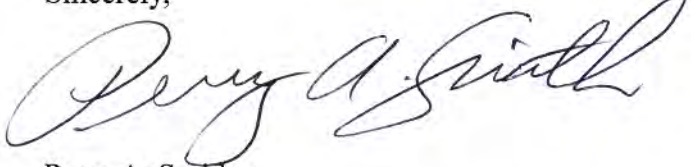
f. Grace Period

We ask that implementation of the revised brokering regulations be accompanied by a twelve month grace period. Industry will need time to ensure brokers are educated on the new rule. It will also require time to implement effective internal controls, establish more robust broker auditing procedures and gather all required registration information. A twelve month grace period would help ensure that industry has the time necessary to properly comply with the new regulation.

III. Conclusion

As drafted, the proposed ITAR amendment would unnecessarily burden Rockwell Collins, our international sales teams and the U.S. defense industry. The current export licensing system already controls the release of defense article hardware, technical data and the provision of defense services. The system also makes record of program values, technology, end users, parties and sales commissions. While national security is of highest priority, we ask that the State Department carefully consider the negative impact these regulations would have on the competitiveness of U.S. defense contractors. Clearly the proposed regulations create additional administrative requirements for both industry and government. However, it is unclear whether the regulations would offer the level and breadth of positive returns to national security intended.

Sincerely,



Perry A. Smith
Director, Export and Import Compliance
Rockwell Collins, Inc.

17 February 2012

Defense MOU Attaché Group

DDTC Response Team

Subject: Brokering Rule Information Collections

The Defense MOU Attaché Group (DMAG)[1] - a Washington, DC-based network of 21 countries with reciprocal defense trade MOUs with the United States wishes to express their concern regarding the Department of State's proposal to amend part 129 of the International Traffic in Arms Regulations (ITAR) relating to brokers and brokering activities.

Our comments are based on the current situation whereby final approvals have not been given as part of the movement of formerly USML items onto the CCL. We hope that once the migration of these formerly controlled technologies is complete there will be less technology that will be subject to the brokering regulations and ITAR. With less military equipment to control, the requirement to register as a broker or report activities would be significantly less. It would be important as part of the continuing dialogue that this assumption be confirmed.

DMAG strongly supports the Administration's efforts to curtail improper brokering activities such as bribery, kickbacks and illegal arms dealing. Each of our member nations are fully committed to fight against illegal brokering and continue to investigate and punish those that are proven guilty. The Dept of State is to be commended for much of the proposed changes of part 129 such as additional exemptions, removing dual registration requirements, and clarification of prior approvals.

DMAG believes that any regulatory change that will result in increased and costly administrative burdens or reduce our collective ability to manufacture, export, re-export, import, transfer or re-transfer defense technology should be carefully considered.

For many years, the U.S. has supplied defense equipment to the armed forces of many of the countries, which currently have reciprocal defense procurement MOUs with the United States. These countries also sell defense technology around the world. These activities are generally already well managed and controlled by national laws and ITAR.

Our specific comments follow:

[1] **DMAG member countries include**: Austria, Australia, Belgium, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom

- Definition of Broker and Brokering Activities – the definition of brokering activities is very broad. While we appreciate there are some carve-outs and exemptions for some activities it seems that this change expands the scope of brokering to those activities that are already managed by ITAR. It is not clear why activities have been broadened yet subsequently exempted when the definition of brokering activities could have been narrowed. It is recommended that the definition of activities be narrowed to reflect these carve-outs and exemptions;

- Article 129.2 (d) (5) - Extraterritoriality – without a clear definition of "on behalf of a US person" it seems to be possible that a foreign company with even a minority U.S. ownership share selling non-U.S. origin defense article or defense service outside of the U.S. would be doing brokering activities. There is comprehensive integration of publicly held Western defense companies with American ownership (majority or minority). DMAG does not support any proposal that a foreign national or a foreign company engaged in marketing activities outside of the USA would be subject to American jurisdiction. This would be unacceptable as it would significantly increase cost and administration between foreign subsidiaries and American parent companies with consequential impacts on mutually beneficial trade. It is recommended that the range of application for "acting on behalf of a US Person" be clarified;

- Foreign subsidiaries – the rule as written would require foreign subsidiaries outside the U.S. to register as brokers if they include U.S origin defense articles or defense services. The act of including the U.S. part into a final assembly is considered brokering. This activity is expected to be frequent and may result in a significant increase in registration and reporting requirements. It is expected to be costly for both industry and the Dept of State to implement the information technology, the control systems and processes to keep records and if required, to report a greater scope of activity.

- Privacy Concerns – it seems that there would be a requirement to provide personal information in order to satisfy prior approval and reporting requirements. This may run contrary to international partner's privacy laws. As well, it seems that there may be a requirement for Companies or individuals to report on their marketing activities and plans, something that would normally be commercial in confidence.

Our concern, is that the effects of the proposed regulatory changes may be too far-reaching, may duplicate what is currently in ITAR and will create a processing burden for new (and renewed) registrations that the State Dept may not be able to manage. This is cause for concern when reduced national Defense budgets will require more efficient conditions for enhanced collaboration within the international defense and security sectors.

DMAG remains a strong proponent of US Export Control Reforms. As such, DMAG recommends additional dialogue between the State Department, DMAG and industry associations prior to the subsequent posting of the final rule.

Ron Genemans
Chairperson
Defense MOU Attaché Group

NATIONAL ASSOCIATION OF Manufacturers

Franklin Vargo

Vice President
International Economic Affairs

February 17, 2011

Mr. Daniel Cook
Chief, Compliance and Registration Division
Office of Defense Trade Controls Compliance
U.S. Department of State
Washington, DC 20037

Re: ITAR Amendment: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions (RIN 1400-AC37)

Via email: DDTCResponseTeam@state.gov

Dear Mr. Cook:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on amendments to the International Traffic in Arms Regulations (ITAR) regarding brokers and brokering activities.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Our members play a critical role in protecting the security of the United States. Some are directly engaged in providing the technology and equipment that keep the U.S. military the best in the world. Others play a key support role, developing the advanced industrial technology, machinery and information systems necessary for our manufacturing, high tech and services industries.

The NAM strongly supports the President's Export Control Reform initiative and the Administration's proposals to strengthen national security and support export growth. The NAM, however, has very serious concerns with this proposed regulation. The NAM believes this proposal, as written, contradicts long-standing U.S. international commitments and imposes substantial new compliance burdens on every facet of the global supply chain. Instead of deterring illicit brokering activities, this proposed rule would likely burden U.S. manufacturers with duplicative regulation and encourage further development of foreign products that exclude content controlled by the ITAR.

The NAM is concerned that the expansive scope of this proposed rule undermines the Administration's stated goals of enhancing U.S. national security and global competitiveness. The regulation seems to greatly surpass the underlying law, and it would significantly expand the regulatory burden on manufacturers involved in lawful defense trade. The lawful export, import and transfer of defense articles and services are currently regulated by the State Department. This proposed rule duplicates existing regulation by levying additional registration and regulatory approval requirements on those licensed transactions. The breadth of the proposed rule is vast enough to effectively capture many activities that are largely unrelated to the business of brokering defense articles. This proposal could, as an example, end up covering

an airline that transports an individual to a sales meeting or a hotel that hosts a marketing event. We strongly encourage the State Department to substantially revise this proposed rule before it is implemented.

The proposed rule goes beyond the original intent of Congress to address unregulated "grey market" arms sales. House Report 104–519, which accompanied H.R. 3121 in the 104th Congress, outlines Congressional intent to require U.S. persons (and foreign persons located in the U.S.) involved in defense trade of U.S. and non-U.S. defense equipment or technology to register with the U.S. government. This proposed rule does not advance that legitimate goal.

Specifically, the proposed definitions for "broker" and "brokering activities" are problematic. Additionally, they would regulate activities already regulated through current ITAR licensing and enforcement mechanisms. Both terms, as proposed, seem to conflict with current legal definitions. Removing the phrase "who acts as an agent for others" from the definition of a "broker" in Section 129.2(a) eliminates a critical component of the traditional definition.

As written, "broking activities" would include "any action to facilitate the manufacture, export, reexport, import, transfer or retransfer of a defense article or defense service." The NAM believes that the phrase "any action to facilitate" would be unreasonably vague to apply in common practice. Likewise, the broad phrase "or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service" provided in the clarifying example in Section 129.2(b)(2) seems to cover any third party, regardless of how remotely associated it might be with a manufacturer of ITAR-controlled items. Additionally, including "financing, insuring, transporting, and freight forwarding" in Section 129.2(b)(1) as examples of brokering activity seems inconsistent with the exemption of those same activities in Section 129.3. The exemption will apply to those persons who are "exclusively" in such business and whose activities do not go beyond such activities, but the distinction seems confusing since brokering activities are usually outside the realm of such service providers. The NAM recommends that the State Department reconsider these definitions.

A lack of clarity regarding the concept of "facilitation" could also lead to confusion for the regulation of ancillary business activities. For example, consultants who offer business assessments could be classified as undertaking "brokering activities" – even though their activities are advisory in nature. If the State Department moves forward with this rule, the NAM recommends specifically excluding certain activities that do not constitute "brokering." Such exclusions might include:

- Consulting services provided by third parties to a U.S. defense contractor that are unrelated to traditional sales and marketing activities, such as providing strategic planning and market assessments,
- Consulting services provided by third parties to a U.S. defense contractor that do not involve interaction with foreign government officials,
- Consulting services provided by third parties to a U.S. defense contractor which involve routine pre-solicitation or business assistance activities, such as:
    - Providing advice regarding economic, political, cultural and language considerations involved in doing business in country;
    - Providing advice regarding customer procurement organizations, personnel and budget;

- Preparing lists of potential customers and opportunities;
- Analyzing customers' preferences and negotiating styles;
- Meeting with potential customers to learn about their needs;
- Providing advice and support regarding compliance issues, such as customs, immigration, and licensing;
- Furnishing logistical and support services such as assistance with lodging, office space, translation, transport, communications, hiring of local staff, and advertising; or
- Researching publicly available information on competitor sales and activities.

An additional concern with the proposed rule is its proposed regulation of foreign persons outside the U.S. The NAM is concerned that regulating foreign persons worldwide would have a negative impact on U.S. companies. Section 129.2(b) eliminates the current requirement that foreign persons be "subject to the jurisdiction of the U.S." The proposed amendment would expand the scope of brokering activity to apply to all foreign persons located outside the Unites States when a U.S. origin defense article or defense service is involved, when they are acting on behalf of a U.S. person, or when they are involved with an import into the U.S. of any defense article or defense service. If implemented, this amendment will have a significant impact on the ability of U.S. manufacturers to market and sell defense articles and defense services abroad.

In our interpretation, the proposed rule could require a foreign person negotiating a sale between foreign entities to register as a broker if the product had any ITAR-controlled content. It could require a foreign company that incorporates ITAR-controlled U.S. components into their product to register as a broker to sell that product – above and beyond the current licensing requirements on re-transfer of that product. It could require a foreign company listed as a sublicensee on an approved Technical Assistance Agreement (TAA) to register as a broker. If these scenarios unfold, the proposed rule would significantly disrupt manufacturing processes and inhibit trade. The expansive application of U.S. jurisdiction, complex two-step nature of registration followed by prior approval, duplicative licensing requirements, and the expense of complying with the proposed regulations are likely to cause many foreign intermediaries to terminate their agreements and seek contracts with non-U.S. defense contractors. This proposal might end up encouraging foreign companies to design out U.S. components or seek non-U.S. products to limit liability and cost, particularly when those parts and components are low-value items. The NAM requests that the State Department consider the scope and the impact of these consequences.

The proposed rule would also impose substantial new registration and reporting requirements on foreign subsidiaries of U.S. companies, which could cause increased production costs and prolonged production schedules. Substantial compliance costs would be imposed at every level of the global supply chain. The proposed rule also poses jurisdictional concerns for U.S. manufacturers, who will be forced to assume increased compliance liability even in cases in which affected companies will not have the ability to control or enforce regulations by other countries. Moreover, brokering activities are illegal in some countries. Requiring a foreign person to register as a broker could preclude necessary marketing activities in key foreign markets.

Many U.S. defense contractors engage foreign sales intermediaries to assist with marketing of their products and services abroad. When an ITAR-controlled defense article or services is involved, unless an exemption is available, the U.S. company must obtain prior approval from the State Department before exporting any technical data, defense articles or defense services to a foreign intermediary – and fulfill reporting requirements. In this regard, the brokering registration and requirement for prior approval is completely duplicative.

Additionally, the substantial number of new registered brokers – including lawyers, subcontractors, negotiators, marketers, and even trade association representatives – would be a significant administrative burden for the U.S. government.

If the State Department moves forward with a final rule, we recommend that our concerns be reflected in a revised rule and that there be a pilot program of at least six months to allow U.S. manufacturers and contractors to promulgate procedures, training, and other compliance systems. We would also respectfully request that the Department consider extending the comment period and also assuring that no further action is taken on this proposed regulation before the next committee of the Defense Trade Advisory Group (DTAG) has had an opportunity to provide their collective input for the Department's consideration.

The NAM appreciates this opportunity to provide comments on the proposed rule related to brokers and brokering activities. We share your commitment to the prevention of illicit brokering behavior but sincerely believe this proposed rule would burden U.S. companies pursuing legitimate export opportunities with little benefit for national security. If interpreted broadly, it would also make U.S. manufacturers less attractive to foreign buyers and undermine the initiative to produce a more predictable, efficient and transparent export control system. We look forward to continuing to work with the State Department and its partners on this important initiative.

Thank you,

Frank Vargo

FV/la

Brokering Rule Comments
Munitions Industrial Base Task Force
Prepared for Submission to the Federal Register by 17 February 2012

The Munitions Industrial Base Task Force (MIBTF) is a group of 19 munitions companies whose common goal is to provide adequate funding and policies to sustain a responsive, capable US munitions industrial base to develop, produce and support superior munitions for the US and its allies.

The Munitions Industrial Base Task Force submits the following comments on the proposed rule to make changes to Part 129 and other related sections of the ITAR that regulate brokers and brokering activities.

Definition of Broker: The proposed rule removes the core tenets of the definition of a broker, namely "one that acts as an agent for others for a fee, commission or other consideration". Without that part, the list of persons who will be classified as a broker is limitless. That phrase provides boundaries and captures those persons who are actually in the business of brokering. MIBTF recommends the DDTC leave the definition of broker as currently written in the ITAR.

Definition of Brokering Activities: Without a definition of broker the list of brokering activities could be boundless. The proposed rule tries to put a limit by defining what is and is not considered a brokering activity, but neither list is exhaustive leaving the possibility that other activities may or may not be brokering activities. Given the open ended nature of the proposed definition of broker and brokering activities, assisting a party in obtaining an export license or a US company providing an Export Administration Regulation (EAR) controlled part used in a defense article would both be considered brokering. According to the proposed rule, a company can receive guidance as to whether an activity is a brokering activity through written request to the State Department. However, if the State Department's response is that the activity is a brokering activity the requestor must still submit a prior approval request under 129.8. MIBTF requests the DDTC provide an exhaustive list of activities that do constitute brokering activities. If the DDTC implements the prior recommendation, there is no need for 129.9. But if the DDTC chooses not to implement our request; we recommend the DDTC consider allowing a request submitted under 129.9 to constitute prior approval per 129.8 in those situations where the DDTC has determined the activity to constitute a brokering activity and the request contains all the elements required in a 129.8 prior approval request.

Registration Requirements: The proposed rule needs to provide a definition of an *exclusive broker* if such individuals are to be included in a company's Statement of Registration. Usually smaller companies seek brokers vetted by larger companies or brokers with proven track records. If a broker is employed by more than one company can he be identified as an exclusive broker by other companies? The proposed rule could limit the availability of brokers for smaller companies, forcing smaller companies to seek lesser known brokers or not be able to engage a broker and, therefore, hurting their opportunities in the international marketplace which is counter to the Administration's National Export Initiative.

Registration Statement and Fees: An annual fee of $2,250 may be considered absurd for a broker merely helping with a proposal for an international sale of a small component. International sales often take years to develop and even then the probability of a win can often be small. This fee can be a "show stopper" for international component sales. MIBTF companies note that foreign entities have a distinct aversion to paying the State Department several thousand dollars every year for broker registration when some of the programs they are working can take 8 to 10 years to come to fruition. Part 129 imposes an upfront investment with no guarantee of return. Rather than an annual fee we recommend that the registration validity be extended to four years, the life of a license, to reduce the administrative load.

Exemptions From Prior Approval Requirement: Munitions products are generally considered as Significant Military Equipment (SME). SME products are not exempted from prior approval requirements for brokering activities with any country including NATO, Australia, Japan, New Zealand or Republic of Korea. Tenders in the ammunition field often have a 30-day turn around or less for these countries. The proposed rule will require US Munitions suppliers to obtain prior approval from DDTC before being permitted to even discuss price and availability issues with foreign suppliers. Since international competitors are not subjected to the same rules, the US munitions supplier is at an obvious disadvantage. US munitions suppliers would like to increase focus on the international marketplace in an effort to sustain a viable production base. The proposed rule and its prior approval requirements may eliminate this incentive. We recommend that the prior approval requirements be exempted for NATO, Australia, Japan, New Zealand and the Republic of Korea to assure that US suppliers can be competitive in these markets.

Brokering Licenses for Countries where brokering is illegal: The national laws for certain countries prohibit brokering (e.g., India, Egypt, and United Arab Emirates). By the limitless definition proposed for broker and brokering activities, entities in these countries registering with the DDTC as a broker would be confessing to violating the national laws of their country. We recommend that DDTC identify the countries where brokering is illegal and provide guidance accordingly.

Prepared by: John Hager, MIBTF International Consultant

Approved by: Richard Palaschak, MIBTF Director of Operations
703-276-1702

Saab North America, Inc.

17 February 2012

Robert S. Kovac, Managing Director
Directorate of Defense Trade Controls
U.S. Department of State
2401 E St., N.W., SA-1, 12th Floor
Washington, DC 20037

Via e-mail ddtcresponseteam@state.gov

Subject: Brokering Rule Comments

Dear Mr. Kovac:

Saab North America, Inc., representing its parent company Saab AB (publ) of Sweden, inclusive of its business areas and country units (collectively, "Saab"), herewith submits comments to the proposed rule "Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions", published in the December 19, 2011, *Federal Register*. Saab welcomes your office's attention to the following content, for the common goal to realize clear, practicable brokering regulations.

Summary

The proposed rule as constructed **misses opportunities** to provide needed definition and clarification to brokering regulations. The impact of the proposed amendments would **work at cross purposes** to both the President's Export Control Reform and Regulatory Reform initiatives. If implemented, the result would **create global "unlevel playing fields"**, and **continue a trend** towards foreign-origin products that are purposefully designed to be free of content controlled by the International Traffic in Arms Regulations (ITAR).

What Are DDTC's Experiences?

Supplementary information within the notice states "...nearly half of the brokers registered with the Directorate of Defense Trade Controls (DDTC) are foreign persons whose first language is not English and who are not accustomed to U.S. regulations." The notice also states that, in 2003, "...the Department of State noted [to the U.S.

Saab North America, Inc.
21300 Ridgetop Circle
Sterling, Virginia 20166

Telephone
703 406-7200

Telefax
703 406-7202

Congress] 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 stem from this experience." However, DDTC's website (www.pmddtc.state.gov) does not include guidance to understanding or complying with current brokering regulations. **It would be greatly beneficial therefore for DDTC to describe its experiences in administering current brokering regulations, how they shaped the proposed rule, and what objectives warrant the proposed revisions to brokering regulations.**

Corporate Affiliation Exemption

The illustrative examples of "brokering activities" in the notice omit two fundamental, prevalent scenarios: U.S. operations of a foreign parent company supporting the foreign parent company and subsidiaries or affiliates thereof to sell the company's foreign-origin defense articles to the U.S. Government or U.S. companies; and, conversely, foreign operations of a U.S. parent company supporting the U.S. parent company and subsidiaries or affiliates thereof to sell the company's U.S.-origin defense articles to foreign governments or foreign companies. In both cases, such activities should be viewed sensibly as normal, international business operations, for which activity is for, and decisions taken within, the corporate body, that do not involve unaffiliated intermediaries, and therefore should not be captured by brokering regulations.

The regulations should clarify both that activities undertaken by a U.S. subsidiary for or on behalf of its foreign parent company or subsidiaries or affiliates thereof, and activities undertaken by a foreign subsidiary for or on behalf of its U.S. parent company or subsidiaries or affiliates thereof, do not constitute "brokering activities". If however DDTC instead purposefully defines corporate international business operations within "brokering activities", the regulations should so indicate but also include specific exemptions from registration, prior approval and reporting for "brokering activities".

Practical considerations oblige such treatment. The sheer volume, complexities, and types of activities, programs, projects and operations in which companies and their affiliates around the world take part would result likely in thousands of requests annually for brokering prior approval. It is conceivable that multiple applications for the same transaction, potentially based solely on location, would be submitted and reviewed without added benefit. The proposed registration, prior approval, and reporting requirements would overwhelm U.S. and foreign persons, and strain government resources.

The President's Export Control Reform and Regulatory Reform Initiatives

The markedly broad expanse of the proposed brokering regulations seems not to take into account important features of both the President's Export Control Reform and

Regulatory Reform initiatives. From the White House *Fact Sheet on the President's Export Control Reform Initiative*, the interagency task force's assessment determined "the current U.S. export control system does not sufficiently reduce national security risk based on the fact that its structure is overly complicated, contains too many redundancies, and tries to protect too much." Since "the stated goal of the reform effort is to 'build high walls around a smaller yard'", **it would be unfortunate and counterproductive if momentum gained by other U.S. export control reforms to protect U.S. "crown jewels" would be undercut** by the need to adjudicate numerous requests for brokering prior approval, particularly those not involving unaffiliated persons, for defense articles, defense services, or technical data either already properly licensed or which would otherwise utilize an existing vehicle for authorization prior to initiation.

The proposed regulations also do not seem to follow many of the tenets of the President's January 18, 2011, *Executive Order 13563 – Improving Regulation and Regulatory Review*. For example, pertinent parts of its "General Principles of Regulation" stipulate that the U.S. regulatory system "must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements." Additionally, regarding regulations, "each agency must, among other things... tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations"; and, ... to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt". **The appearance of the proposed brokering regulations is that they do not yet meet these standards.** Regulations should be written to be clear and precise to avoid confusion and misinterpretation, and should not need to be further explained by voluminous guidance from outside the regulations.

Further to this, the January 2012 update to the Department of State's Retrospective Review Plan Report (http://www.whitehouse.gov/files/regulatory-reform/DOS-RegulatoryReform-January2012.pdf), with regards to the proposed brokering regulations, states, "Regulatory clarification. Burden reduction for that subset of registrants that register as manufacturers/exporters and brokers of defense articles, as this rule would eliminate the need to register as each separately and pay a separate registration fee." Notwithstanding that some persons will not need separate registration as a broker, the expected number of new registrations, the corresponding volume of requests for brokering prior approval (for which costs to the largely affected defense industry would increase since fees are calculated in part by the number of applications submitted), and the reports to be filed would negate the declared net benefit.

Inclusion of Sweden

Proposed Section 129.7(c)(1) states an exemption for prior approval of "brokering activities" if "...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, Australia, Japan, New Zealand, or the Republic of South Korea..." Although this group of countries is consistent with the current brokering regulations, if this exemption is maintained, **DDTC should consider means to include Sweden within this territory.** Sweden was specifically included in the Defense Trade Security Initiatives (DTSI), and is included in different exemptions in the ITAR (124.2(c), 125.4(c), and 125.14(a)(4)) and for eligibility in comprehensive export authorizations (126.14). Sweden possesses a robust defense industry and a robust export control system, with companies working with and supplying both to the U.S. Government and U.S. companies. Sweden is a reliable partner with the U.S., as demonstrated in part by the 1987 U.S.-Sweden Memorandum of Understanding regarding mutual cooperation in the defense procurement area; the 2003 Declaration of Principles (DOP) for enhanced cooperation in matters of defense equipment and industry; and on-going and previous coalition military operations.

"Unlevel Playing Fields"

More widely, **the outwardly far-reaching scope of the proposed regulations will cause an "unlevel playing field".** Absent a contract, which would be a supporting document for permanent export license applications or requests for retransfer, details are in flux and negotiable. Companies who do not qualify for the proposed exemptions would be compelled when seeking prior approval to provide insight into their sensitive, proprietary business information, which could include business plans, marketing strategies, and cost structures (provision of which may also be in breach of national legislations). These companies would also be disadvantaged when competing against companies who do not require prior approval. Whatever the outcome for the proposed regulations, **a "level playing field" must be preserved.**

Another issue with the proposed regulations is that **global enforcement is impractical and would create inequities.** It will be impossible to have full knowledge of or monitor many thousands of companies' activities internationally which may encompass "brokering activities" as proposed. Some companies will submit numerous requests, some companies will decide not to proceed with activities so as not to be ensnared by the proposed regulations, and some companies will either be unaware of the requirements or operate outside the bounds. U.S. government actions taken to administer the proposed regulations would inevitably be incomplete, lead to selective enforcement and accusations of bias to or against companies, and create "unlevel playing fields".

If a foreign company feels disadvantaged or discriminated against by the regulations, it is very conceivable that **foreign-origin, "ITAR-free" systems will continue to be developed, marketed and sold.** Among the potential ramifications, this could limit U.S. government procurement options; preclude U.S. companies from legitimate opportunities to supply foreign companies with U.S. technologies; take away U.S. government export regulatory oversight and authority; and be damaging to coalition partnerships, operations, and interoperability.

Definitions and Scope of "Broker" and "Brokering Activities"

The proposed brokering regulations are written too expansively and vaguely to be able to determine reasonably at what point in any given scenario that brokering prior approval would be required. No boundaries are placed on the definition of "brokering activities" in Proposed Section 129.2(b). Without any specifics to establish the requirement, and with the global application of the proposed regulations, this will lead to widespread confusion, multiple interpretations of activities, numerous requests for approval by some companies and no requests by others, review of applications which either do not constitute "brokering activities" as envisioned or are benign, all of which would have the effect of rendering the regulations senseless and unenforceable. The proposed brokering regulations would benefit from having much greater, explicit detail as to what does and doesn't constitute "brokering activities". The phrase "Any action to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service" in Proposed Section 129.2(b) is so overly broad that a starting point for commencement of "brokering activities" cannot reasonably be deduced.

In this light, **the proposed deletion from Section 129.2 of the current brokering regulations of the phrase "who acts as an agent for others" should be abandoned,** as this standard provides at least some indication as to how "brokering activities" should be viewed. **Likewise, the proposed removal from Section 129.2(a) of the current regulations of "in return for a fee, commission, or other consideration" should not occur.** The rationale for their proposed removal, that the phrases are not part of the definition of "brokering activities" in the Arms Export Control Act (AECA), is specious and inconsistent; for example, the term "broker" is not defined in the AECA yet appears in the ITAR. Another example; "brokering activities" in the AECA are not defined as "Soliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service", but that phrase is included within the proposed regulations.

Two definitions of "broker" from on-line sources are enlightening: 1) from Black's Law Dictionary, "An agent employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation commonly called 'brokerage'." (see http://blackslawdictionary.org/broker/); and 2) from Oxford Dictionaries, "A person who buys and sells goods or assets for others (see http://oxforddictionaries.com/definition/broker?q=broker). Both "who acts as an agent

for others" and "in return for a fee, commission, or other consideration" have been part of the current regulations for more than a decade, even as they have not been explicit within the AECA. It is unclear what motivation warrants their proposed removal from the regulations at this juncture. The phrases should be maintained, or compelling reasons articulated to justify deletion.

Returning to the phrase "in return for a fee, commission, or other consideration", the references to "consideration" in Proposed Sections 129.8 and 129.9, regarding requests for prior approval and guidance, respectively, suggest that a connection still exists between "brokering activities" and payment for services; **it should therefore remain explicit within the definition of "broker".**

Proposed Section 129.3(b) lists exemptions from registration, prior approval and reporting requirements. **With regard to Proposed Sections 129.3(b)(3) and 129.3(b)(4), if not deleted, it is recommended that these sections be moved to be part of proposed Section 129.2(e)**, that is, that activities by these persons not be defined within "brokering activities" at all. In both instances, licensing obligations (e.g., export licenses, agreements, retransfers) already exist. Rather than defining "brokering activities" as generally as possible and then creating exemptions for established, regular business practices (which shouldn't be characterized as "brokering activities"), it would be far better to refine the scope of "brokering activities" to encompass only legitimate definitions of activities for which no other means of export authorization is available for their regulation.

Proposed Section 129.3(b)(4) reads, "Persons (including their bona fide regular employees) whose activities do not extend beyond acting as an end-user of a defense article or defense service exported pursuant to a license or approval under parts 123, 124, or 125 of this subchapter, or subsequently acting as a reexporter or retransferor of such article or service under such license or approval or under an approval under § 123.9 of this subchapter are exempt from registration. Such persons exempt from registration are also as to these activities generally exempt from the requirements in § 129.6 of this subchapter for prior approval for brokering activities, as well as reporting and recordkeeping requirements". Aside from that this activity should not be viewed as "brokering activities" in the first place, **the proposed amendments leave open whether DDTC believes foreign companies marketing their own foreign-origin items containing U.S.-origin defense article content are engaging in "brokering activities".** The existing Section 123.9 provisions govern retransfer obligations; but it would be overreaching to assert that jurisdiction exists to regulate foreign companies' marketing efforts.

Further to this, **the word "generally" in Proposed Section 129.3(b)(4) is imprecise and open to interpretation, and should be stricken from the text.** Additionally, the referral to Proposed Section 129.6 leads in turn to referral to Proposed Section 129.7. Companies which cannot avail themselves of the exemption in Proposed Section 129.7(c) solely by their geographic locations, have very limited recourse. The exemption

in Proposed Section 129.7(d) would restrict "brokering activities" by type (non-Significant Military Equipment, and exclusions listed in Proposed Section 129.7(e)), dollar value ($25 million or more, though it is unclear whether the dollar value is intended to apply to the U.S.-origin defense article content or the value of the foreign-origin product), and customer (end-use by private entities is not included, and the involvement of foreign consignees is not articulated). The list of excluded items in Proposed Section 129.7(e) includes, "Foreign defense articles and defense services of a nature that are described in various categories of § 121.1 of this subchapter other than those that are involved in brokering activities meeting the criteria of paragraphs (c)(1) and (c)(2) of this section." Thus, as examples, it could be interpreted that, without brokering prior approval, a Finnish company would be unable to market a Finnish-origin system which includes nominal U.S.-origin defense article content to an Indian government customer, even though no U.S.-origin defense articles or technical data would be retransferred in the marketing phase; or, that a United Kingdom company would be unable to team with a U.S. company responding to a U.S. Government solicitation if the United Kingdom product incorporates a U.S.-origin gyroscope (listed under USML Category XII(d)). **Such controls under the guise of "brokering activities" would be untenable and insupportable to companies and governments alike.**

The intent behind exclusion of foreign defense articles and defense services in Proposed Section 129.7(e) should not be to prohibit foreign companies from working with their own products, but to address persons truly acting as a "broker" (refer to the aforementioned definitions) of defense articles and services where no other form of export authorization would be applicable for their regulation. In addition, the broad wording of "brokering activities" and their applicability to foreign persons in Proposed Section 129.2 seemingly could include the temporary import into the U.S. of defense articles by foreign persons for participation at trade shows or demonstration to potential customers. **It is recommended that these activities not be defined as brokering and that such exclusion be added to Proposed Section 129.2(e).** If DDTC defines such activities as brokering, exemptions from registration, prior approval, and reporting should be added to Proposed Sections 129.3 and 129.7, respectively.

The proposed procedures for obtaining brokering prior approval do not reflect business realities. Companies have multiple product lines, subsidiaries, and interests. Campaigns routinely run several years, with or without successful conclusions. Teaming partners change. Solicitations often have very short timelines for response and require immediate action. Support activities will vary not only depending on need and situation, but also as campaigns, projects and programs enter into different phases. What is conceivable at a particular time can look drastically different in practice. Slight permutations could transform an exempted activity into one which requires authorization. Given the broad and extraterritorial reach of the proposed regulations, it is not feasible to believe that any company seeking brokering prior approval can conceive of the possibilities and fully identify all stipulated data points of Proposed Section 129.8, and that any changes to that information can be applied for and

processed without causing substantial disruptions. **It is essential that the definition of "brokering activities" be scaled back and sharply defined so as to not unduly capture activities which reasonably are not "brokering activities" and for which other forms of export authorization exist for their regulation.**

Further illustrative of the overreach of the proposed regulation of "brokering activities" is Proposed Section 127.1(b), which reads, "Any person who is granted a license or other approval or acts pursuant to 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." The context of the proposed section is "possession of the defense article or technical data", which existing forms of authorization (e.g., export licenses, agreements, retransfers) already address adequately; "brokering activities" for which a "broker" does not have possession of a defense article or technical data" would seem not to meet the criteria of this proposed section.

Model on Section 126.8 Removal

The August 2010 removal from the ITAR of the Section 126.8 requirements for prior notification and prior approval should guide the framing of the proposed regulations. In the supplementary information for the final rule, it was stated that elimination of the Section 126.8 requirements were "in accordance with the President's Export Control Reform effort", indicating efforts not only to decrease the number of applications, but also to focus on protecting U.S. "crown jewels". The notice further stated, "Currently, the time between submitting a license application or proposed agreement and obtaining a decision from the Department of State whether to authorize such transactions has been decreased sufficiently that requiring prior approval or prior notification for proposals is unnecessary and imposes an administrative burden on industry." By eliminating the Section 126.8 requirements, DDTC did not weaken its review or enforcement authority, because the export or retransfer of U.S.-origin defense articles, defense services and technical data still requires prior written authorization. **The proposed regulations should follow this model and not require brokering prior approval if the subsequent export or retransfer of defense articles, defense services and technical data would be subject to U.S. export authorizations** (as is presently the case), as its logic mirrors that cited to eliminate the Section 126.8 requirement. As written, the proposed regulations would have the likely result of requiring multiple authorizations for the same transaction; instead, **the proposed regulations should be honed to require prior brokering approval only for when no other U.S. export authorization would be applicable for regulation.**

"Foreign Criminal Statutes"

The statement of registration certification included as part of Proposed Section 129.4(c)(1), and certification needed for requests for brokering prior approval included as part of Proposed Section 129.8(a)(2)(i)-(iii), read in part that information must be provided by the intended registrant or applicant, respectively, as to whether it "is the subject of an indictment or has otherwise been charged (e.g., by information) for or has been convicted of violating... foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in Sec. 120.27 of this subchapter... 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". Although notionally sensible, **the proposed text requires reconsideration**. The attempt to define comparatively U.S. criminal statutes specifically listed in Section 120.27 with imprecise reference to hundreds of unspecified foreign criminal statutes will lead to confusion and potential misapplication in trying to determine which foreign statutes are or aren't applicable. Further, the proposed certification does not appear to be applicable to registrations in accordance with Section 122.2(b), or certifications in accordance with Section 126.13; it is unclear why, after decades of operation of the ITAR, this requirement is now deemed important at this time and only with regards to proposed "brokering activities". The impact of such certifications would be disproportionately slanted against foreign persons (particularly when viewed against the exemption from registration, prior approval, and reporting in Proposed Section 129.3(b)(3)), so **it is recommended that the text in these proposed sections (and also in Proposed Section 120.25(c)) be deleted.**

Reporting

The reporting requirements identified in Proposed Section 129.10 are problematical. The level of detail and scope for reporting are not currently part of, and are well beyond, the current brokering regulations. As with the requirements for prior approval in Proposed Section 129.7, **persons would be effectively directed to provide insight into their sensitive, proprietary business information** (again, provision of which may also be in breach of national legislations). The lack of definition for "brokering activities" would likely result in multitudinous submittals from some persons, and negative reports from others. The phrase "for each of the brokering activities" is imprecise, as it can be interpreted to mean for all activities collectively of a brokering effort, or, for each "brokering activity" conducted even if part of a single effort. The effort to collect and verify information, and prepare reports, would be burdensome without a seemingly commensurate objective or need. **It is recommended that Proposed Section 129.10 be removed, and the text of current Section 129.9 regarding reporting be maintained.**

Priority for Export Control Reforms

Saab supports the Administration's U.S. export control reform efforts but views the proposed brokering regulations as contradictory of that goal, and believes **the proposed rule at a minimum should be shelved, if not cancelled altogether, in favor of on-going and prospective reform initiatives.** If the proposed brokering regulations are revisited, a revised draft which incorporates the expected, many public comments received should be published, again for public comments; there should be no imminent rush to implement the proposed regulations which would have such a major impact on U.S. and foreign persons, particularly as the regulations have been under some kind of review since 2003.

Please feel free to contact me at 703-406-7206 or e-mail jeff.rieckhoff@saabgroup.com if you have any questions or require additional information. Thank you for your full consideration of Saab's comments.

Sincerely,

Jeff Rieckhoff

Jeff Rieckhoff
Vice President, International Trade Compliance

Cc: The Embassy of Sweden
2900 K Street, N.W.
Washington, DC 20007-5118

From: Robert Grimmer [mailto:rgrimmer@s4industries.net]
Sent: Friday, February 17, 2012 12:38 PM
To: DDTC Response Team
Cc: Green Sara
Subject: Brokering Rule Comments

I am providing these comments in response to the Federal Register notice posted on 19 December 2011 of behalf of Sierra Four Industries (S4 Industries). S4 Industries has been a registered broker with DDTC since 2005 and executes many US Government contracts under the ITAR's brokering provisions. Additional company information can be found at www.s4industries.net.

129.2(a) and (b) Definition of Broker. We encourage the new definitions to be as detailed as possible. DDTC should also offer a mechanism for contractors who believe they may be engaging in brokering activities to request a timely opinion/ruling through a brokering 'specialist' or dedicated web page/e-mail address to serve brokers. For example, we provide consultancy services to larger defense contractors on their FMS/brokering programs, but have received differing opinions as to whether or not our activities are considered brokering. We feel these rulings should be treated much like the commodity jurisdiction review process.

129.2(d) Definition of Broker (Foreign Persons). As with the above recommendation, we ask that the definitions of foreign persons' brokering activities be as clear as possible, and again offer a mechanism to provide timely guidance. Many US-based brokers utilize foreign representatives to assist them in other countries; it should be clear if whether or not a foreign person acting on a US-based broker's behalf should also be registered as an independent broker.

Other scenarios to consider regarding the definition of a broker:
1. Are permanent imports of USML materiel for a US Government agency subject to brokering regulations, or is the licensing and approval processes completely subject to ATF regulations?

2. Is a US-based person buying USML materiel from a US-based manufacturer and exporting it to a foreign customer required to be registered as an exporter, broker, or both? Is this activity considered exporting or brokering?

3. Is a US-based person under contract with a US-based broker to assist them with their brokering activities also required to be registered as a broker?

129.7 Exemptions from Prior Approval. This is currently one of the most confusing sections of Part 129, and we ask that the new guidelines be as clear as possible. Consider the following example which occurs regularly: a US Government activity (say the Department of Defense) posts a solicitation on fbo.gov for USML materiel for a foreign end user. The solicitation is for materiel which cannot be procured in the United States, so contractors must look to factories overseas. Let's assume the requirement is for 82mm mortar systems (SME) which must be manufactured in Serbia and delivered to Afghanistan for use by the Afghan Army. The contractor's proposals are due 30 days from when the solicitation is posted.

In the above example, would prior approval be required *before* the US-based broker is able to ask the Serbian manufacturer for pricing? If yes, is there a way for DDTC to guarantee it will be given inside of five working days, assuming the proposals are due in 30 days? In this scenario we lose valuable time to prepare the proposal. Most contracting authorities are unaware of the ITAR's brokering provisions, let alone the prior approval requirement. The proposed exemption mentions 'persons under direct contract with a US Government agency', but does not address persons who are competing to win a contract for a US Government agency. In some cases, proposals are due in 10-15 days from when they are posted; we believe it would be impossible to obtain prior approval and complete a proposal in such a short period of time.

We request that the prior approval exemption to extend to any solicitation issued by a US Government agency for the sole use of a Government agency, as well as any foreign end user. Once the solicitation is posted, wouldn't it be feasible to assume that some degree of due diligence has already been done to ensure the foreign end user is able to receive the materiel?

We agree that revisions to Part 129 are overdue, and greatly appreciate the opportunity to provide commentary on the proposed changes. If you have any questions please feel free to contact me at any time.

Sincerely,

Robert Grimmer
Sierra Four Industries
+1 303 668 7377 Phone (GMT -6)
+1 303 496 1065 Fax
rcgrimmer Skype
rgrimmer@s4industries.net
www.s4industries.net

Ambassade de France
aux Etats-Unis

N° 448

The Embassy of France in the United States of America presents his compliments to the Department of State and has the honor to provide the following comments on the draft "Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions":

- We welcome the substantial efforts of the United States Government to reform the current U.S. export control system and its commitment to consult allies and partners.

- We would like to draw the Department of State's attention to the following five issues which may have a significant impact on current European and French legislations:

1. A broad definition of "brokering activities" contains none of the sense of acting as an agent, intermediary or middleman which is essential to capturing the core issue of "brokering activities" and be able to discriminate without ambiguity between a "broker" and any other agent.
2. The French government considers that none of its employees acting in an official position is likely to submit to any kind of brokering activities.
3. The limited scope of exemptions regarding registration and prior approval requirements (129.3.b.4) raises concerns regarding the DoS's increased "droit de regard" over foreign defense companies using U.S. origin components, which will be required to register as brokers even though the activities are already covered under part 129.2 (b) and even though DDTC already asserts jurisdiction over them under ITAR 127.1 (b).

   To avoid any future discrepancy of interpretation of paragraph 129.3.b, the French Government would very much appreciate to have this provision partially reviewed as to:

   - explicitly exclude from the scope of "brokering activities" (paragraph 129.3.b.4): marketing activities of foreign-made defense article end-items incorporating US-origin parts and components that are not their principal element and are not marketed as such,
   - explicitly exempt from brokering requirements: all activities undertaken by a subsidiary for a parent, by a parent for a subsidiary, or by one affiliate, as well as all activities undertaken by a person on behalf of its employer or the employer's parent, subsidiary, or affiliate.

4. With regards to registration requirements, the identification of detailed data collection (names, addresses, situations of parties in a transaction altogether), their recording and transfer to the U.S. Government raise some serious concerns of conflicting

legislations. French/European privacy laws[1] do not allow such transfer and record of detailed data.

5. The French Government, albeit convinced of the need for a strict monitoring of brokering activities, would like to stress the fact that it does not recognize such a claim to extraterritoriality of U.S. regulations. Persons involved in those activities are already subject to specific national in-country regulations.

- As most of these comments are also of interest to other European countries, we suggest discussing these issues in both bilateral and multilateral frameworks. We remain at your disposal for any question you may have and look forward to working with you.

The Embassy of France avails itself of this opportunity to express and renew to the Department of State the assurance of its highest consideration./.

DDTC
Robert S. Kovac, Managing Director
Directorate of Defense Trade Controls
U.S. Department of State
2401 E St., N.W., SA-1, 12th Floor
Washington, DC 20037

[1] Article 413-7 et al. of the Penal Code and ministerial instruction n°486 dated 1 March 1993 on protection of scientific and technical patrimony within the international transaction.

Kathryn L. Greaney
Vice President
Global Trade Controls
Office of Internal Governance

The Boeing Company
2201 Seal Beach Blvd
P.O. Box 2515 MC 110-SA23
Seal Beach, CA 90740-1515

February 17, 2012

Mr. Daniel L. Cook
Chief, Compliance and Registration Division
Office of Defense Trade Controls Compliance
U.S. Department of State
12th Floor, SA-1
2401 "E" Street, NW.
Washington, DC20037

Subject: Proposed Rule – Amendment to the International Traffic in Arms Regulations: *Registration and Licensing of Brokers, Brokering Activities, and Related Provisions*, Federal Register/Vol. 76, No. 243, dated December 19, 2011

Dear Mr. Cook:

The Boeing Company ("Boeing") appreciates the opportunity to comment on the Directorate of Defense Trade Controls ("DDTC") proposed amendment to Part 129 of the International Traffic in Arms Regulations ("ITAR"), relating to the brokering of Defense Articles and services. We support DDTC's efforts to provide more clarity and precision for the definition and scope of brokering activities, as well as streamlining brokering compliance requirements. If the proposed rule is adopted as written, however, its extraordinarily broad scope will have a strong negative impact on The Boeing Company and the U.S. aerospace industry. Therefore, we do not support this proposed regulatory change, as currently written.

We realize that defense trade brokering is a difficult activity to regulate, yet one that understandably must be regulated in order for the U.S. to address and protect our national security interests. Brokering has also been a complex compliance area for industry generally, and one that broadly touches on our defense business. We offer the following comments in the belief that the final rule can protect the nation's security interests while reflecting the global nature of today's aerospace and defense industry:

Overview

Our primary concerns with the proposed rule may be summarized as follows:

- The scope of the proposed regulation exceeds the original intent of Congress expressed in the legislative record aimed at addressing activities of an unregulated "grey market" for illicit arms sales. We believe the proposed regulation goes well beyond reducing the activities of those persons and entities that would threaten our national security, while imposing significant administrative burdens on legitimate commercial activity.

- The revised definitions of "broker" and "brokering activities" included in the proposed rule:

    - Unnecessarily capture activities over which DDTC already has oversight through current ITAR export licensing and enforcement mechanisms and which are in conflict with the legal and commonly understood definitions of these terms;

    - Imposes extensive new requirements for companies' foreign subsidiaries engaged in normal business activities, which will reduce U.S. industry's competitiveness;

    - Will capture the entire global aerospace & defense supply chain (including commercial suppliers) as brokers, requiring registration & reporting.

- Lack of clarity with respect to the inclusion of a sanctions-type concept of "facilitation" which could result in regulation of even ancillary business activities performed such as logistical support for trade shows or consulting services relating to strategic planning and general market/cultural assessments.

- While the proposed rule streamlines and consolidates duplicate registration requirements under Parts 122 and 129 of the ITAR, it will require many more parties to register as brokers, many of whom are clearly outside U.S. jurisdiction.

- While Boeing is firmly committed to compliance with U.S. export control laws and regulations, the proposed rule imposes substantial new implementation costs and burdens on nearly every facet of the aerospace industry -- including manufacturers, suppliers, support organizations, legal counsel, consultants and trade associations – without commensurate improvements to U.S. national security.

- Substantially increases the compliance liability placed upon registered companies for actions by all brokers, without having the ability to control or enforce compliance.

- Includes excessive extraterritoriality and conflict with some national laws that will negatively impact the competitiveness of U.S. aerospace manufacturers in these markets.

BOEING

A detailed discussion relating to each of these points is provided below:

Original Intent of Congress in Regulating Brokering & Brokering Activities

The Brokering Amendment to the Arms Export Control Act ("AECA" was included in legislation introduced in the House of Representatives during the Second Session of the 104th Congress (March 20, 1996) to amend the Foreign Assistance Act of 1961 and the AECA. The legislation (H.R. 3121,) was referred to the Committee on International Relations. As stated in a Report issued by the Committee to accompany H.R.3121 (House of Representatives Report 104-519, Part I, Section 151, p11, April 16, 1996), the intent of the Congress was to capture activities that at the time were outside the scope of existing controls:

> *"Section 151. Brokering Activities Relating to Commercial Sales of Defense Articles and Services.*
>
> *Section 151 requires U.S. persons (and foreign persons located in the U.S.) involved in defense trade of U.S. and non-U.S. defense equipment or technology to register with the U.S. government and provides the U.S. government authority to regulate such brokering activities. The Arms Export Control Act provides the Department of State with the authority to regulate the destination and use of U.S. origin and U.S.-made defense commodities. However, the 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 export 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."

In the H.R.3121 Committee Report, the clear Congressional intent was to regulate the activities of U.S. Persons, wherever located, and *foreign persons located in the U.S.* The current rule significantly expands the reach of the proposed controls to capture the activities of foreign persons located outside the United States who are engaged in the normal business of the global supply chain for the aerospace industry.

For example, the proposed language relating to "facilitation," as currently worded, would appear to require registration and reporting as "brokering" for the provision of *commercial* parts and components such as nuts, bolts and screws by a U.S. or foreign company acting as one of our suppliers. The proposed changes to the brokering regulations, if adopted, would also expand the jurisdictional reach of U.S. law and subject many additional types of business conduct to regulation. The proposed rule imposes additional regulatory requirements on companies engaged in legitimate defense business significantly beyond the originally-expressed intent of Congress.

Overly Broad Definitions Capturing Significant Portions of Authorized Defense Trade

Boeing has serious concerns about the extremely broad scope of the proposed definition of "brokering activities," as well as the use of the word "broker," which appears to contradict the common legal understanding of this definition. The application of these proposed definitions broadens the reach of the regulations to the point that, if adopted, they would have a significantly adverse impact on U.S. industry, as explained below.

Part 129.2 - Definitions

"Broker" – Under the new regulations, the term "broker" is defined through the activities it captures. However, "broker" has a standard *legal* definition that implies the presence of three parties to a transaction. For instance, *Black's Law Dictionary* defines "broker" as "an agent employed to make bargains and contracts *between other persons*, in matters of trade, commerce, or navigation, for a compensation commonly called "brokerage" (emphasis added). Therefore, a broker, as commonly understood by industry, is involved with one party acting on behalf of another, i.e., a broker is a person who acts as an intermediary. However, the proposed regulations capture a person as a broker even when that person is involved in a direct transaction with only one other party.

This implies that every foreign supplier to a U.S. manufacturer of a defense item would be considered a broker – even if the products are commercial parts or raw materials. This proposed rule would extend the application of the term "broker" to many commercial entities worldwide.

> *Recommendation*: The definition of a broker should make clear that it is a legal person/entity subject to U.S. jurisdiction which acts as an intermediary between two or more other persons in the performance of "brokering activities" as defined. A proposed definition of "broker" is provided below for your consideration:
>
> *"A broker is a U.S. person or a foreign person subject to U.S. jurisdiction who acts as an intermediary between U.S. and foreign persons in the performance of brokering activities as defined in 129.2(b)."*

Further, as a result of over-broad definition of "brokering activities," many other activities customarily performed in the normal course of business would appear to be captured, including general business consulting, research, logistical support for trade shows or assistance to the non-broker parties in understanding local laws and regulations, as these activities are not addressed in the exclusions provided in Part 129.2(e). For example, the proposed definition of brokering captures intra-company transfers and transfers to affiliates and subsidiaries, based upon the broad premise of "facilitation" of sales of defense articles and services, without regard to the type of article or service being provided or taking into account the ultimate destination or end-user. Further, the rule fails to exclude other ancillary activities customarily performed in a transaction including business consulting, research, logistical support for trade shows or assistance in understanding local laws and regulations.

"Brokering Activities" – The proposed language in Part 129.2(b) is extremely broad, principally because of the inclusion of the phrase "*any* action that *facilitates*" and also because of the lack of precision in the use of the term "broker." Pursuant to this proposed rule, while U.S. suppliers would be excluded under Part 129.2(e)(1), the language in Part 129(2)(b) would capture Boeing's entire non-U.S. supply chain.

As we currently understand the proposed definition, all of our commercial and defense item/part suppliers outside of the United States would be considered brokers because their actions could be construed as "facilitating" defense trade. We address this new term below in more detail, however, as we understand the application of the term in the proposed rule, these suppliers would have to register under the proposed rule, and might also require prior approval from DDTC to engage in the simplest activities in the performance of their normal roles as suppliers.

For example, a foreign commercial part manufacturer importing low level parts and components into the United States (such as bolts, nuts, washers and screws that would be classified as EAR99 items under the Export Administration Regulations ("EAR")) that are used by Boeing for installation on a military aircraft to be exported to, for example, a non-NATO/not Major-Non-NATO ally country, would be required to register and receive prior approval from DDTC for brokering activities. Under a plain reading of the proposed rule, the hypothetical non-U.S. supplier would be "facilitating" defense trade.

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Boeing has direct and often long-standing relationships with its suppliers. In most cases there are no intermediaries in these transactions and we believe that our suppliers should not be considered brokers under the commonly accepted legal definition nor should their normal activities as suppliers be considered "brokering activities." Sufficient controls currently exist that make it unnecessary to impose these additional controls on non-U.S. suppliers. Our suppliers are subject to their own countries' export laws and must also comply with the import requirements of the State Department or the Department of Homeland Security's Bureau of Alcohol, Tobacco and Firearms, as applicable, as well as with other trade related requirements enforced by Customs and Border Protection.

Further, the proposed rule would adversely impact the cost and availability of imported goods, increasing costs to Boeing, to our U.S. Government customers, and to our U.S. and non-U.S. customers. The net effect would be to reduce our competitiveness in the global marketplace. Some of our suppliers outside of the U.S. may determine that the increase in these extraterritorial controls would be so onerous that they would forego entering into a supplier relationship with us or other U.S. manufacturers. This would be especially true for small and medium-sized supplier companies.

Need for a Definition of the term "Facilitation" – Facilitation is not a concept that has traditionally been applied in the administration of the ITAR or the EAR. Facilitation, however, is an important term under the economic sanctions regulations administered by the Department of the Treasury's Office of Foreign Assets Control ("OFAC"). We realize that in the presence of an economic embargo, which always includes a freezing of the sanctioned party's assets, facilitation of a transaction can be a key factor because any and all transactions can ultimately support the sanctioned country's economy which in turn can undermine the embargo. In other words, facilitation under the OFAC regulations is an all-encompassing term that can capture the smallest of transactions, with very few exceptions usually allowed by statute.

The use of the term "facilitation" in this proposed rule replicates its broad meaning under the economic sanctions regulations, which is inappropriate under Part 129. Clearly, not every action should be captured by Part 129 just because it could potentially or remotely be connected to an ITAR-controlled item, unless an exclusion from the language or an exemption is in place. Such

extraordinary controls would not contribute to an enhanced national security environment and would result in a significant increase in regulatory requirements for both defense and commercial international trade. And again, we respectfully suggest that it is far beyond the legislative intent of the AECA.

To highlight the practical impact, we offer the following example. A common business function that may be considered "facilitation" under the proposed definition are services provided by consultants who are often engaged by aerospace and defense companies to assess the geopolitical and national security environment in the global marketplace. These consultants offer their assessments so that companies are better informed about (a) US. national security policy in a region; (b) foreign governmental policies in a given region; and (c) market trends in these same regions. These activities are advisory in nature only and are not "facilitation" of specific transactions, unless the consultant also acts as a direct intermediary consonant with our suggested revision to the definition of a "broker," which is rarely the case.

In addition to ensuring that these activities are not captured by the concept of "facilitation" through the adoption of our recommended definition below, we also recommend that these activities be specifically added as examples of administrative services under Part 129.2(e)(3) or that an exclusion be articulated under Part 129.3(b).

Recommendation: In conjunction with a revised definition of "broker," and precise language as to what constitutes "brokering activities", we have two recommendations:

- First, we recommending deletion of the term "facilitation" altogether from Part 129. In the financial-transaction driven sanctions environment it makes sense, however, in the context of defense trade, it does not.

- In the event that DDTC strongly desires the use of this term, we recommend the following revised definition that would capture only activities that are meaningful for national security controls:

  "Facilitation for purposes of this subchapter means any action that is performed by a broker, as defined, that is directly related to and enables the specific sales transaction of a defense article to a foreign person."

We also recommend the following additional changes to the definitions in Part 129.2 for your consideration:

- Add an exclusion from the definition of brokering activities under Part 129.2(e) for non-U.S. suppliers.

- Delete "Such action includes, but is not limited to" under Part 129.2(b) to enhance clarity and certainty for exporters, which will facilitate compliance.

Exclusions in Part 129.2(e)(1)-(3)

The provisions enumerated in Part 129.2(e)(3) exclude activities that do not extend beyond administrative services, which are defined to include arranging office space and equipment, hospitality, advertising or clerical, visa or translation services or activities by an attorney that do not extend beyond providing legal advice to a broker. While these are helpful exclusions, the list should be expanded to also include the provision of additional activities that should not be construed as "brokering." Examples of these sorts of activities include consulting services by third parties to U.S. companies that are unrelated to direct marketing activities, such as provision of advice for strategic planning, market assessments or the economic, political or cultural considerations involved in doing business in a foreign country. Alternatively, additional enumeration of excluded activities could be avoided completely by limiting the scope of the definition of "brokering activities," as previously suggested. This would avoid the inevitable issue of discovering, in the future, other activities that should have been excluded, but are not, requiring an amendment to the regulations.

More importantly, we strongly recommend an exclusion from the requirements of this Part for brokering activities that would take place under the proposed ITAR exemption that will implement the provisions of the U.S.-UK and the U.S.-Australia Defense Trade Control Treaties. This exclusion is especially important for treaty-eligible activities in the context of proposals or solicitations for a contract.

Brokering Registration Requirements

We appreciate the elimination of redundant registrations for companies engaged in both manufacturing and brokering. However, we offer the following observations and comments with respect to registration requirements:

- The exemption at 129.3(b)(1) includes an exemption for "international organizations," however, that term is not defined. We believe that it would be beneficial to clarify that this term includes multilateral governmental organizations such as NATO.

- Foreign governments frequently utilize contract labor to perform government tasks. It can be difficult or impossible for U.S registrants to identify these contract employees. In addition, U.S. registrants have no influence over the actions of foreign governments in their selection of contract labor or in the control of that labor force once selected. Therefore,

we recommend adding foreign government contract laborers to the Part 129.3 (b)(1) employees of foreign governments exemption.

- Many U.S. companies have part-time employees, however, the exemption from registration included in Part 129.3(b)(3) is limited to their "bona fide and full-time employees." The regulation is silent with respect to part-time employees, creating confusion as to whether these employees would need separate registration if they were required to engage in brokering activities as a condition of their employment. We recommend that the term "regular employee" be used in this section, as it is used in other areas throughout Part 129.

- As with part-time employees, differentiating contract employees from regular employees and imposing a separate requirement to register would create significant administrative burdens for companies. These contract workers are managed and held to the same standard of conduct as regular employees; thus, there is no reason to exclude them from this exemption. Accordingly, we recommend the following changes so as not exclude a Part 122 registrant's part-time employees and add contract labor:

  "(3) Persons registered pursuant to Part 122 of this subchapter, their U.S. person subsidiaries, joint ventures, and other affiliates listed and covered in their Statement of Registration, their bona fide regular and contract employees,"

- Since we do not think it is the intent of this proposed rule to capture non-U.S. commercial parts and defense articles supplied to U.S. manufacturers, we recommend adding a Part 129.3(b) "supplier" exception for non-U.S. manufacturers who are shipping defense and commercial items into the U.S. for manufacture.

- Given that DDTC has already approved all parties on an authorization, we recommend expanding the §129.3(b)(4) End Users exemption to include all parties on an authorization, rather than just end users, to limit double licensing of these parties.

Liability and Compliance Concerns

The proposed rule could significantly expand potential liability by adding the word "broker" to Part 127.1(b), thereby making registrants liable for the acts of brokers in connection with transactions for which ITAR licenses or approvals are obtained. In many instances this liability would attach to the actions of individuals or organizations over which the applicant would have limited or no control or influence, especially with respect to participants with whom there is no direct contractual relationship. For example, one of the reasons that many companies do not allow third-party International Sales Consultants the ability to

legally bind the Company (*e.g.*, these consultants are NOT "agents") is to prevent any such liability to attach to the company. Here, the proposed rule negates all provisions in a consultancy arrangement that seeks to limit liability between parties to the contract. For example, a bank providing a Letter of Credit to a foreign supplier in conjunction with the sale of a defense item to a U.S. defense contractor, while excluded under Part 129.3(b), would still be a broker by definition, and the U.S. contractor would have no visibility as to the identity of the bank, but would nevertheless be liable for its actions..

This potential liability also extends to circumstances when a broker is acting under an exemption and although may not require prior approval from DDTC, may still be required to comply with reporting and recordkeeping requirements.

Meeting the compliance requirements of the proposed rule is impracticable by nature because of the large population of entities captured as brokers and the extensively broad definition of brokering activities. Further, many of the brokers that would be required to be identified in export authorizations would not be able to be controlled by the applicant because there would be no contractual relationship or obligation between the two parties. We believe that it would be unworkable to achieve the level of control that DDTC proposes to impose under these regulations or, further, comply with the obligations to which exporters would be subject under proposed Part 126.1(b) *Violations* if brokers are added to that section.

> *Recommendation*: Acceptance of the proposed definitions of "broker," "brokering activities" and "facilitation" as suggested previously in this submission would mitigate this concern.

<u>New Part 126.13(c) – Required Information to Be Reported In Export Licenses.</u>

If the definition of "broker" contained within the proposed rule were to be adopted, identifying and describing on a license application the activity of every person/entity contributing to the transaction, in any way, including those brokers exempted in Part 129.3(b) from registration, prior approval, and reporting, would be a highly-intensive regulatory requirement. For example, the list and description of the activity of the brokers to be listed on a DSP-5 for the sale of a military aircraft to Australia or the U.K. could stretch into the hundreds of entities, and would include the following:

- All non-U.S. parts suppliers from which we procured parts for the aircraft
- All entities involved in these parts transactions – banks, insurers, transporters, freight forwarders
- All subsidiaries and affiliates that supported the manufacture, promotion, marketing, financing, insurance, sales, transportation, and freight forwarder activity involved in the transaction

- All outside persons and entities that supported the manufacture, promotion, marketing, financing, insurance, sales, transportation, and freight forwarder activity involved in the transaction

  Recommendation: We recommend adoption of the definition of "broker" proposed earlier in this submission. Additionally, applicants should not be required to report on brokers who are excluded under Part 129.3(b).

Part 129.7 – Exemptions from Prior Approval

We recommend DDTC provide an exemption from prior approval for brokering activities in support of Foreign Military Sales (FMS) programs, including manufacture of the end item to be exported and follow-on support activities involving direct exports by a U.S. contractor. These activities and the parties involved are already identified and strictly controlled by the U.S. Government. We note, however, that Part 129.7(b)(2) paragraphs (i) and (ii) restrict the use of the exemption by not applying to brokering activity in support of a contractor who is supplying defense items pursuant to an FMS program.

Recommendation: delete paragraphs (i) and (II).

Jurisdiction and Extraterritoriality

The proposed rule attempts to clarify when the brokering regulations apply to foreign persons and identifies the following as subject to Part 129:

> (1) Brokering activities by any foreign person *in the United States*; (2) Brokering activities by any foreign person located outside the United States *involving U.S.-origin defense articles or services*; (3) Brokering activities by any foreign person located outside the United States *involving the import into the United States of any* defense article or defense service; or (4) Brokering activities by any foreign person located outside the United State *acting on behalf of a U.S. person* [emphasis added].

The emphasized text provides some helpful clarification in determining how the proposed rule would apply to foreign persons. However, the proposed rule asserts an overly broad reach of U.S. jurisdiction. For example:

- The proposed rule does not include an exclusion for U.S.-origin defense articles incorporated into foreign-origin items; jurisdiction could attach in the case of Part 129.2(d)(2) even where the article has been incorporated into a foreign-origin defense article.

- Further, Part 129.2(d)(3) could encompass sales of foreign-origin defense articles for import into the United States, even if all activities outside of the import took place outside of the United States.

- Part 129.2(d)(4) is ambiguous and may have an unduly broad reach. For example, if a foreign subsidiary substantially participates in the actual manufacture or assembly of equipment or the provision of services, we believe it is acting on its own behalf and, therefore, not engaged in "brokering activities."

BOEING

Additionally, in several countries, such as India, acting as a "broker" is forbidden under national law which prohibits intermediaries in defense sales programs. This conflict between laws places suppliers, partners, service providers and customers in an untenable position, having to choose between compliance with the ITAR and compliance with their own national laws. Adoption of the definitions we have suggested in this submission will help to alleviate this burden.

We urge DDTC to engage with industry before issuing a final rule on the new regulation so that the impact of these requirements on U.S. trade and competitiveness, collaboration with foreign suppliers, partners, service providers and end-users, as well as day-to-day business operations can be better understood and the much needed revision to Part 129 of the ITAR can be aligned with the overall goals of the U.S. Export Control Reform initiative.

Thank you for the opportunity to provide comments on this proposed rule. We reiterate our desire and commitment to work with the U.S. government on a continuing basis on the U.S. Export Control Reform initiative. Boeing believes that government-industry engagement is essential in this area, and is ready to answer any questions or provide any assistance or input that may be helpful.

If you have any questions, please contact Boeing's Washington D.C. representative, Stephanie Reuer, at (703) 465.3505.

Very truly yours,

K. L. Greaney

Kathryn L. Greaney

February 16, 2012

Mr. Daniel Cook
Chief, Compliance and Registration Division
Office of Defense Trade Controls Compliance
U.S. Department of State
2401 E Street, N.W., SA-1, 12th Floor
Washington, D.C. 20037

Subject: RIN 1400-AC37
Proposed Revisions to the International Traffic in Arms Regulations
Brokering

Dear Mr. Cook:

AIA member companies support the efforts of the U.S. Government and the international community to stem illicit brokering of defense articles, and assure that criminal offenders can be prosecuted successfully. AIA member companies also support clear identification of the definition of a broker and what activities constitute brokering.

However, AIA member companies cannot support the proposed rule as written for the following reasons:

1) The proposed regulation extends the regulatory requirements further than the statutory language of the Arms Export Control Act (AECA) and the amplifying intent of the Congress as identified in House Report 104-519 and language related to other U.S. multi-national regime commitments;
2) The proposed regulation is directly contrary to the intent of the President's Export Control Reform Initiative and the Defense Department needs for increased security cooperation and partnership capacity with our military allies to ensure global security and protection of U.S. national interests;
3) The proposed regulation imposes substantial costs and compliance liability on U.S. business, including those performing tasks that are not related to a sale of defense articles/services, such as trade associations, consultants, etc., as well as duplicative authorization requirements for brokering activities for legitimate business transactions already authorized under other requirements of the ITAR;

4) The proposed regulation imposes requirements on brokering by individuals with no relationship to a U.S. exporter or U.S. export transaction, subsequently further encouraging the trend in foreign markets to assure their products are free of ITAR-tainted technology and items; and
5) Requirements to register and obtain brokering authorizations in the United States may be in direct conflict with local laws in places like India, United Arab Emirates, and elsewhere that prohibit "brokering" (same word, but different definition) in the local jurisdiction. Consultations with these relevant governments should be undertaken to mitigate the potential conflict before this rule is implemented.

The Aerospace Industries Association and its member companies believe these concerns, if not taken into account before a final rule is published, will have a strong negative effect on the aerospace industry and serve as a significant deterrent to collaboration and defense trade between our member companies and U.S. partners and allies. We anticipate particular damage to small and medium size enterprises, which, by necessity must use international representatives to reach potential customers in foreign markets. Further amplification of the comments above follows.

Statutory Language and Multi-Lateral Commitments

House Reports 104-128 and 104-519 regarding the legislative history of the AECA and this provision in particular indicate that the Congress did not intend for extraterritorial application of the brokering registration requirement generally, but to address specific loopholes in existing statutes (activities not otherwise regulated under the AECA) to regulate the activities of U.S. persons (and foreign persons located in the United States) brokering defense transactions overseas involving terrorist countries. The amendment provides those authorities. We agree the regulations should be clear in regulating the activities of U.S. persons (located anywhere in the world) and foreign persons located in the United States, with extraterritorial applications extended consistent with the statutory language and amplifying reports, as well as norms of international law.

Additionally, the proposed amendment eliminates the current "subject to the jurisdiction of the U.S." requirement in regard to foreign persons, significantly expanding the scope of brokering activity to apply to all foreign persons located outside the Unites States:

- When a U.S. origin defense article or defense service is involved; or
- When they are acting on behalf of a U.S. person; or
- When they are involved with an import into the U.S. of any defense article or defense service.

We believe such a broad application of the jurisdictional reach of the brokering regulations goes beyond the statutory language of the Arms Export Control Act and the intent of Congress to apply extraterritoriality in limited circumstances. Likewise, such an expansive application of extraterritoriality appears inconsistent with traditional notions of jurisdiction to only regulate transactions within the territory of the United States.

The AECA brokering amendment (22 U.S.C. §2778(b)(1)(A)(ii)) language reads "no person may engage in the business of brokering." The expansive definition of brokering activities in the proposed rule to "any action to facilitate" is inconsistent with the statutory language and is overly broad. When this proposed change is coupled with the language broadening the jurisdictional scope, almost all activities involving international transactions of a munitions list item could be construed as subject to the brokering regulations, as well as current authorization requirements for the export of the defense article, technical data and/or defense service, creating a duplicative licensing scheme for the same transaction.

With regard to U.S. multi-lateral commitments, the Wassenaar Arrangement Elements for Effective Legislation on Arms Brokering identify regulation for activities "of negotiating or arranging contracts, selling, trading or arranging the transfer of arms and related military equipment." The language identifying activities the member States should regulate as brokering activities is a defined scope identified with common business and legal definitions of brokering activities.

Building Allied Partnership Capacity and Export Control Reform

The proposed rule is directly contrary to U.S. Government stated aims to clarify and streamline the export control reform system, and to build partnership capacity through military cooperation with our allies. Indeed, given that a significant amount of items that are currently controlled on the U.S. Munitions List (USML) will be moved to the Commerce Control List, it would be prudent to complete the list review exercise before applying the new brokering rules to the revised USML.

§129.2(e)(2) – U.S. Government Exclusion

AIA and our member companies recognize that U.S. government support for defense trade is critical to building partnership capacity and security cooperation. It is clear DDTC also understands that U.S. government employees, acting in an official capacity to further defense trade/cooperation, should not be burdened with onerous regulations. AIA supports the U.S. government employee registration exclusion found in §129.2(e)(2). However, the fact that this exclusion was drafted demonstrates that DDTC recognizes the actual burden of these regulations would have inhibited U.S. government representatives from effectively doing their job. A U.S. industry representative traveling abroad to meet with a foreign Ministry of Defense (MoD) is not much different than the U.S.

Senator/Congressman/Hill staffer who meets with the MoD to support the sale of equipment manufactured in their district - both are engaged in §129.2(b)(2) activities.

Our foreign partners and allies often model their regulations from U.S. best practices. This is especially relevant as the U.S. is in the midst of negotiating with other members of the United Nations to develop the parameters of a Global Arms Trade Treaty, which currently includes language regarding brokering. Should other countries adopt the U.S. standard, U.S. persons and their industry representatives may be compelled to register as a broker in multiple countries. Defense trade relies on coordination from both U.S. industry and the U.S. government. If exemptions are determined to be warranted for one party, similar reasonable flexibility should be considered for all parties supporting government-to-government transfers.

Imposition of Additional Compliance Costs and Liability on U.S. Exporters

Increased Liability for U.S. Exporters

DDTC proposes to amend Section 127.1(b) to specify that "any person who is granted a license or other approval or acts pursuant to 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."

The Federal Register notice explains simply that "responsibilities imposed on a person granted a license also apply to a person who 'acts pursuant to an exemption,' and that such responsibilities include acts of brokers." 76 Fed. Reg. at 78,582. AIA respectfully submits that there is a lack of sufficient clarity regarding the responsibility of an exporter for the acts of brokers, and recommends that DDTC explain the parameters of this responsibility in order to guide the exporting community. We have identified the following issues.

First, the language leaves it unclear what relationship with a broker triggers the exporter's responsibility for the broker's acts. It is ambiguous whether the language "to whom possession of the defense article or technical data has been entrusted" modifies all the antecedent persons (i.e., "employees, agents, brokers, and all authorized persons") or just modifies "all authorized persons." If this language modifies all the antecedent persons, it does not appear to have meaning with respect to brokers, since brokers generally would not obtain "possession of the defense article or technical data." A broker's role is generally to facilitate a transaction, as DDTC explains in its definition of "brokering activities" in Section 129.2(b). And if the language only modifies "all authorized persons," then it does not define the relationship with a broker that triggers exporter responsibility. Therefore, it is unclear what relationship with a broker triggers exporter responsibility. The "possession" language has meaning in the context of persons who

receive defense articles, but not in the context of brokers. The current approach effectively states that all exporters are responsible for the acts of all brokers.

DDTC may intend that an exporter is responsible for a broker's actions when the broker has engaged in brokering activities on the exporter's behalf with respect to an article that the exporter has received a license to export. If so, we believe that this should be clearly stated.

Second, assuming that an exporter is responsible for a broker's actions, it is unclear whether the exporter is responsible for all of a broker's actions or only those actions that relate to activities on the exporter's behalf. As drafted, the language is not limited, in that it imposes liability on the exporter for "the acts of ... brokers". For instance, it would appear that if a broker files a report pursuant to Section 129.10, and improperly fails to report brokering activities with respect to activities that were not on the exporter's behalf, the exporter could nonetheless be held responsible for the broker's violation. In other words, the draft amendment would appear to make an exporter responsible for all of a broker's compliance with the ITAR, even for actions which do not relate to the broker's activities on the exporter's behalf. Such a broad approach would be problematic for brokers and exporters. It would be difficult, and perhaps impossible, for an exporter to obtain information from a broker regarding its compliance relating to actions that do not relate to the broker's activities on the exporter's behalf, because these actions likely would involve proprietary information of third parties. Yet without this information, the exporter would not be able to ensure that the broker was complying with the ITAR, and therefore would not be able to protect itself against liability under Section 127.1(b).

DDTC may intend that the exporter is responsible for the broker's acts relating to the broker's activities on the exporter's behalf (e.g., is responsible for the broker's acts of registering with DDTC and reporting on activities with respect to activities on the exporter's behalf related to USML defense articles). If so, we believe this should be clearly stated.

Third, it is unclear whether the proposed language would apply to the ITAR-controlled actions that brokers actually execute on an exporter's behalf. The Proposed Rule would make exporters responsible for "the acts of ...brokers ... regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad." It is unclear whether registration under Part 129 is an act "regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad." Similarly, it is unclear whether reporting under Part 129 is such an act. DDTC may intend that exporters are responsible for the broker's acts of registering with DDTC, obtaining any necessary brokering approvals, filing required reports, and record-keeping. If so, we believe this should be clearly stated.

AIA members recommend that DDTC more clearly set forth the circumstances that trigger an exporter's responsibility for a broker's compliance, and more clearly explain the specific ITAR-related actions of a broker for which an exporter bears responsibility. We believe that this would best be accomplished through a separate provision explaining

the meaning of the "broker" language in Section 127.1(b). While such explanations could be provided in the Supplementary Information, this approach is always a concern from a transparency perspective, because the Supplementary Information does not appear in the Code of Federal Regulations. If exporters must go back and research the original Federal Register notice in order to correctly apply the rule, this not only imposes a burden on the exporter but also is likely to result in either non-compliance or unnecessary measures by exporters.

§129.4(c)(1)(i) – Officer Certification

The new language found in this section requires a company's empowered senior officer to certify whether "the intended registrant, chief executive officer…other affiliate or other person required to be listed in the Statement of Registration: Is the subject of an indictment or has otherwise been charged (*e.g.*, by information) for or has been convicted…" The prior wording of this section did not include "indictment or has otherwise been charged." Likewise, the proposed regulation expands the applicable criminal statutes subject to certification from Sec.120.27 of the ITAR to include "or foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in Sec. 120.27…."

An empowered official, particularly of a foreign registrant, may not have the ability to determine with certainty that their company registrants are not the "subject of an indictment…" due to local privacy laws, etc. Further, that these individuals would be knowledgeable of both U.S. criminal statutes, as well as any possible "equivalent local laws" in their jurisdiction or the territories in which they operates, would require retention of international legal counsel, as well add cost and compliance risk for both the foreign broker and any U.S. exporter they support.

The new language scope of the proposed rule requires a broad scope of responsibility and oversight that is impractical to implement, even with agreement clauses requiring a foreign broker to be compliant with applicable U.S. laws and regulations.

Imposition of Substantial Cost and Administrative Burden

§129.3(b)(3) – use of "full-time" to describe regular employee

Proposed §129.3(b)(3), in-part, states: "…covered in their Statement of Registration, their bona fide and full-time regular employees, and their eligible…" The Fair Labor Standards Act, administered by the U.S. Department of Labor, does not define 'full-time'. The definition is left to the discretion of the employer, resulting in inconsistent application of the term 'full-time'. Additionally, throughout proposed Part 129, "regular employee" is used several times but only in §129.3(b)(3) is 'full-time' placed in front of it. Therefore, AIA recommends removal of full-time so the subparagraph reads, in-part: "…covered in their Statement of Registration, their bona fide regular employees, and their eligible…" AIA recommends rewriting language in Part 129 to read, "…foreign person brokers listed and indentified as their ~~exclusive~~ brokers in the Statements of

Registration, *or their covered foreign person for activities listed in Part 129.2(a)(2) if specifically identified in a license application for transactions or* whose ~~brokering~~ activities…"

§129.3(b)(3) versus §129.3(b)(4) – clarification of example 2

Example 2 in the proposed rule involves a foreign person promoting, receiving, warehousing and distributing U.S. origin SME defense articles. It goes on to state that the foreign person is engaged in brokering activities but exempt from the registration, licensing and reporting requirements because the U.S. person included the foreign person on their Part 122 registration as an affiliate; therefore qualifying under §129.3(b)(3). AIA requests the DDTC clarify: if the foreign person was not included on the U.S. person's Part 122 registration, would the foreign person still qualify under §129.3(b)(4) and still be excluded from registration, licensing and reporting under Part 129?

§129.3(b)(3) and §129.3(d) – inclusion of "foreign subsidiaries"

Proposed (b)(3) identifies "Persons registered pursuant to part 122 of this subchapter, their U.S. person subsidiaries, joint ventures, and other affiliates listed…" and includes their foreign person brokers; while (d) has similar language but includes "foreign subsidiaries". AIA requests clarification on why "foreign subsidiaries" were excluded from (b)(3) and asks the DDTC to consider including "foreign subsidiaries" as part of (b)(3). Indeed, it would be simpler to delete all of the explanation around registered parties and simply state "persons registered pursuant to part 122 of this subchapter …" which would then automatically include U.S. and non-U.S. person subsidiaries, joint ventures and affiliates listed on a party's registration.

§129.6 - Prior Approvals Required for Too Many Activities

Existing regulatory "prior approval" and "prior notification" requirements have always been confusing. The new regulations attempt to clarify when these authorizations are required, but do so by mandating prior approval for all brokering activities, unless exempted. "Prior notification" would be eliminated, which is a positive element of the proposed rule. However, the exemptions for prior approvals are so narrow, that most brokering activities would still require prior approval, even if performed by a registered broker. Indeed, most intra-company activity involving foreign subsidiaries and the sale of defense articles and services will require prior approval. This is true even when a foreign subsidiary is reaching back to its U.S. parent for support or when a U.S. company is seeking intra-company support from its foreign subsidiaries. Coupled with the expansion of brokering activities, this could significantly curtail pre-sale marketing activities and have a negative impact on the entire supply chain for defense articles. Further, in many cases these transactions already identify all the parties and their roles as part of a DSP-5 license for the export of technical data or a TAA authorizing defense services as part of a marketing effort, and duplicate authorizations for brokering activities related to these marketing efforts should not be required. Rather an authorization for brokering should be required only when there is no other Dept. of State authorization.

Proposed §129.8 Procedures for Obtaining Prior Approval

Proposed §129.8 (b)(2) requires "[t]he name, nationality and country where located of all persons who may participate…" This could result in the need to identify dozens of regular employees of the applicant. If an applicant identifies all known persons 'who may participate' at the time of the application, would it require the applicant to then amend the approval in the future to identify additional regular employees 'who may participate'? AIA requests the DDTC to consider limiting this requirement to the name, address and country of the registered person, their US or foreign subsidiaries, joint ventures, or affiliates which will be engaged in brokering activities under the approval.

Proposed §129.8(b)(4) requires the request to identify if the sale will be through DCS, FMS or other activity in support of the U.S. Government. The applicant may intend for the sale to be through one mode but may decide that the sale should be through FMS or other activity in support of the U.S. Government. Given the certification requirement under §129.8(c) and the addition of 'brokering activities' under §127.2(b)(13), would the applicant be viewed as making a misrepresentation by stating the sale will be through one method but eventually going through another?

Proposed §129.8(b)(5) requires the request to identify "[t]he type of consideration received or expected to be received, directly or indirectly…" and include the "dollar value amount and source thereof." Many brokering arrangements are commission based and dependent on the contacts received. Therefore, providing a dollar value amount, as required in (5)(iii), would be a guess or approximation, at best. AIA requests the DDTC consider revising the language under (5)(iii) to read as follows: "the estimated U.S. dollar value amount and source thereof." The 'estimated' value aligns with the estimated quantity and value requested in §§129.8(b)(3)(iv) and (v), respectively.

§129.10 – reporting unsuccessful brokering activities

The annual brokering report requires identification of, amongst other things, "the quantity…and U.S. dollar value of the defense articles or services; the type and U.S. dollar value of any consideration received or expected to be received…" If the broker is paid a commission, engaged in brokering activities but no sales occurred during the report year, the broker would not be able to provide quantities, types or values because no sales occurred. What information should the report include, so the Empowered Official can "certify that the report is complete and accurate"? AIA requests the DDTC to consider revising §§129.10(b)(1) and (2) to read, in-part, as follows:

"(1)…The report shall describe each of the brokering activities, which resulted in a sale, including the number of the prior approval or the exemption claimed; and"

"(2) For each of the brokering activities, which resulted in a sale, the report shall identify all persons…"

Additional Comments

Under the proposed regulations, industry's entire foreign supply chain (because they manufacture minor piece parts that are incorporated into ITAR controlled systems) would be considered brokers, even those entities that manufacture commercial items considered EAR99 under U.S. regulations. In practical terms, this would impose a registration, reporting, and recordkeeping requirement on foreign suppliers who manufacture commercial parts, just because those parts may be incorporated into an ITAR- controlled system further down the supply chain. The end result of these requirements will drive up the cost of goods manufactured, as these registration fees and other costs would eventually be passed on to the consumer.

Similarly, part-time employees working on the manufacturing line of defense articles destined for export would also be considered brokers, subject to registration reporting and recordkeeping requirements. Because the current exceptions to the brokering rules in the proposed re-write only apply to "bona fide and full-time regular employees", this definition would require seasonal or part-time employees often employed by defense companies to work an international manufacturing line to register on an individual basis. The effect of this cost could be calamitous, driving up the cost of manufacturing defense articles as that cost would be passed on to the consumer.

Administrative Issues

§129.4(a) – FedWire

AIA suggests there may be an error in omitting the changes made in 76 FR 76035 adding FedWire as an alternate means of electronic payment.

§129.4(e)(1) – typo

The first sentence of the proposed subparagraph contains a typographical error. The proposed subparagraph states, in-part: "Any of the persons referred to in §129.4(b)(1) of this subchapter…" The citation is wrong and should be corrected to read "§129.4(c)(1)".

Additional General Comments

Given the broad expansion of scope of the proposed regulations, we would respectfully ask the DDTC to take into account the sweeping effect such changes will impose on the U.S. defense industry and engage in extensive consultation with industry on these submitted comments before moving to "Final Rule" implementation. We believe that when the final rule is issued, it should be done as an "interim final" rule, and there should be a period of at least six months to a year to allow U.S. defense contractors and the foreign affected entities to promulgate procedures, training, and systems to become educated and compliant with the new regulations.

AIA would like to thank the Department of State for the opportunity to comment on the proposed rule. We share a commitment to the goals of the new brokering requirements in preventing illicit behavior. However, the current proposed brokering regulations will simply place more cost and recordkeeping requirements on U.S. defense companies seeking legitimate opportunities in the international marketplace already regulated by U.S. government authorizations. If implemented in the current form, the regulations would make U.S. defense systems less attractive to foreign purchasers and defense marketing more difficult and cumbersome – as well as undermine the Obama Administration's objective of creating a more effective and efficient export control system.

We appreciate that the DDTC has traditionally considered the inputs of the Defense Trade Advisory Group (DTAG) relative to issues associated with the ITAR. We would therefore respectfully request the DDTC to consider involving interaction with the DTAG to allow the next term of the DTAG to commence and this topic further be tasked to them for their consideration and collective input.

Sincerely,

Remy Nathan
Vice President, International
Aerospace Industries Association of America

MARK BARNES & ASSOCIATES

ATTORNEYS AT LAW

SUITE 1255

1350 EYE STREET, NORTHWEST

WASHINGTON, D.C. 20005

(202) 626-0089

FAX: (202) 626-0088

E-Mail: MarkB17@aol.com

MARK BARNES*
CHRISTOPHER THOMAS◊
REGINA FISHER△
KATIE STEWART○

*ALSO ADMITTED IN ARIZONA AND ALASKA
◊ ALSO ADMITTED IN ARIZONA
△ ONLY ADMITTED IN OHIO
○ ONLY ADMITTED IN MARYLAND

TERRI BARSTIS□
OF COUNSEL
□ALSO ADMITTED IN VIRGINIA

February 17, 2012

BY ELECTRONIC DELIVERY

U.S. Department of Justice
Directorate of Defense Trade Controls
Attn: Daniel L. Cook, Chief
Compliance and Registration Division
PM/DDTC, SA-1, 12th Floor
2401 E Street, NW
Washington, D.C. 20037

RE: Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions, 76 Fed. Reg. 78,578 (proposed Dec. 19, 2011) (to be codified at 22 CFR pts. 120, 122, 126, 127 and 129).

Dear Mr. Cook:

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, and in response to the U.S. Department of State's proposed rule amending Part 129: Registration and Licensing of Brokers of the International Traffic in Arms Regulations (ITAR), the implementing regulations of the Arms Export Control Act (AECA), 76 Fed. Reg. 78,578 (proposed Dec. 19, 2011), I am submitting this comment to the proposed rule. My clients have expressed the following concerns regarding the proposed rule and ask that these provisions be modified accordingly.

1. Proposed Changes to the Definitions of Broker and Brokering Activities

DDTC proposes to amend the definitions of the terms "broker" and "brokering," currently located in ITAR § 129.2(a) and (b), to eliminate the requirement that a broker be an agent for others and the remuneration requirement. This apparent effort to bring the regulations more in line with the Arms Export Control Act (AECA) removes common-sense parts of the definition, thereby vastly expanding the reach of the regulations. Industry reaction to these proposed regulations shows there is much concern over this proposed change and that many in the ITAR community are worried that persons acting

on their own behalf, independently of another registrant, may be implicated by this proposed definition of brokering.

While it has always been clear that it is DDTC's intent that the brokering regulations be broadly applicable, we do not believe this proposed change in the definition was meant to drastically expand the applicability of the regulations to encompass those operating independently and in their own interest. In fact, the carve-outs set out in other parts of the regulations clearly show that DDTC does not mean for the regulations to apply to those acting merely as end-users, resellers, or retransferors. Instead this proposed change seems to stem simply from an attempt to make the definitions more closely follow the governing statute. Unfortunately, the deletion of these phrases as proposed may have that unintended effect.

Further, some in the industry are concerned that the removal of this agency phrase, combined with the additional clause excluding attorneys only when "providing legal advice to a broker," would result in the requirement that many attorneys or consultants involved in providing licensing assistance to clients would have to register as they would technically be "facilitating the export or transfer of a defense article or service." In the introductory summary of the Federal Register notice, however, the phrase is instead, "providing legal advice to a *client*" - a much broader exemption more likely in line with the drafters' intent.

We would therefore suggest that, should the agency and remuneration phrases be necessarily removed to agree with the AECA language, the carve outs for financing, freight forwarding, administrative duties, attorney advice, or reselling and retransferring be emphasized to make clear that only those directly involved in the facilitation of the transaction with foreign persons or entities are intended to be covered. Further, the reference to attorneys should be changed to allow for the provision of "legal advice and assistance to a *client*" so as to remove any doubt that attorneys providing this type of service and activity would not be required to register.

2. U.S. Government Exemption

The proposed change to the U.S. Government exemption in § 129.7 would limit the use of the U.S. Government exemption to only those persons in direct contract with the Government, thereby eliminating the ability of official sub-contractors to use the exemption. Additionally, the exemption would be limited to transactions solely for U.S. Government use or an official U.S. Government foreign assistance or sales program.

As currently written, this exemption is widely misunderstood and often inconsistently applied. While this clarification seems to make things clearer, the revision significantly limits its use. It is also not clear what types of programs would qualify: only FMF/FMS? Or would other U.S. Government sponsored programs qualify like those for AFRICOM or the U.S. Army training and support of the Afghan National Police? DTC should also clarify which agencies other than the Department of Defense are also covered by this exemption.

Thus, we would suggest that officially added or approved sub-contractors on U.S. Government contracts also be allowed to use the exemption. Additionally, we would request clarification on which U.S. Government programs qualify, with the suggestion that the broadest possible interpretation apply.

Finally, one other question arises regarding how one might go about getting "written concurrence" from DDTC on the applicability of the USG exemption, and, in fact, how that might differ in practice from requesting prior approval. Further, requiring a person to seek prior approval after receiving this guidance seems to be duplicative and DDTC should consider combining the guidance responses to approval for situations in which enough information is provided in the guidance request. Thus, we would suggest that DDTC clarify or set forth regulations providing for the procedure to acquire "written concurrence" on the applicability of the USG exemption.

3. The Proposed List of Non-Exempt Items at § 129.7(e)

Another troubling change that would significantly impact the firearms community is the addition of all firearms (USML Category I(a)-(d), Category II(a) & (d), and Category III(a)) to the list of non-eligible items for the Prior Approval exemptions. Previously, only fully-automatic firearms were ineligible for the prior approval exemptions, such as the NATO+4 exemptions.

This proposal would greatly increase the administrative burden on our clients in the small arms community, who largely deal with NATO+4 countries, as even sporting firearms covered by the ITAR would no longer be able to take advantage of the NATO+4 exemption, or any other exemptions under § 129.7. We can determine no national security or foreign policy objective that would be served by this change. Thus, we suggest that DDTC reconsider the proposed list of non-exempt items, or consider the application to and impact of such a proposed list on the small arms community and provide for that impact accordingly.

4. Concern Regarding §§ 126.13 and 127.1

The changes proposed in § 126.13 and § 127.1, requiring that brokers be identified and disclosed on licensing applications, that brokers and those operating under exemptions are also held responsible for ITAR compliance, and the obligation that license holders are responsible for the actions of their brokers, cause concern. Many foreign agents are hesitant to register for legitimate reasons, including high registration costs for agents who are involved in small transactions, and in some cases foreign laws that prohibit "brokering" as defined in those countries using definitions different from those in the ITAR.

The requirement that brokers be disclosed on license applications may create problems and delays if an unregistered broker declines to register with the Department of State, despite the urging of a U.S. registrant. In fact, the alleged "broker" may continue to

refuse to register for what he may consider to be legitimate legal reasons; for example U.S. jurisdictional limitations or that his conduct does not constitute brokering. A better approach is to require the DTC registrant to notify the foreign person or entity possibly subject to the Part 129 requirements, but not hold their transaction in abeyance if the foreign person or entity declines to register for good faith legal reasons.

Furthermore, holding a U.S. applicant liable for the actions of that broker is concerning. Even if a U.S. company is required to work only with registered brokers, it is nearly impossible for a U.S. company to thoroughly monitor the activity of a broker, often a foreign person, especially to the extent required to make a company comfortable with accepting liability for him.

It seems wholly unreasonable to hold registrants, especially those separately organized and registered, responsible for a non-employee broker's actions. We urge DDTC to revise this requirement to eliminate the liability section for unrelated registrants.

5. Conclusion

As described above, my clients have serious concerns regarding DDTC's proposal. We urge DDTC to consider the impact of these proposed changes specifically on the firearms industry and small arms community and to revise or provide for these impacts in its final rule. Accordingly, I respectfully request that these provisions be modified consistent with these concerns as outlined above. We support all other changes.

Thank you for your attention to this matter. If you have any questions or need additional information, please do not hesitate to contact me at (202) 626-0070, or attorney Katie Stewart at (202) 626-0084.

Cordially yours,

Mark Barnes (RJT)

Mark Barnes
Attorney at Law

MB:ks:kk

February 17, 2012

Submitted Via E-Mail (DDTCResponseTeam@state.gov)

Attn: DDTC Response Team
Directorate of Defense Trade Controls
U.S. Department of State

Re: Brokering Rule Comments (RIN 1400-AC37)

Lockheed Martin Corporation (Lockheed Martin) is pleased to submit comments on the proposed rule issued by the U.S. Department of State as published in the Federal Register on Monday, December 19, 2011 (76 Fed Reg. 243). The proposed rule would make changes to Part 129 and related sections of the International Traffic in Arms Regulations (ITAR) related to defense trade brokering and brokering activities. The proposed revisions are "intended to clarify registration requirements, the scope of brokering activities, prior approval requirements and exemptions, procedures for obtaining prior approval and guidance, and reporting and recordkeeping of such activities."

I. GENERAL ISSUES: CONGRESSIONAL INTENT AND THE NEED FOR TARGETED BROKERING REGULATIONS

We appreciate the Department of State's efforts to revise the ITAR brokering regulations. Lockheed Martin concurs that the current regulations, which have remained largely unchanged since their entry into force in 1997, lack clarity and are not effectively targeted on international arms trade activities of particular concern to the U.S. Government. However, in crafting new brokering regulations, the Department of State should seek to prevent the imposition of unnecessary and cumbersome new regulatory obligations on U.S. and foreign persons engaged in legitimate defense transactions that are already authorized by the U.S. Government. Imposing redundant brokering restrictions and attendant compliance requirements on U.S. companies will have a negative impact on the ability of these companies to conduct business in support of U.S. Government strategic objectives abroad.

The marketing and sale of U.S. defense articles is already a well-regulated enterprise, with each step of the sale of a defense article – from the sharing of technical information to the export of a completed system to a subsequent reexport or transfer – requiring authorization from the U.S. Government. In 1996, Congress amended the Arms Export Control Act (AECA) with the intent of expanding the U.S. Government's legal authority to regulate transactions by U.S. persons (and foreign persons located in the U.S.) that were then outside the scope of existing export controls, including specifically, "the brokering of non-U.S. defense articles or technology."

U.S. regulation of defense brokering proceeds, in large part, from the definition of "broker." To date, a "broker" has been defined as "any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles and services in return for a fee, commission, or other consideration." Under the new rule, a broker would be anyone

engaged in “brokering activities,” regardless of whether that person was acting as an agent or compensated by the parties to a transaction. The justification for this change is that the new definition more closely tracks the statutory language in the AECA; however, while regulatory implementation must obviously be consistent with the underlying statute, its added value is derived from being informed by both relevant policy and practical considerations. The new proposed definition would instead have far-reaching unintended negative policy and practical consequences.

Under the proposed regulations, any activity “to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or service” would be considered a brokering activity. Taken together, the proposed definitional changes to “broker” and “brokering activities” will broadly expand the scope of persons and activities considered to be involved in brokering – such that lawyers, trade association representatives, those who provide assistance with local laws and regulations, and any company that subcontracts any aspect of a defense transaction (e.g., part procurements from suppliers) would be required to register as a “broker” and obtain a brokering license without regard to whether the Department of State had already approved the export or retransfer of the defense articles to the same end-user under an export license or other authorization.

U.S Government oversight of how U.S. companies and persons conduct defense trade throughout the world is critical to ensure that such activities do not run counter to U.S. regulations and policies. The U.S. Government also has an interest in preventing the export, reexport, and transfer of U.S. defense articles that are out of the control of U.S. persons to countries and/or end users of concern. Illicit defense brokering activities undermine U.S. defense and foreign policy objectives and the legitimate business interests of law-abiding U.S. companies and persons. Thwarting the criminal intent of those who seek to market and sell U.S. defense articles – often to the countries of greatest concern – without U.S. Government approval should be the highest priority. Yet, regulating defense brokering activities is just one of many regulatory tools to implement this necessary oversight. For example, regulatory authority already exists under the ITAR to target persons who conspire to reexport a U.S. defense article but are not the actual reexporter. (See Sec. 127.1(a)(3))

Accordingly, U.S. brokering regulations should focus on international defense trade transactions that are not otherwise regulated under the ITAR, including U.S. persons who are, in fact, “brokering” defense deals for foreign parties. Brokering regulations should be narrowly targeted and not apply to persons conducting routine business activities or business activities already authorized by the U.S. Government.

Lockheed Martin strongly supports the implementation of U.S. Government brokering regulations that follow these guidelines. However, the proposed December 2011 regulations would impose a broad licensing, reporting, and recordkeeping regime on all defense trade, and then exclude certain activities with narrowly defined exemptions that do not cover many routine or licensed activities. By not distinguishing between brokering activities that should be regulated and routine business activities that are necessary and common to the success of any commercial transaction, the proposed regulations would not accomplish the policy objective or align with the intent of the 1996 Amendment to the AECA to control activities that pose a risk to U.S. national security interests.

The U.S. Congress did not intend to impose multiple layers of authorization, registration, and recordkeeping requirements on U.S. defense trade; rather, the goal was to create legal authority to reach the activities of concern described above effectively. The 1997 regulatory changes

acknowledged this intent with implementing regulations that limited the impact of brokering restrictions on the normal conduct of international business. The new proposed regulatory changes, however, do not strike this balance.

In April 2010, the Secretary of Defense aptly noted, "The overly broad definition of what should be subject to export controls. . .[makes] it more difficult to focus on those items and technologies that truly need to stay in this country. Frederick the Great's famous maxim that 'he who defends everything defends nothing' certainly applies to export control." This same principle should be applied to regulating arms brokering activities as well.

If implemented in its current form, the proposed rule would undermine the ability of U.S. defense and aerospace companies to compete for legitimate business opportunities abroad and for the U.S. Government to implement an effective national security policy. U.S. defense manufacturers and systems integrators will be unable to market and sell American defense articles effectively, and the U.S. Government will inhibit its own ability to achieve its national security strategy objectives – including building international defense partnerships, projecting power, and increasing interoperability with our closest allies and partners.

While the new brokering regulations will drive up costs and impose substantial licensing and recordkeeping requirements, including on persons who were not previously considered "brokers," our primary concern is that these new regulations would:

- Effectively preclude the conduct of long-standing international marketing and business practices necessary to compete in the international market;
- Encourage foreign companies to "design out" U.S.-origin items and products;
- Disrupt the global supply chain and inhibit the ability for the U.S. Government to support its own programs in a timely and cost effective manner; and,
- Bolster our foreign competition by making it more difficult to work with U.S. companies.

When viewed in the context of the Administration's ongoing Export Control Reform Initiative, the proposed brokering rules are a step backward – making the U.S. export control system more cumbersome, restrictive, and problematic for U.S. exporters of defense articles.

In previous comments submitted to the Department of State, Lockheed Martin noted that while the Administration's ongoing review of the U.S. technology control lists is expected to have some positive benefits for the export of many defense system parts and components, Lockheed Martin does not expect the list review effort to have many direct benefits on export licensing for its military platforms. The proposed brokering restrictions, on the other hand, will have a substantial negative impact on U.S. defense trade and fundamentally make the export control system less efficient and more onerous for both U.S. exporters and foreign purchasers than ever before. We do not consider this to be in keeping with the President's August 2010 call for more "transparency and coherence" in the export control system.

In July 2011, the Administration made clear that "the current export control system is overly complicated and fragmented, contains too many redundancies, and, in trying to control too much, diminishes our ability to focus on the most critical national security priorities, impairs the interoperability of our Armed Forces with our Allies in the field, and undermines the competitiveness of sectors key to U.S. national security." We believe that the proposed revisions to the defense brokering license requirements follow this same tradition of an overly broad, outmoded, and outdated system of control.

We appreciate that the proposed changes to the brokering restrictions stem from the Directorate of Defense Trade Controls' experience gained in administering the brokering provisions of the ITAR. This experience provides the Department of State with unique insight into how the brokering regulations currently operate. But it is important that any changes to the ITAR brokering regulations take into account the collective experience of U.S. defense companies in interpreting and complying with these regulations as well as information regarding the potential impact of brokering rules on their global operations.

Lockheed Martin maintains over 300 partnerships in 63 countries to support more than 300 defense programs valued at over $100 million and 45 programs valued over $1 billion. It is because of this extensive experience conducting international defense business transactions that we are confident that the proposed brokering modifications would have significant adverse – and potentially irreversible – consequences on how U.S. companies manufacture, market, sell, export, transfer, and supply some of the most sophisticated defense platforms and articles in the international marketplace.

Accordingly, we strongly urge the Department of State to reconsider the proposed rule, taking into account the stated intent of Congress and the Administration's Export Control Reform Initiative as well as the specific comments provided below.

II. SPECIFIC ISSUES RELATED TO THE PROPOSED REVISIONS

A. Definitions of "Broker" and "Brokering Activities" are Overbroad and Create Unnecessary Regulatory Burden (Sec. 129.2(a); 129.2(e)(3)); 129.3(b)(3))

Lockheed Martin concurs that the current definition of "broker" and "brokering activities" would benefit from further clarification. Indeed, the proposed December 2011 changes to the brokering requirements are in part driven by industry's request for greater clarity in the rule. In particular, clarification is needed to help U.S. exporters address confusion in determining, for example, who meets the definition of a broker, when brokering is occurring and confirmation that brokering does not exist between affiliates of the same corporation.

As discussed in the general comments above, under the new regulations, a "broker" would be anyone engaged in "brokering activities," and "brokering activities" would be any activity "to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or service." The expansion of the definitions is so extensive as to require virtually any person involved at any point of a transaction to first register as a "broker" and obtain a brokering license.

The inclusion of the concept of "agency" in the current rule has been critical to an effective and useful definition of "broker" that prevents this regulatory overreach. As a general rule, a broker is considered to be a person who acts on behalf of another (e.g., a principal party to a contract) in return for some form of compensation. The distinction between those persons empowered to act on behalf of another in return for compensation and those who are not is a vital component of corporate compliance efforts. It helps put clear boundaries around those who are and those who are not "brokers" in a way that satisfies the legislative intent discussed above.

A U.S. person should not be permitted to engage a foreign person to act on their behalf with the objective of avoiding U.S. Government oversight of a transaction. On the other hand, if a U.S.

company, subject to the ITAR, hires a foreign person to assist with a sale of defense articles overseas, but does not empower that person to act on its behalf, that person should not be considered a broker; U.S. national security interests in this situation are already protected by the jurisdiction over the U.S. company. Such a distinction is essential to ensure compliance with the AECA requirement for regulating persons in the "business of brokering activities," prevent regulatory overreach, and enable U.S. companies to implement and comply with the regulation.

The negative ramifications of excluding the concept of "agency" from the definition of "broker" is exacerbated by the breadth of activities included in the definition of "brokering activities." The proposed rule provides examples in an attempt to define what would and would not constitute "brokering activities," but these exclusions offer little relief for activities that today are considered routine activities customarily performed in a transaction, such as business consulting, research, logistical support for trade shows, and assistance in understanding local laws, regulations and acquisition processes.

Without any real distinction between: (1) routine business activities (e.g., scheduling meetings, consultations on local business practices and culture, support for local advertizing, evaluation of foreign company capabilities and products); and (2) actions widely recognized to be brokering activities (e.g, acting as an agent on behalf of another company in negotiating contracts, purchases, sales or transfers of defense articles or defense services), the proposed new definitions would throw such a wide regulatory net as to require registration and recordkeeping requirements for practically all persons whose activities precede a transaction and may otherwise be authorized separately under a license by the Department of State.

For example, all of the following likely would be considered brokering activities under the proposed rule, and those who provide these services would need to be registered as brokers or be a full time employee of a registered broker:

- A technical consultant hired to provide assistance in the United States with a proposal to sell U.S. origin defense articles or services overseas.
- A lawyer who is hired to assist a small parts supplier with the development of terms and conditions for a proposed sale of a defense system overseas.
- Two foreign companies that agree to work together in pursuit of an opportunity to sell defense articles or services into the United States regardless of whether one of the companies had direct contact with the customer and even before any contract is awarded.
- A U.S. company and a foreign company that team to pursue opportunities to sell a solution that combines both of their technology and expertise.
- *Any person* who, with "only one action" (per the proposed Section 129.2(b)) facilitates the manufacture of a defense article, including suppliers of commercial parts; vendor technicians who install, test or calibrate commercial machine tools; or quality assurance inspectors.

Lockheed Martin does not believe any of the activities of these persons should constitute brokering the sale of defense articles abroad, as Congress contemplated.

Even with the proposed overbroad definition of "broker," the scope of what would be considered "brokering activities" and the accompanying recordkeeping requirements remains unclear. Would recordkeeping be required for every meeting between parties to a transaction, for example, or would there be a requirement for a recordkeeping notation for each transaction

subject to the proposed regulations? Examples provided in the proposed regulations imply that any "introduction" among parties could be considered brokering. In addition, the proposed regulation introduces a new concept of "exclusive brokers" for which we cannot identify any person or entity that would meet such criteria. Simply determining the breadth of the new reporting requirements will require extensive compliance capacity and resources – with no additional benefit for the U.S. Government oversight responsibilities.

The impact of the expansion of the definition of what constitutes a "broker" and "brokering activities" on the global supply chain is significant. For example, Lockheed Martin programs, such as the F-35 Lightning II and Littoral Combat Ship, involve thousands of U.S. and foreign subcontractors across several tiers. Under the new regulations, each subcontractor could be considered a broker, subject to regulatory recordkeeping and reporting, even when "exempt" from licensing requirements. These regulatory compliance requirements are onerous and unnecessary. These costs would adversely affect the U.S. Government directly in the form of increased overhead costs, longer delivery schedules, and undue strain on its relationships with international partner nations.

This expansive scope of who and what constitutes a "broker" and "brokering activity" is neither aligned with the language and intent of the original statutory requirements nor representative of how brokering is currently defined. Accordingly, we do not believe that such a broad expansion of these definitions is warranted or necessary to meet the U.S. policy objective of "clarifying" the scope of brokering regulations, as stated in the proposed regulation.

B. Proposed Brokering Restrictions Threaten to Undermine U.S. Defense Trade Competitiveness (Sec. 129.2(d); 129.3(b)(3); 129.3(c)(2))

The proposed rule attempts to clarify when U.S. brokering regulations apply to foreign persons. As noted above, regulating the activities of foreign persons' brokering activities involving U.S.-origin defense articles and services remains an important U.S. national security priority. However, the application of the brokering regulations to all such activities threatens to curtail the ability of U.S. defense companies to participate in international commerce. For example:

- Foreign Restrictions on Brokering: In some other countries, brokering for a foreign defense company is illegal. The expansion of brokering registration and recordkeeping requirements to actions that facilitate a defense transfer would likely preclude many foreign consultants from continuing to work for U.S. defense companies, which rely on their services to support routine business transactions that would be reclassified as "brokering activities."

- Using Trading Companies: In some Asian partner countries, it is customary to conduct business and financial exchanges through a trading company. In particular, there are approximately 11,000 trading companies in Japan that serve varying roles in a business transaction, from freight forwarder, customs broker, to contract/sales agents, some of whom meet the current definition of broker and are already registered with the Department of State. Expanding the scope of routine business activities subject to brokering requirements would likely require many more of these companies to register as U.S. defense trade brokers in order to continue to do business with the United States. Even when legally permissible in a foreign country, some foreign persons may chose not to support U.S. defense transactions, if required to register as a broker.

- Trade Shows and Introductions: Participating in common marketing practices in foreign countries essentially would be precluded by the new brokering requirements. A U.S. company would be responsible for the activities of local personnel hired to make introductions at international air shows and anyone making such routine introductions (according to Example 6 provided in the proposed rule) would be considered a broker. Any support service, including being a representative on a trade show floor, booth, or pavilion and making contacts with prospective clients/customers, would be subject to U.S. brokering regulations. Similarly, an introduction made for a foreign subsidiary or supplier to any foreign government official on a trade show floor would be considered brokering.

- Part Time Employees: Part-time and contract employees of foreign subsidiaries, who generally make up a large percentage of the workforce within foreign subsidiaries, would be required to register as a broker separately. This would likely diminish the available local work force.

- Financing: Despite an exemption for financial institutions, the regulations require banks, firms, or other persons providing financing for defense articles or defense services to register when 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. Yet, this could have wide-reaching effects on funding structures considered normal business to financial institutions (e.g. factoring). In addition, bank holding companies can act (through subsidiaries) as both an "arranger" and a "lender," where only the lender is potentially exempt. If a lender "tailors" and funds a financing solution to support the purchase of a defense article to meet specific customer requirements, would this lender also be deemed an arranger and be required to register? Alternatively, would "arranging" a transaction only trigger a registration requirement if financing terms being offered go beyond a lender/arranger's normal business practices? This level of uncertainty in how these regulations apply to such activities will have an adverse effect on international financing of legitimate, authorized defense trade transactions.

- Interference with Foreign Sovereign Relationships: The new brokering reporting requirements may, in some cases, require foreign companies to reveal information pertinent to foreign customer requirements. For example, a foreign subsidiary would need to provide information to its U.S. parent for activities related to arranging a deal in a third country. This scenario would be further complicated if the foreign customer wanted to arrange for the transaction to occur through a foreign government-to-government arrangement, with the foreign subsidiary being the identified industrial partner, not the U.S. parent. In this case, the foreign government of the subsidiary might object to the US brokering restrictions as an infringement on its sovereign right to conduct foreign policy and legitimate trade across borders with its foreign allies and partners. Since any transfer of U.S. defense articles or technology would require a license from the Department of State, the benefit of regulating the brokering activities of companies in support of sovereign governments is not apparent.

- Requirement to Register and Obtain Authorization Would Begin Before Any Knowledge or Intent to Broker: The preamble to the proposed regulations describes the introduction of a bank client to a procurement official of a foreign government as

a brokering activity. The making of such an introduction likely was not contemplated when the bank offered its financing services to the manufacturer. The ease with which one can be non-compliant with the proposed regulations, as suggested by this example, means that many persons will need to register as brokers even before they have an actual intent to perform brokering activities.

The collective impact of applying the new brokering licensing, registration, and recordkeeping requirements to all of these routine business activities would inhibit the ability of U.S. companies to market and compete for international business. None of these new regulatory obligations is required under the current law.

As important, the long-arm provisions of the brokering rules would lead to an inevitable conclusion by foreign customers: U.S. export controls have become more, not less, cumbersome. This will, in turn, provide a competitive advantage to foreign products and services that are not saddled with such unnecessary restrictions.

C. Transactions and Activities will be Subject to Multiple Layers of Licensing, Registration, and Recordkeeping Requirements (Sec. 129.3(b)(4); Sec. 129.4(d); Sec. 129.8(a); Sec. 126.13)

In addition to a broader scope of persons subject to the brokering restrictions, the proposed regulation will subject U.S. persons participating in legitimate defense trade activities to multiple regulatory redundancies and recordkeeping requirements.

In particular, the proposed regulation recognizes the discretion of the Department of State to permit a broker that is a parent of a U.S. or foreign person registered as a broker under Part 129 of the ITAR to be covered by the registrant's Statement of Registration, provided that such broker parent is listed in the registrant's Statement of Registration and meets the same certification and other requirements set forth in this section. Accordingly, Lockheed Martin supporting a UK subsidiary would be considered a brokering parent.

One example of how this would result in redundant regulatory requirements: Lockheed Martin UK was selected for a $1 Billion contract to upgrade the British Army's Warrior Armoured Fighting Vehicle. Leading suppliers include U.S., French, German and British companies. Lockheed Martin (US parent) might now pursue follow-on efforts to offer the same upgrade to other Warrior vehicle owners and provide support for these new international business opportunities. An export license and retransfer authorization would be required for all US content, as would a Technical Assistance Agreement for any US technical assistance. But because the UK design for the upgrade includes US components, the new regulations would result in Lockheed Martin UK being a broker of the licensed US components and LM Corporation to be a broker for supporting its own subsidiary company.

Moreover, efforts to limit the scope of the brokering activities subject to multiple authorizations by exempting certain activities would have little practical effect. The proposed rule mandates "prior approval" for all brokering activities, unless exempted. The exemptions are so narrow, however, as to require a prior approval for most brokering activities. As described in the example above, exemptions would not apply to most intra-company activity with foreign subsidiaries. In addition to foreign subsidies, foreign companies who enter into teaming agreements with Lockheed Martin to pursue foreign business opportunities likely would be required to register as brokers and seek pre-approval prior to performing any support activities.

This would be required even though Lockheed Martin would need an export license or Technical Assistance Agreement to cover these same activities.

Another notable example of the limitations of the exemptions involves the clarification for brokering activities undertaken by an agency of the U.S. Government, which would be amended to apply only to persons under direct contract with a U.S. Government agency for the sole use by that 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 the Department of State, or the contract at issue must contain an explicit clause stating that the contract supports a foreign assistance or sales program authorized by law and the contracting agency has established control of the activity covered by the contract by other means equivalent to that established under the ITAR. This direct contracting limitation would subject any subcontractor – the use of which is common practice – to a brokering prior approval requirement.

It is not reasonable to expect U.S. Government agencies to insert such a contracting clause, nor is it beneficial for the U.S. Government to require prior approval for every level of a contract. The net effect would be an incredibly burdensome reporting and recordkeeping scheme that offers no practical or compliance benefit for the U.S. Government. As the global supply chain becomes increasingly important to defense system development and production, such restrictions will place unnecessary burdens on U.S. Government programs.

Another pertinent example of the limited use of the exemptions applies to Foreign Military Sales (FMS). U.S. contractors, pursuant to an export authorization or ITAR exemption, actively support and participate with the U.S. Government in pursuing FMS transactions, resulting in government-to-government Letters of Offer and Acceptance (LOA). Such support may include, *inter alia*, providing briefings to foreign customers, clarifying technical parameters and capabilities, drafting of maintenance, logistics and support packages, and the development of price and availability information. This activity certainly facilitates defense transactions and would therefore appear to fall subject to the revised definition of brokering activities, on behalf of the U.S. Government. But these activities occur long before there is ever an LOA or contract between the U.S. Government and the U.S. prime; therefore, it would not meet the requirements of the exemption for brokering on behalf of the U.S. Government. When it inserted statutory authority to regulate international brokering, Congress clearly did not intend to regulate activities that support such pre-contract activities of the U.S. Government. Yet, all such commonly occurring activities would be subject to the broader definition of “brokering activities” and, even with an explicit exemption for supporting the U.S. Government, would still require registration, prior approval, recordkeeping and reporting of these separately-authorized activities.

Moreover, the information required for the submission of a prior approval, when the activity is not exempt, is cumbersome and may be difficult to obtain. For example, the information that would need to be submitted as part of a request for prior approval includes a statement on whether the broker applicant or its senior officers or officials have been “indicted” or otherwise “charged” or convicted by foreign governments for violating any national statutes “similar to” those listed in Sec. 120.27 of the ITAR. The statement must also include information on whether the applicants 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. This language is highly problematic, as it would require a complex knowledge of U.S. law on behalf of the broker and similar expertise of foreign law on behalf of the U.S .company. Not only would this lead to inevitable delays and reinforce the perception of needlessly intrusive U.S. export control requirements, but add more confusion to the prior approval process.

The proposed regulation also provides more specific guidance on the information required in a prior approval 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. The requirement for identifying both entities AND individuals is likely unintended and should read: "entities or individuals." If the intent is to also regulate and license individual employees of a company by name, this would be a significant and unnecessary expansion of the requirements. Furthermore, the requirement to disclose "consideration" could directly conflict with many foreign countries' privacy laws.

The proposed regulations would require all brokers to be listed on export license applications, regardless of any affiliation or contractual relationship with the applicant. However, it would be impossible to know and list all of the persons who, in any way had, at the time of export license application, or that subsequently in the future might facilitate or otherwise assist an international defense trade transaction. This regulatory requirement would impose liability on the applicant for any omission from a license application of any "broker." The international defense marketplace is extraordinarily dynamic; as companies consider partners, suppliers and products for a potential offering, these factors change frequently, particularly in the pre-proposal phase of an acquisition lifecycle. Because of the broad scope of persons that would be defined under the proposed regulations as "brokers," untold thousands of additional replacement export licenses or amendments would be required, as the mix of potential "brokers" (who would not normally be recipients of defense articles and, therefore, not currently required to be listed on export licenses) changes.

Finally, it is important to note that even if exempted from license requirements, the imposition of new registration, reporting and recordkeeping requirements is a significant regulatory burden. Under the new regulations, Lockheed Martin expects that almost all of our foreign subsidiaries, and many domestic subsidiaries, would be required to register as brokers. Although the new rule could permit a consolidated registration statement (this is not entirely clear, due to the confusion over what constitutes "exclusively" brokering for Lockheed Martin), the expanded reporting and recordkeeping requirements will be a substantial compliance burden.

For example, proposed Sec. 129.11 provides that records on brokering activities must be maintained in accordance with Sec. 122.5. There is no definition of the specific requirements or even of the activities that would trigger an instance for brokering that would require a record. Would it be each instance of a contact, meeting among parties or an "introduction?" Each instance of a payment received? Each instance of a signed agreement between parties? Records required for manufacturing and exporting of defense articles are clearly articulated; "brokering activities" is merely mentioned as having a requirement for maintaining records. This ambiguity will result in the need for enormous recordkeeping responsibilities. In effect, the creation of these voluminous records may require the attention of significant U.S. Government resources and capacity – distracting from other more critical responsibilities. The focus of the ongoing Export Control Reform Initiative was to address this concern, not add new recordkeeping exercises that provide little if any value for U.S. Government defense trade oversight responsibilities. In fact, no explanation is provided for why these additional regulatory requirements are necessary.

III. RECOMMENDATIONS FOR A REVISED BROKERING CLARIFICATION

Lockheed Martin recognizes that there are some positive elements of the proposed changes to the existing brokering regulations. For example, consolidating the registration processes for brokers and exporters would provide some relief from the existing registration procedures. Eliminating the requirement for "prior notifications" would remove the often confusing and difficult to implement distinction between "prior approvals" and "notifications." However, these positive benefits of the proposed rule are offset by the onerous new regulatory requirements on legitimate defense trade activities. On balance, it is difficult to conclude that the proposed changes will result in a reduction of burden to the affected public.

We recommend that the State Department reexamine the intent and purpose of the proposed clarifications and revise the regulations to better reflect Congressional intent and focus on mechanisms that will support U.S. national security priorities. In particular, a revised brokering regulation should:

Limit the scope of who constitutes a "broker":

- Clarification of the current definition of "broker" is warranted. Yet, clarifications should not seek to expand Congressional intent and regulate consultants, lawyers, trade association representatives, trade show employees, and many other persons who enable U.S. companies to compete in the international marketplace.

Focus on the brokering of international defense trade transactions that are not otherwise regulated:

- Perhaps the best way to ensure that the definition of "broker" is not overbroad is to narrowly target the brokering regulations on the need for prior approval for U.S. persons, wherever located, and foreign persons in the United States brokering foreign-origin defense articles located outside the United States from one foreign person to another foreign person. This regulatory structure would not unnecessarily capture many transactions that already require Department of State authorization, such as the export of foreign-origin defense articles from the United States or the retransfer or reexport of foreign-origin defense articles that contain U.S. defense articles.

Target Illegal Arms Transfers:

- Under current law, the export, reexport, retransfer of all U.S. defense articles requires an authorization from the U.S. Department of State. The State Department exercises this statutory authority by authorizing these transactions under an export license, agreement, reexport/retransfer authorization or exemption (e.g., FMS sale). The U.S. Government would obtain no more effective oversight over these transactions by also requiring the regulation of intermediaries that facilitate transfers that State has authorized. In fact, the U.S. Government has a direct interest in eliminating regulatory redundancies to facilitate and strengthen international defense partnerships.

- The Department of State should exempt the regulation of activities of persons who facilitate legitimate/authorized defense trade transactions, including requirements to register, obtain a prior approval, report or maintain records, without exception. This approach would better account for current international business practices and ensure that the international supply

chain that supports authorized defense transactions is not adversely affected. It would, however, ensure that persons who facilitate illegal (i.e., unauthorized) exports or retransfers of U.S.-origin defense articles, would not be exempted from regulation. The U.S. Government could then thwart illegal defense brokering by targeting enforcement actions on those persons who fail to obtain required export or retransfer authorizations and those who broker such unauthorized transactions. This would prevent criminalizing the activities of persons facilitating legitimate, USG-authorized, international defense trade transactions.

IV. CONCLUSION

Technical fixes to the provisions of the proposed brokering rule discussed in Section II above will provide some relief for companies and persons participating in legitimate, authorized defense trade. However, without a complete reconsideration of the proposed approach to regulating defense brokering, Lockheed Martin remains concerned that the proposed regulations would have substantial negative ramifications on the ability of all U.S. companies to compete in the global marketplace and effectively support U.S. Government defense programs.

The proposed brokering regulations cannot be viewed outside the purview of the Administration's ongoing Export Control Reform Initiative, which as the President said in August 2010, is intended to "focus our resources on the threats that matter most, and help us work more effectively with our allies in the field. . .bring transparency and coherence to a field of regulation which has long been lacking both. And by enhancing the competitiveness of our manufacturing and technology sectors. . .help us not just increase exports and create jobs, but strengthen our national security as well." Onerous and redundant brokering licensing, registration, reporting and recordkeeping requirements on U.S. companies are contrary to each of these guidelines. With this in mind, we strongly encourage the Department of State to reexamine the proposed rule intended to clarify current U.S. brokering regulations.

If you have any questions related to the above, please contact Mr. Mark Webber, Director, Government and Regulatory Affairs, at (703) 413-5951 or Mark.J.Webber@lmco.com.

Thank you again for the opportunity to provide comments on the proposed rule.

Sincerely,

For Lockheed Martin Corporation
Gerald Musarra
Vice President
Government and Regulatory Affairs

BEFORE THE

Department of State

Washington, DC

In the Matter of Proposed Rule Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions	RIN 1400-AC37

To: Directorate, Defense Trade Controls, Department of State

COMMENTS OF THE EADS EXPORT COMPLIANCE COUNCIL

Introduction

1. The EADS Export Compliance Council ("EADS ECC") of the European Aeronautics Defence and Space, NV ("EADS"), hereby comments on the above captioned Proposed Rulemaking in which the Directorate, Defense Trade Controls ("DDTC"), U.S. Department of State ("DoS") seeks comments on the proposed changes to ITAR Part 129 relating to brokers and brokering activities and other changes to related provisions of the ITAR.

2. The EADS ECC is composed of the EADS Group Export Compliance Office, the National Export Compliance Officers for France, Germany, Spain, the United Kingdom, and the United States, and the Business Unit Export Compliance Officers for Airbus (including Airbus Military), Astrium, Cassidian, Eurocopter and EADS North America.

3. The ECC is responsible for establishing and coordinating the export compliance policies of the EADS Group. Each of the ECC members have day-to-day export compliance responsibilities in the principal EADS nations and business units, including non-US EADS businesses that are end-users of defense articles subject to the ITAR and EADS North America business units that are manufacturers or exporters of defense articles subject to the ITAR. The members of the ECC and the companies they represent therefore are interested parties in the above captioned proceeding.

General Comments

4. Members of the ECC have participated in the comments being submitted by the National Defense Industrial Association ("NDIA"), the Export Control Committee of the AeroSpace and Defence Industries Association of Europe ("ASD") and the French Aerospace Industries Association ("GIFAS")[1], which is a member of ASD. We fully endorse the comments being made by NDIA, ASD and GIFAS.

5. We also understand that the American Bar Association Section of International Law is filing extensive comments on international law issues. We urge DDTC to give careful consideration to those comments as well.

6. We do not wish to repeat all of the points being made by NDIA, ASD and GIFAS, but wish to make one general comment that leads to three issues of particular importance to the EADS group of companies; Scope of Brokering Activity; Extraterritorial Application of the Brokering Rule; and Marketing of Products of Affiliate Companies.

7. The present Part 129 ("Brokering Rules") were adopted first in 1997 to implement amendments to the Arms Export Control Act ("AECA") enacted in 1996.

[1] *Groupement des Industries Françaises de l'Aéronautique et du Spatial.*

8. The present proposal to amend the Brokering Rules started in 2003, when DDTC began its review of the present brokering regulations. The proposed rules, which are the subject of this proceeding, are the second draft revised Brokering Rules to be published for public comment.

9. Between the publication of the first draft and the second draft of the revised Brokering Rules, DDTC also asked for the comments of the Defense Trade Advisory Group, the results of which were presented at a public meeting and were published.

10. We believe that DDTC should be commended for the publishing the second draft of the proposed revised Brokering Rules for comment by the interested public. We are of the opinion that every proposed rule benefits from the comments from different points of view and different life experiences.

11. Because the current proposed revised Brokering Rule is drastically different than the previous proposal, we believe that DDTC will benefit from comments on the current proposed rule. Furthermore, it is not apparent from the preamble to the proposed rules that DDTC considered all of the comments made in the first rulemaking round or that DDTC considered the comments made by the Defense Trade Advisory Group. Furthermore there are substantial additional requirements that have been added to the proposed rule that were not previously present and there is no clear explanation of why these requirements have been added.

12. Of course, this rulemaking is not yet final and there is yet an opportunity for DDTC to explain the rationale of the rule that is finally adopted. We strongly urge DDTC to do so as we believe that such explanation will greatly improve the clarity of the final rule which will lead to better compliance by industry.

13. The absence of reasoned explanation of the changes has led us to wonder if DDTC is fully aware of the consequences of some of the provisions of the proposed rule. Some of the provisions of the proposed rule that are of particular concern to us are examined in more detail below.

Scope of "Brokering Activity"

14. A plain reading of the proposed rule indicates that the term "brokering activity" has an astonishing breadth of coverage, which is much broader than the present rule and much broader that the previously proposed revision. The language in the proposed rule does not appear to limit in a practical, rational way, the scope activities that fall within the definition of "brokering activity".

15. We are led to question whether DDTC really intends to impose a requirement on virtually every party remotely connected with a U.S. licensed export transaction to register as a broker and to comply with the numerous ancillary requirements that are triggered by such registration. Is that really the intention of DDTC and, if so, what is the regulatory objective?

16. As DDTC is aware, a typical defense program in Europe involves multiple nations, multiple integrators and multiple suppliers. Some of these parties have no connection to the United States other than indirect and remote connection by virtue of the incorporation of a USML article in a foreign manufactured defense article end-item. It is difficult to believe that DDTC intends to create the opportunity for the equivalent of a brokering QRS-11 type of crisis because of a brokering requirement what would apply to each and every actor remotely connected to the foreign program. Unfortunately, we believe that would be the result of the proposed rule.

17. We also believe that such an expansive interpretation of the term "brokering activity" could result in provoking resistance by the foreign firms in the supply chain, provoking diplomatic protest by allied nations, creating conflict of laws situations for

defense contractors and encouraging foreign firms to avoid procurement of parts, components, subsystems and systems with U.S.M.L. content.

18. We recommend that DDTC articulate a practical and rational limit to the coverage of "brokering activities" that avoids these consequences.

Extraterritorial Application of the Brokering Rule

19. One of the subjects that was previously discussed in comments to the original proposed revised rule in this proceeding is the extraterritorial application of the brokering rules to non-U.S. persons outside the geographic jurisdiction of the United States.

20. Comments have been filed previously that set forth the principle of U.S. statutory interpretation that holds that U.S. laws are to be presumed not to be applied extraterritorially[2] unless there is clear evidence of Congressional intent to apply the law in question extraterritorially.[3]

21. Comments also have pointed out to DDTC that there is no legislative history that indicates that Congress, when it enacted the broker amendments in 1996, intended those amendments to be applied extraterritorially.

22. It appears that DDTC proposes, without explanation, rationale or support, that the brokering regulations be applied extraterritorially to non-U.S. persons.

23. We sincerely hope that DDTC will not adopt a final rule that applies the brokering rules extraterritorially to non-U.S. persons. If DDTC does adopt such a final rule, we

[2] *EEOC v. Arabian Am. Oil. Co. ("ARAMCO")*, 499 U.S. 244, 248 (1991).

[3] ARAMCO and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176 (1993).

strongly suggest that DDTC explains why all of the arguments that have been made are not valid.

24. If DDTC adopts a final rule that applies the brokering rules extraterritorially to non-U.S. persons without adequate explanation, the impression will be created that the arguments against extraterritorial application of the rules to non-U.S. persons is valid. The suspicion also will be created that the action of DDTC intends to achieve a competitive advantage in the international marketplace for U.S. final integrators. DDTC has a very good record of impartial application of the ITAR and we believe that continuation of that policy of impartiality will strengthen the trans-Atlantic alliance.

Marketing of the Products of Affiliated Companies

25. It appears that the proposed rule would require an affiliated company involved in the sales and marketing of defense articles that contain U.S.M.L. articles be registered as a broker even if the end products are licensed for delivery to the end-user. For example, does DDTC intend that a French company that assists its German affiliate company in a sales campaign in a third country for a fighter aircraft manufactured in Germany by the German company but which incorporates a USML part or component to register as a broker in the U.S.? If the retransfer of the US components to the third county is authorized, what is the purpose of requiring the affiliated company to be registered?

26. We urge DDTC to clarify that affiliates involved in licensed transactions are not required to register.

Conclusion

27. In the past ten years we have witnessed a remarkable improvement in the way DDTC conducts rulemaking proceedings. It is highly laudable that the public is given the opportunity to review and comment on proposed rules.

28. We also have seen a remarkable effort to clarify ambiguities in the regulations to avoid the regrettable situations where uncertainty of interpretation made compliance difficult even for exporters desiring to achieve compliance.

29. We urge DDTC to continue this trend by clarifying the proposed rules, providing a clear and understandable rationale for why comments of interested parties are or are not accepted by DDTC, and to provide practical and rational limits to the scope of the activities being regulated as "brokering activities."

30. We respectfully urge the consideration of the comments and suggestions to the proposed rules as set forth above.

Respectfully submitted on behalf of the EADS Export Compliance Council (Christophe Assemat, Dennis Burnett, Pierre Cardin, Dominique Guillaume, Jochen Hartmannshenn, Arnaud Idiart, Peter Klein, David de Teran, and Doris Wirth)

By: Dennis J. Burnett
V.P. Trade Policy and Export Control
EADS North America
Phone: (703) 466 7538
Fax: (703) 466 7506
E-Mail: Dennis.Burnett@EADS-NA.com

February 17, 2012

Ref: RIN 1400-AC37 - Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions

AAR CORP., a leading provider of diverse products and services to the worldwide commercial aviation and government/defense industries, submits the following comments and recommended changes regarding the proposed rule referenced above:

1. Additional Guidance Is Needed on "Broker" and "Brokering Activities" Definitions

   We do not believe DDTC has provided enough information in the proposed amendments so that we and other parties could determine if and when we are subject to the regulations. Given that, under the proposed ITAR 126.13(c) and 127.2(b)(13), exporters would now have express accountability for identifying brokers and brokering activities when seeking export authorizations and, under proposed ITAR 127.1(b), exporters will be responsible for the acts of any brokers they use, it seems imperative that DDTC include clear guidance in the proposed amendments for determining who is a "broker" and what activities constitute "brokering activities."

   The need for such guidance also arises from the fact that DDTC is proposing to remove any agency or remuneration requirements from the proposed definition of a "broker", thereby making a broker in this context very different from definitions of a "broker" that appear in dictionaries or from common examples of brokers in other contexts, such as brokers in the real estate and stock market industries. Therefore, without adequate guidance as to who is a broker in the context of the ITAR, it is likely that many exporters will fail to realize they are subject to the regulations. Additionally, in order to avoid liability for failing to identify and monitor brokers and brokering activities, it is likely that many other exporters will, out of an abundance of caution, identify individuals and companies as brokers even when they are unsure that is the case. Such inefficient use of exporter and DDTC resources is not only unfortunate, it is inconsistent with one of the primary goals of the current export reform initiative which is to eliminate such ambiguity from the regulations so that affected parties will clearly know which regulations they are subject to and what steps they need to take in order to comply with applicable regulations. Moreover, without adequate guidance, U.S. exporters will continue to be at a competitive disadvantage in the marketplace.

   In 2009, the Defense Trade Advisory Group ("DTAG") recommended that the proposed amendments should include an extensive list of activities that are excluded from the scope of brokering activities, such as activities undertaken for a person's own benefit, undertaken by related companies on behalf of each other, and activities undertaken by a person on behalf of his or her employer or a related company of the employer[1]. Without the benefit of specific

[1] To date, DDTC appears to have taken the position that employees are not brokers for their employers if the employees are acting within the scope of their employment authorization. See the second question at http://pmddtc.state.gov/faqs/license_foreignpersons.html. Presumably that is because the employees are not acting as an agent for another. However, since DDTC proposes to eliminate any agency requirement in the revised definition of a broker and, because employees would certainly engage in many

limitations like the DTAG recommended, such activities would appear to potentially fall within the scope of brokering activities under the definition currently proposed by DDTC and lead to inadvertent violations and/or unnecessary identification of brokers cited in the preceding paragraph.

Finally, language in the proposed amendments and in the preamble creates confusion over when attorneys may be acting as brokers. As written, the description of activities that are not brokering provided in proposed ITAR 129.2(e)(3) only excludes "activities by an attorney that do not extend beyond providing legal advice to a broker." However, in the preamble, DDTC summarizes this particular change by stating that brokering "does not include activities beyond the provision of legal advice by an attorney to his client." See 76 Fed. Reg. at 78578. We believe that DDTC most likely made a typo in the summary statement in the preamble and that the statement there should instead read "does not include activities *that do not extend* beyond the provision of legal advice by an attorney to his client. Even after resolving the conflicting statements, it will still be unclear whether attorneys (whether in-house or in private practice) who perform tasks such as preparing or assisting exporters with the preparation of export license applications, or speaking on behalf of exporters to DDTC, U.S. Customs & Border Protection, or other U.S. Government agency personnel about questions or issues regarding exports or imports of defense articles will be considered to be brokering.

2. Additional Guidance Is Needed on When Foreign Persons Are Subject to the Regulations

DDTC did not provide any guidance as to when a foreign person is deemed to be "located in the U.S." or when a foreign person is "acting on behalf of a U.S. person." This creates some concerns for interactions between U.S. parent companies and foreign subsidiaries given that, as described above in Comment 1, DDTC has removed any agency or remuneration requirements from the definition of a broker and DDTC has not clarified whether or not DDTC believes (i) employees can broker on behalf of their employer or an affiliate of the employer, or (ii) affiliated companies can broker on behalf of one another. For example:

- If an employee of a foreign subsidiary travels to the U.S. to obtain approvals from the U.S. parent company for one or more aspects of a transaction involving the sale of foreign-origin defense articles to another foreign country, is the foreign employee subject to the regulations?
- Is a foreign subsidiary considered to be "acting on behalf of its U.S. parent" simply because the parent will ultimately benefit from the foreign subsidiary's transactions that involve the sale of foreign-origin defense articles to another foreign country?

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of the facilitating actions cited by DDTC in the revised definition of brokering activities, DDTC's position on this issue becomes unclear. It is also unclear what DDTC's position is with respect to whether or not temporary (contract) workers hired by companies to assist with export-related activities are brokers.

Without such guidance, we believe that communications between U.S. companies and their foreign subsidiaries will likely become subject to unnecessary restrictions or DDTC will receive unnecessary broker registrations and requests for approval of brokering activities.

3. Correction, Clarification and Expansion of Exemptions from Registration Requirements

In proposed ITAR 129.3(d), U.S. persons who are registered as manufacturers or exporters under Part 122 of the ITAR, including their U.S. or foreign subsidiaries, joint ventures or other affiliates listed on their registration, would not be required to register separately under Part 129 or pay a separate broker registration fee as long as they list and identify themselves as brokers on the Statement of Registration. However, it appears DDTC made a typo in the last sentence of the proposed ITAR 129.4(b) because ITAR 129.3(d) is not listed in ITAR 129.4(b) as one of the instances when a separate registration statement and fee is not required. See 76 Fed. Reg. at 78588.

In the proposed exemptions set forth in ITAR 129.3(b)(3) and ITAR 129.3(b)(4), DDTC expressly states that bona fide regular employees of the listed entities are also excluded from any separate registration requirements; however, DDTC does not give any indication if employees of the entities listed in the proposed exemption at ITAR 129.3(d) are covered by that exemption. Moreover, the fact that DDTC uses the phrase "bona fide regular employees" in the proposed exemptions in ITAR 129.3(b)(3) and ITAR 129.3(b)(4) seems to indicate there might be a registration requirement for contract or temporary workers who assist companies with exports for defense articles or services. We request that DDTC provide clarification on this requirement.

Under the proposed exemption set forth in ITAR 129.3(b)(3), manufacturers and exporters can include any exclusive foreign person brokers on their Part 122 Statement of Registration if the brokering activities of such persons are only on behalf of the registrant and do not extend beyond brokering defense articles or services that (i) are located in the U.S., and (ii) are or will be covered by an export authorization from DDTC. As a result of being listed on the Part 122 Statement of Registration, such foreign person brokers will be exempt from any registration, prior approval and reporting requirements under Part 129.

- Given that, under the proposed ITAR 126.13(c), all exporters will need to identify all brokers and describe all the associated brokering activities as part of each license application and, under the proposed ITAR 127.1(b), exporters who use any DDTC export license or exemption will be responsible for all acts of all brokers they use (i.e. DDTC will hold exporters liable for their brokers' failure to register, report and keep records), it is unclear to us why the benefits of the proposed ITAR 129.3(b)(3) exemption need to be limited to exclusive foreign person brokers. Allowing U.S. manufacturers and exporters to list on their Part 122 Statement of Registration any foreign brokers who will only participate in transactions that are subject to a DDTC export authorization would eliminate the double licensing requirement for the brokering activities and it would reduce the amount of time that transactions will need to be suspended while exporters

verify that foreign brokers have registered and obtained prior approval for the brokering activities that are already covered by a separate DDTC authorization.

4. Expansion of Exemptions from Prior Approval Requirements

The proposed exemption in ITAR 129.7(b)(1) is available for brokering activities that (i) are undertaken for a U.S. Government agency pursuant to a contract between that agency and the broker, and (ii) involve defense articles or defense services solely for use by the U.S. Government agency.

- We do not understand how, as a U.S. person, a U.S. Government agency could be the user of defense services; therefore, we believe the words "or defense services" should be deleted from the language used in the proposed ITAR 129.7(b)(1).
- Additionally, we understand that, as written, the proposed exemption would not be available to subcontractors since the subcontractors would not be a party to a contract with the U.S. Government agency. We believe that subcontractors also should be eligible to use the exemption when they perform brokering activities to support the transfer of defense articles for ultimate end use by a U.S. Government agency. Such brokering activities by subcontractors would not pose a threat to national security or U.S. foreign policy interest which we understand was the primary concern that resulted in the 1996 amendment to the AECA and 1997 amendments to the ITAR.

The proposed exemption in ITAR 129.7(c) is available only for brokering activities (i) undertaken wholly within the NATO+4 countries, and (i) that involve defense articles or services located within and destined exclusively for those countries. We believe this exemption should be available for brokering activities that are undertaken for the transfer of defense articles or services to NATO+4 countries when the NATO+4 countries are operating outside their borders in support of U.S. Government missions.

Per the language used in proposed ITAR 129.5(b) and ITAR 129.7(a)(3), it appears brokers would be ineligible to use any of the prior approval exemptions in ITAR 129.7 if the brokering activities involve any country, area, or other person referred to in ITAR 126.1. We believe it would be beneficial to make an exception to this prohibition for instances when the brokering activities are undertaken in support of a U.S. Government mission that is operating within a country listed in ITAR 126.1 (e.g. Operation Enduring Freedom).

/s/ Michael Schuman
International Trade & Compliance Officer
AAR CORP.
1100 North Wood Dale Road
Wood Dale, IL 60191
(630) 608-1804

DRS Technologies, Inc.
Trade & Security Compliance Office
2345 Crystal City Drive
Arlington, VA 22202

February 17, 2012

Mr. Robert S. Kovac
Managing Director
PM/DDTC, SA-1, Room 1200
Directorate of Defense Trade Controls
Bureau of Political Military Affairs
U.S. Department of State
Washington, DC 20522-0112

Subject: Response to the Proposed Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions - 76 FR 78578, RIN 1400-AC37

Dear Mr. Kovac:

DRS Technologies, Inc. appreciates the opportunity to comment on the proposed revisions to the ITAR related to Brokers and Brokering Activities. We support regulatory change directed towards stopping illicit brokering of defense articles and services. The proposed rule however, appears to broaden the regulation beyond both the scope and intent of the original legislation and adds vagueness to a section of the ITAR already plagued by ambiguity. We believe these proposed changes could have a significant negative impact on legitimate, U.S. government approved, defense trade with no corresponding enhancement to U.S. national security. If the intent of regulating brokering is to stop illicit weapons transfers we recommend the U.S. Department of State ("the Department") consider an alternative approach focusing §129 on the brokering of foreign defense articles, amending §127 with regard to facilitating illegal transfers of U.S. defense articles, and allow the brokering of lawful transfers of U.S. defense articles to be regulated through the existing export approval process from the Department. If the intent is to further regulate already regulated lawful transactions, we recommend the Department refer this proposed change to the Defense Trade Advisory Group for analysis and comment before proceeding. The rational for our proposed alternative approach and our concerns with the proposed rule are outlined below.

An analysis of brokering activities with relation to defense trade transactions, and the activities to support those transactions, reveals four scenarios to potentially be regulated: Brokering of 1) lawful transfers of U.S. defense articles; 2) unlawful transfers of defense articles; 3) lawful or unlawful transfers of foreign defense articles by U.S. Persons worldwide; and 4) lawful or unlawful transfers of foreign defense articles by Foreign Persons located in the U.S. Scenario one, lawful transfers of U.S. defense articles worldwide, is already regulated by the Department. Hence any brokering associated with such lawful transfers is defacto regulated via the §123, §124, or §125 export application approval process and should not be duplicatively

regulated within §129. Scenario two, unlawful transfers of U.S. defense articles worldwide, is currently prohibited via §127 and does not need to be further regulated within §129. We do however recommend a change to §127.1(a)(6) to clearly capture facilitation related to unlawful transfers of U.S. defense articles and services. Accordingly, §129 need only address scenarios three and four. We recommend §129 be revised to focus on the regulation of brokering foreign defense articles by U.S. persons worldwide and foreign persons located in the U.S. This approach would significantly reduce confusion and administrative burden, while achieving the goal of preventing illicit brokering of weapons.

The proposed rule appears contrary to the U.S. government's efforts to accomplish needed export control reform. The broad expansion of what constitutes a broker coupled with the vaguely defined brokering activities appear to create an environment where almost any activity remotely associated with any defense company would be subject to this rule. The President, the Secretaries of State, Defense, and Commerce and their administrations have publicly pushed for higher walls around fewer things. This proposed rule expands the current scope of regulatory oversight by removing the requirement that brokers act as an agent or act for consideration (ex. fee). Almost any act, whether direct or indirect, substantive or inconsequential, could be regulated under the proposed rule. The parties impacted can be far removed from the sale, export, transfer, etc. and still be considered a broker. This puts higher walls around significantly more things, many of which have nothing to do with facilitating the sale of a defense article. The proposed rule creates a higher degree of uncertainty with respect to brokering and has the potential to significantly increase the cost and time to industry with respect to compliance, while at the same time unnecessarily disadvantaging legitimate U.S. defense exports.

The proposed changes to §129.2(a) define a broker as a person who "engages in brokering activities" and removes the current requirement for compensation (i.e. fee, commission, or other consideration). This is significantly broader than the language in the Arms Export Control Act ("AECA"), which states a broker is a person who "engages in *the business* of brokering activities." The term "engages in *the business*" is generally defined in U.S. statutes and regulations to include an element of seeking profit. Eliminating the requirement of compensation to be considered engaged in brokering expands the application of this rule beyond the legislative intent, contributes to the lack of clarity in the brokering regulations and unnecessarily regulates persons performing any activity related to defense articles and services. §129.2(a) should remain consistent with the language of the AECA by maintaining the requirement for compensation in the definition of a broker.

The proposed changes to §129.2(a) also eliminate the requirement of "acting as an agent" from the definition of a broker. This phrase is critical to ensure a person who is not involved in the actual execution of a sale is not needlessly "caught" by the regulations. As proposed, the rule broadly expands the scope of persons meeting the definition of a broker to essentially any person, however remote, involved with the transfer of defense articles or services. This includes a company that subcontracts any aspect of a defense transaction (e.g. part procurements from suppliers and certain warehouses) or even a trade association that arranges a discussion between the governments and industry representatives. These parties, regardless of how far removed from "the business of brokering activities" and absent a fee or commission could all be

considered a "broker" under the proposed regulations. Accordingly, we recommend the requirement of "acting as an agent" remain in the definition of a broker.

The proposed change to §129.2(b) defines brokering activity to mean "*any action to facilitate* the manufacture, export, re-export, import, transfer, or retransfer of a defense article or defense service." The phrase "any action to facilitate" is unreasonably vague. Likewise, the overly-broad wording "*or otherwise assisting* in the purchase, sale, transfer, loan, or lease of a defense article or defense service" provided in the clarifying example at 129.2(b)(2), would (in concept) appear to allow the DDTC to define a wide range of third parties as brokers if they contract with or support a U.S. manufacturer of defense articles or services. Examples include manufacturing CCL articles incorporated into or sold for a system with USML articles, an airline that transports an individual to a meeting about defense articles, or a hotel that hosts a meeting between defense contractors. The definition of brokering activity must be more definitive and limit regulation of activities not intended by the legislation.

§129.2(d) proposes to regulate brokering activities of foreign persons not located in the United States. This change exceeds the intent of the authorizing legislation. The House report (104-519) states "Section 151 requires U.S. persons (and foreign persons located in the U.S.) involved in defense trade of U.S. and non-U.S. defense equipment or technology…" As such, it does not appear that the legislation was intended to apply to foreign persons located outside of the U.S. U.S. statutory interpretation holds that U.S. laws are to be presumed not to be applied extraterritorially[1] unless there is clear evidence of Congressional intent to apply the law in question extraterritorially.[2] Accordingly, the proposed §129.2(d)(3)-(5) should be deleted.

The proposed changes to §129.6 and §129.7, regarding prior approval are expansive. These changes appear to negate the administration's past efforts to reduce unnecessary administrative burden by eliminating the prior approval requirement in §126.8. The proposed definition of a broker coupled with who has to register as a broker and with this significant expansion in prior approval requirements for brokering activities, will cause a significant increase in the submission of brokering license applications to the DDTC. This change also undoes the clear line regarding license applications that was set by the elimination of §126.8. With the current prior approval/notification requirement eliminated (except for 126.1 countries) and the prior approval for brokering limited to very small part of the USML, the bulk of industry could rely on drawing a line of requiring DDTC approval prior to the export of technical data, defense articles, and/or defense services. This proposed rule nullifies that line and will make the determination of who needs to obtain a license for prior approval, and more importantly, at what point in the business development and sale process they need to obtain it, a very complicated question. The requirement for prior approval should be eliminated.

The proposed change to §126.13 would require all brokers to be listed on a license application. This is problematic given the extremely broad proposed definition of both a broker and brokering activities, including such remotely associated parties as a bank providing a standard line of credit. It will be nearly impossible to comply with this requirement by providing

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[1] *EEOC v. Arabian Am. Oil. Co. ("ARAMCO")*, 499 U.S. 244, 2488 (1991).
[2] ARAMCO and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176 (1993).

an accurate list of all brokers on license applications. The requirement for inclusion of all brokers on a license application should be eliminated.

The proposed change ties registration to the definition of a regular employee. For contract employees, this definition requires they be located at the company facility to be considered a regular employee. This will create situations whereby such contract employees would be covered under a company registration for their brokering activities until they travel on company related business, at which point they would no longer be "located at the facility" and would have to immediately register with the DDTC as a broker. We recommend the definition of a regular employee be amended to remove the requirement regarding being located at the company facility.

As we stated earlier, we have several significant concerns with the proposed rule, including the ability of industry to successfully implement it. We believe the new definitions of brokering and brokering activities coupled with the extraterritoriality expansion to include foreign persons outside the United States would result in foreign companies designing out U.S. ITAR articles or seeking non-U.S. products to avoid the associated U.S. liability and cost. This will limit foreign individuals' willingness to support U.S. defense transactions. As stated previously if the intent of regulating brokering is to stop illicit weapons transfers we recommend the Department consider an alternative approach focusing §129 on the brokering of foreign defense articles, amending §127 with regard to brokering illegal transfers of U.S. defense articles, and allow the brokering of lawful transfers of U.S. defense articles to be regulated by the existing export approval process from the Department. If the intent is to further regulate already regulated lawful transactions, we urge the Department to further study this proposed rule and refer it to the Defense Trade Advisory Group to afford industry the opportunity fully vet these changes to ensure the national security objectives of the U.S. are met with the absolute minimum negative impact to U.S. industry.

Should you have any questions in this matter or require additional information, please contact Mr. Greg Hill at (703) 412-0288, ghill@drs.com.

Sincerely,

Heather C. Sears
Vice President, Trade & Security Compliance
& Associate Corporate Counsel
DRS Technologies, Inc.

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

The Voice of the International Trade Community Since 1921

February 17, 2012

Via E-Mail (DDTCResponseTeam@state.gov)

Compliance and Registration Division
Office of Defense Trade Controls Compliance
U.S. Department of State
12th Floor, SA-1
2401 E Street, NW
Washington, DC 20037

Re: Brokering Rule Comments
RIN: 1400-AC37

Dear Sir or Madame:

On behalf of the American Association of Exporters and Importers (AAEI), we respectfully submit these comments concerning the proposed rule on the Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions (the "Brokering Rule") published in the Federal Register on December 19, 2011 (75 Fed. Reg. 78578).

AAEI has been a national voice for the international trade community in the United States since 1921. AAEI represents the entire spectrum of the international trade community across all industry sectors. Our members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the industry, which is comprised of brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. Many of these enterprises are small businesses seeking to export to foreign markets. AAEI promotes fair and open trade policy. We advocate for companies engaged in international trade, supply chain security, export controls, non-tariff barriers, import safety and customs and border protection issues. AAEI is the premier trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade. We are recognized as the technical experts regarding the day-to-day facilitation of trade.

1. General Comments

AAEI appreciates the opportunity to comments on the Brokering Rule. While we are aware that this regulation is promulgated pursuant to the Arms Export Control Act, which is not directly part of the the President's Export Control Reform Initiative, we believe that it is appropriate for the State Department to review the activities of brokers operating with ITAR controlled articles at this time.

We appreciate the State Department's goal of reducing the burden to the public subject to this rule.

2. Specific Comments

We strongly support the underlining goal of reducing the burden to the public subject to this rule by making changes relating to registration, licensing, exemptions and reporting procedures, and we appreciate the effort being made by Directorate of Defense Trade Controls ("DDTC") in this regard. However, we are concerned about its actual application to specific entities or transactions.

a. Brokering Activities Covered

Among our specific concerns is the relationship between covered "brokering activities", the Section 129.3 registration exemptions, and registration formalities which are unclear in a number of ways.

Exemption from registration under the proposed new section 129.3(b) requires the brokering parties be identified on a registered party's Part 122 registration. The requirement to register under part 129.4 (for those not exempt from registration) can *also be met* if the brokering parties are identified on a registered party's Part 122 registration according to the new Section 129.3(d). Since many benefits under the proposed rules (i.e. exemption from prior approval and reporting) are tied to exemption from registration, how will DDTC determine which parties identified on a 122 registration are brokers exempt from part 129 registration, and which are brokers not exempt from Part 129 registration?

Section 129.2(d)(5) purports to clarify that brokering activities by foreign persons outside the United States but "on behalf of" a U.S. person are subject to Part 129. There have been concerns raised by our members that DDTC might construe this phrase to mean that the activities of foreign subsidiaries of U.S. companies are generally "on behalf of" the U.S. parent. A foreign subsidiary of a U.S. company brokering non-US origin defense articles or services entirely outside the U.S. should not be subject to Part 129 as to those non-US activities on a theory that all of a subsidiary's business is "on behalf of" its DDTC registered parent. This may not be DDTC's intent at all, but AAEI suggests that perhaps DDTC might confirm the meaning of the phrase "on behalf of" in the Federal Register notice publishing the final rule.

b. Exemptions are Ambiguous

The proposed section 129.3(b)(3) exempts brokers from registration (and prior approval and reporting) when their "brokering activities" are limited to the activities described in subparagraphs (b)(3)(A) or (B). There are a number of ambiguities in these proposed exemptions. A few are highlighted below:

- DDTC should confirm that brokering performed by non-US persons, involving non-US origin defense articles and services (ITAR-free) and with no connection to the U.S. would not be among the "brokering activities" to be

considered in applying Section 129.3(b)(3). We believe parties should be exempt from registration on the basis that their brokering activities are subject to the ITAR (under the proposed new Section 129) but meet the conditions set out in subparagraphs (b)(3)(A) and (B). Where a party is engaged in brokering that is not subject to the ITAR, those activities should not be relevant to application of Section 129.3(b)(3). In other words, brokering activities that are not subject to the ITAR and which may not meet the conditions of set out in subparagraphs (b)(3)(A) and (B) should not disqualify a party from Section 129.3(b)(3).

- Both of these exemption provisions – section 129.3(b)(3)(A) and (B) – require the broker's activities be tied to DDTC-authorized exports. Subparagraph (A) then exempts from registration those whose brokering activities are limited to brokering of the Part 122 registrant's defense articles and services. There is no requirement that the brokering be "on behalf of" the Part 122 registrant, but the requirement that brokering be limited to the registrations articles and services would effectively impose the same requirement (we note that brokering on behalf of an unaffiliated distributors of the Part 122 registrant's defense articles may be what DDTC had in mind with its proposed language). Subparagraph (B) exempts from registration those brokering activities that are "on behalf of" the Part 122 registrant, and obtained from the U.S., but apparently of anyone's defense articles/services. The practical outcome is that there is very little difference between (A) and (B). DDTC's main concern seems to be that parties be exempt only where the transactions they broker are ultimately authorized by DDTC. Perhaps DDTC could make this the sole requirement. If DDTC insists it must keep some condition as to the origin and source of the items brokered, we believe that it would be preferable to delineate (A) and (B) as follows:

  > (A) involve only such registered persons' defense articles or defense services, regardless of origin, so long as subject to an approval from DDTC prior to export, reexport or transfer;
  >
  > (B) involve only exports of defense articles or defense services from inside the United States for export outside the United States, so long as subject an approval from DDTC prior to export.

3. Conclusion

AAEI and its member companies greatly appreciate all the work and effort being made by the Government to reduce the burdens placed on entities that engage in brokering activities and provide more clarity to U.S. companies. AAEI would be pleased to discuss these comments in more detail with DDTC leadership and staff.

Sincerely,

Marianne Rowden
President & CEO

cc: Douglas N. Jacobson, Co-Chair, AAEI Export Compliance & Facilitation Committee
Phillip Poland, Co-Chair, AAEI Export Compliance & Facilitation Committee

COMMENTS OF THE SATELLITE INDUSTRY ASSOCIATION TO THE DIRECTORATE OF DEFENSE TRADE CONTROLS REGARDING THE PROPOSED RULE ON REGISTRATION AND LICENSING OF BROKERS AND BROKERING ACTIVITIES

The Satellite Industry Association (SIA) on behalf of its member companies[1] welcomes the opportunity to comment on proposed revisions to the ITAR related to Brokers and Brokering Activities.[2] SIA is a U.S.-based trade association providing worldwide representation of the leading satellite operators, service providers, spacecraft and component manufacturers, launch services providers, and ground equipment suppliers. Since its creation more than fifteen years ago, SIA has become the unified voice of the U.S. satellite industry on policy, regulatory, and legislative issues affecting the satellite business.

We strongly support the President's Export Initiative and the Administration's Export Control Reform proposals. Satellite export control reform would facilitate the ability of our industry to compete internationally, support investment and innovation, and help supply essential government and industry communications. However, we cannot support the proposed brokering rule in its current form, given its extraordinary expansion of regulatory authority. The proposed rule, if implemented, would have a strong negative effect on the satellite industry and its ability to conduct international business – this proposed regulation further increases the incentives for foreign firms to select non-U.S. primes and/or design out U.S. components.

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[1] SIA Executive Members include: Artel, Inc.; The Boeing Company; The DIRECTV Group; EchoStar Satellite Services L.L.C.; Harris CapRock Communications; Hughes Network Systems, LLC; Integral Systems, Inc.; Intelsat, S.A.; Iridium Communications Inc.; LightSquared; Lockheed Martin Corporation.; Loral Space & Communications, Inc.; Northrop Grumman Corporation; Rockwell Collins Government Systems; and SES S.A. SIA Associate Members include: ATK Inc.; Cisco; Cobham SATCOM Land Systems; Comtech EF Data Corp.; DRS Technologies, Inc.; Eutelsat, Inc.; GE Satellite; Globecomm Systems, Inc.; Glowlink Communications Technology, Inc.; iDirect Government Technologies; Inmarsat, Inc.; Marshall Communications Corporation.; Orbital Sciences Corporation; Panasonic Avionics Corporation; Spacecom, Ltd.; Spacenet Inc.; TeleCommunication Systems, Inc.; Telesat Canada; Trace Systems, Inc.; Ultisat, Inc.; ViaSat, Inc, and XTAR, LLC. Additional information about SIA can be found at www.sia.org.

[2] *See* Amendment to the International Traffic in Arms Regulations, 76 Federal Register 78578 (2011).

There are three areas of primary concern: proposed definitions, registration and reporting requirements, and compliance. We are particularly opposed to the expansion of scope proposed for the terms "broker" and "brokering activities." As proposed, both terms are more expansive than commonly understood legal definitions, such as those in Black's Law Dictionary. By vastly expanding the scope of these two definitions our industry members will be burdened with significant cost increases throughout the global supply chain to include manufacturing, functional support (i.e. business development, legal and finance), and sales.

We are concerned about the negative effects of a substantial increase in registration and reporting requirements for our members leading to increased production costs and schedule, without any gains with respect to national security considerations. These consequences would serve to make the satellite industry less rather than more competitive in the international market place resulting in higher prices and fueling the already growing ITAR-free satellite manufacturing by our international competitors. Finally, we are very concerned that the scope of the proposed rule is so broad, and difficult to implement, that the compliance risk and legal liability for U.S. exporters would increase substantially, without corresponding benefits to U.S. national security.

In recent testimony before the House Foreign Affairs Committee, SIA underscored how the "one-size-fits-all satellite export control laws" have actually undermined national security and our industry's ability to compete internationally. The proposed rule on Brokers and Brokering Activities would be a step backward in critical Administration export and export-related reforms. We welcome the opportunity to meet with key Administration officials to express our views in more detail prior to any final decision on a new regulation.

Respectfully Submitted,

Patricia Cooper
President
Satellite Industry Association
1200 18th Street N.W., Suite 1001
Washington, D.C. 20036

February 17, 2012

SÄKERHETS & FÖRSVARS FÖRETAGEN
SWEDISH SECURITY & DEFENCE INDUSTRY

Robert S. Kovac, Managing Director
Directorate of Defense Trade Controls
U.S. Department of State
2401 E St., N.W., SA-1, 12th Floor
Washington, DC 20037
USA

Via e-mail ddtcresponseteam@state.gov ; subject line "Brokering Rule Comments"

CC; Swedish Embassy, Washington D.C., USA
Swedish MoFA Department for Disarmament and Non-Proliferation,
Swedish Agency for Non-Proliferation and Export Controls

Dear Sirs,

I write to you in an important matter,

Response to the Federal Register Notice: December 19, 2011, Vol 76, RIN 1400-AC37 Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions

The U.S. Department of State (DoS) did on the 19th of December 2011 issue a proposed rule "Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions". The DoS asks for comments to be provided by the 17th of February 2012.

It called for interested parties to provide comment by February 17th 2012.

The Swedish Security and Defence Industry Association (SOFF) was founded in 1986 and has today 56 member companies including 43 Small and medium sized enterprises (SMEs). The purpose of the Association is to promote the common interests of the security and defence industry and to strive for increased understanding of its importance to Swedish security and defence policy.
The Association represents the Swedish security and defence industry in AeroSpace and Defence Industries Association of Europe (ASD) and in NATO Industrial Advisory Group/Partnership for Peace (NIAG/PfP), in addition to co-operating with defence industry organizations in several countries.

Storgatan 5
Box 5510
SE-114 85 Stockholm
Sweden
Tel: +46 8 782 08 71
Fax: +46 8 660 33 78
www.soff.se

SÄKERHETS
& FÖRSVARS
FÖRETAGEN
SWEDISH SECURITY & DEFENCE INDUSTRY

It is thus important for SOFF to declare that we fully support the answer sent to DoS by ASD, on the matter of this FRN, and signed by the Secretary General of the ASD.

SOFF welcomes the opportunity to comment on the Department of State's proposed rule and we would like to take the opportunity to make some remarks we find important to make from a Swedish industry perspective and partly reiterate some important comments already made by ASD.

In principle, SOFF supports and welcomes the Department's efforts to undertake reforms of the ITAR.

However, we are of the opinion that the proposed rule as constructed misses opportunities to provide needed definition and clarification to brokering regulations. The impact on companies could be contrary to both the President's Export Control Reform, and Regulatory Reform initiatives. If implemented, the result would risk creating competitive disadvantage for foreign companies using US origin components and subsystems, and continuing the trend towards foreign-origin products free of content controlled by the International Traffic in Arms Regulations (ITAR).

We believe that these concerns, if not taken into account in the final rule, will positively discourage collaboration between our member companies and US defence exporters, with detrimental consequences for the present Administration's aim of enhancing US exports and encouraging defence cooperation with allies and interoperability between allies.

Furthermore, Sweden is not covered by Proposed Section 129.7(c)(1) that states an exemption for prior approval of brokering activities if "…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, Australia, Japan, New Zealand, or the Republic of South Korea…" Although this group of countries is consistent with the current brokering regulations, if this exemption is maintained, **DoS should include Sweden within this territory**. This is underpinned by the long standing excellent relations with the 1987 U.S.-Sweden Memorandum of Understanding regarding mutual cooperation in the defense procurement area, the 2003 Declaration of Principles (DOP), the 2001 Defense Trade Security Initiatives (DTSI) and the robustness of the Swedish export control system as well as prior and ongoing coalition military operations;

Storgatan 5
Box 5510
SE-114 85 Stockholm
Sweden
Tel: +46 8 782 08 71
Fax: +46 8 660 33 78
www.soff.se

SÄKERHETS
& FÖRSVARS
FÖRETAGEN
SWEDISH SECURITY & DEFENCE INDUSTRY

Also, the prior approval and reporting requirements include the provision of personal information which may be contrary to Swedish/EU data protection law and other applicable laws;

SOFF has no wish to give additional currency to the present trend in Europe among companies and their customers towards the development of defence equipment which is 'ITAR free', but we fear that the proposed brokering regulations as they stand will be seen in terms of a measure to extend the jurisdiction and the competitive advantage of the United States rather than to fill a loophole in the Arms Export Control Act with regard to the activities of US persons wherever located and foreign persons in the US.

SOFF therefore urgently proposes reconsideration of the proposals as they stand. Our preference would be to see brokering redefined to cover those activities not already controlled under other parts of the ITAR i.e. regulations should be honed to require prior brokering approval only for when no other U.S. export authorization would be applicable for regulation. Alternatively to see an exemption for activities controlled elsewhere in the ITAR and if that is not acceptable, consideration of Exclusion of activities carried out by any part of a company on behalf of another part and Exemption for foreign end items containing USML parts and components, provided that their export etc had been properly authorized.

To the minimum the current brokering regulation definition of “brokering” should remain i.e. the phrase “who acts as an agent for others” and likewise should current regulation “in return for a fee, commission, or other consideration” be retained since this will give some guidance and indication to companies.

Regulations should be written to be clear and precise, to avoid confusion and misinterpretation, and should not need to be further explained by voluminous guidance not part of the regulations.

We look forward working with you on the US Export Control reform efforts.

Best Regards,

Jan Pie
Secretary General of the Swedish Security and Defence Industry

Storgatan 5
Box 5510
SE-114 85 Stockholm
Sweden
Tel: +46 8 782 08 71
Fax: +46 8 660 33 78
www.soff.se

1525 Wilson Blvd., Ste. 900
Arlington, VA 22209
Telephone 703.717.6036 Facsimile 703.717.6172

PAE

17 February 2012

By E-Mail

Mr. Daniel L. Cook
Office of Defense Trade Controls Compliance
U.S. Department of State
Directorate of Defense Trade Controls
2401 E Street NW, SA-1, Room H1200
Washington, D.C. 20522-0112

Re: Brokering Rule Comment
RIN (1400–AC37)

Dear Mr. Cook:

Pacific Architects and Engineers Incorporated, a corporation organized under the laws of California with its headquarters in Arlington, Virginia ("PAE"), hereby respectfully submits this comment in response to the notice of proposed rulemaking published in the Federal Register on December 19, 2011, regarding the proposed amendment to Part 129 of the International Traffic in Arms Regulations.

The proposed limitations on the exemptions from licensing requirements set forth in proposed Sections 126.1(a), 129.5 and 129.7, as applied to brokering activities carried out by government contractors acting pursuant to duly authorized contracts in support of official U.S. Government agencies and foreign assistance programs, violate the clear, mandatory exceptions from licensing requirements for brokering activities related to the official use of the United States Government and foreign assistance programs set forth in the Arms Export Control Act. The AECA expressly excludes brokering activities by or for USG agencies or foreign assistance programs from brokering license requirements:

> "***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."

22 U.S.C. §2778(b)(1)(A)(ii)(III)(*emphasis added*).

Congress did not delegate any authority to deviate from this exception. It is a basic principle of administrative law that federal agencies have no powers not expressly granted, and may not exceed their statutory power to issue rules. *Carpenter v. Mineta*, 432 F.3d 1029 (9th Cir. 2005); *American Bus Association v. Slater*, 231 F.3d 1 (DC Cir. 2000). The Administrative Procedures Act at 5 U.S.C. §558[1] provides in pertinent part that:

[1] Contrary to 22 CFR 128.1, there is no "foreign affairs function" exception to 5 U.S.C. § 558 of the APA.

> **"(a)** This section applies, according to the provisions thereof, to the exercise of a power or authority.
> **(b)** *A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."*

(*Emphasis added*). In the operative statute, Congress expressly and without limitation excluded "brokering activities" conducted on behalf of other United States Government agencies and foreign assistance programs from the licensing authority delegated by Congress; therefore, DDTC has no legal authority to require a license for brokering activities related to U.S. Government operations or foreign assistance programs in so-called 126.1 countries. The United States Department of State and the United States Department of Defense, *inter alia*, conduct operations and issue contracts for contractor support in 126.1 countries from time to time. The United States Department of State, including the Bureau of Political Military Affairs, and the United States Department of Defense also carry out foreign assistance and sales programs in 126.1 countries that require contractor support. Congress clearly did not intend to give DDTC veto power over the agencies authorized by Congress and subject to control by the President and Commander-in-Chief to conduct such operations and carry out foreign assistance programs.

If DDTC has any questions or requires any additional information, please contact Michael Deal at (703) 717-6036 or michael.deal@paegroup.com.

Respectfully submitted,

Michael Deal
Senior Manager and "Empowered Official"
PAE International Trade Compliance Office

AeroSpace and Defence
Industries Association of Europe

16th February 2012

ASD Offices
270 avenue de Tervuren, 2nd Floor
B-1050 Brussels
Belgium
Tel: + 32 2 775 8110
Fax: + 32 2 775 8112

Robert S. Kovac, Managing Director
Directorate of Defense Trade Controls
U.S. Department of State
2401 E St., N.W., SA-1, 12th Floor
Washington, DC 20037
USA

Via e-mail ddtcresponseteam@state.gov ; subject line "Brokering Rule Comments"

Cc; Rose Gottemoeller
Acting Under Secretary of State for Arms Control and International Security
U.S. Department of State
2201 C Street, N.W., Room 7208
Washington, DC 20520

Andrew J. Shapiro
Assistant Secretary of State for Political-Military Affairs
U.S. Department of State
2201 C Street, N.W., Room 6212
Washington, DC 20520

Dear Sir,

Response to the Federal Register Notice: December 19, 2011, Vol 76, RIN 1400-AC37 Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions

The US Federal Register of December 19, 2011, Vol 76 (RIN 1400-AC37) advised that the Department of State (DoS) is proposing to amend the International Traffic in Arms Regulations (ITAR), to 'clarify registration requirements, the scope of brokering activities, prior approval requirements and exemptions, procedures for obtaining prior approval and guidance, and reporting and recordkeeping of such activities'.

It called for interested parties to provide comment by February 17th 2012.

This response is provided by the Export Control Committee of ASD, the AeroSpace and Defence Industries Association of Europe. ASD represents the aeronautics, space, defence and security industries in Europe in all matters of common interest with the objective of promoting and supporting the competitive development of the sector. ASD pursues joint industry actions which require to be dealt with on a European level or which concern issues of an agreed transnational nature, and generates common industry positions.

ASD has 28 member associations in 20 countries across Europe and represents over 2000 companies with a further 80 000 suppliers, many of which are SMEs. The industry sectors employ around 696,000 people, with a turnover of 154.7 billion €.

ASD welcomes the opportunity to comment on the Department of State's proposed rule.

In principle, ASD supports and welcomes the Department's efforts to undertake reforms of the ITAR.

However, we are of the opinion that the proposed rule as constructed misses opportunities to provide needed definition and clarification to brokering regulations. The impact on companies could be contrary to both the President's Export Control Reform, and Regulatory Reform initiatives. If implemented, the result would risk creating competitive disadvantage for foreign companies using US origin components and subsystems, and continuing the trend towards foreign-origin products free of content controlled by the International Traffic in Arms Regulations (ITAR).

The purpose of the suggested rule is explained by DoS as to address the need to modify the regulations in light of the experience gained in administering the current regulation. DDTC's website (www.pmddtc.state.gov) does not include guidance to understanding or complying with current brokering regulations. It would be therefore be greatly beneficial for DDTC to describe its experiences in administering current brokering regulations, how they shaped the proposed rule, and what objectives warrant the proposed revisions to brokering regulations.

ASD has carefully examined these proposals in the light of what we understand to be the original intention of Congress in passing the brokering amendment to the Arms Export Control Act. The Act does not contain a definition of brokering, but the House Report noted that the AECA as it previously stood did not 'authorise the Department to regulate the activities of US persons (and foreign persons located in the US) brokering defense transactions overseas'. The present regulation goes well beyond that, and the proposed regulation further still. We do not believe that such extension is necessary to support the foreign policy interests of the United States, since manufacture, export, reexport, import, transfer, or retransfer of US origin defense articles and defense services is already controlled under other Parts of the ITAR.

Below are our major concerns;

- the far-reaching definition of brokering, given that no boundaries are placed on the definition of "brokering activities" in Proposed Section 129.2(b), could mean that any and all European companies handling ITAR material would be obliged to register as brokers, as facilitating the manufacture, reexport, retransfer etc. of defence articles, imposing a considerable burden in terms of registration, record-keeping, reporting and costs. This will likely lead to widespread confusion with multiple interpretations of activities and numerous requests for approval of activities which do not constitute "brokering activities" as envisioned;

- the exemptions are insufficiently defined; it is not clear what actions and by whom they do or do not cover;

- the expected volume of obtaining prior brokering approvals will be high based on the apparent requirement that that one approval seemingly only covers a limited amount of brokering activities i.e. program, product, marketing country campaign etc. and not all activities undertaken by an entity. This could reverse the momentum in the reform initiatives since brokering requests will be made for ITAR products already under DDTC licensing obligations leading to longer lead times to obtain prior approvals thus severely disadvantaging companies needing a prior approval versus those that do not;

- The burden placed on the DDTC by reason of the number of registrations, prior authorizations and reports may result in delays in processing applications, thus disadvantaging companies registered as brokers;

- proposed Section 129.7(c)(1) that states an exemption for prior approval of brokering activities if "...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, Australia, Japan, New Zealand, or the Republic of South Korea..." Although this group of countries is consistent with the current brokering regulations, if this exemption is maintained, DoS should consider including EU within this territory as already done in ITAR §123.16 and §124.16;

- the prior approval and reporting requirements include the provision of personal information which may be contrary to EU data protection law and other applicable laws;

- the prior approval and reporting requirements include the provision to a third party of sensitive commercial, or in some cases Classified, information of great interest to competitors about the value of transactions which would not necessarily be released even to the persons home government;

- anyone organizing a defense trade fair or exhibition would have to register, and report information they did not have about the activities of exhibitors;

- exporters liability for their brokers failure to register, report and keep records;

- it is unclear if the rule will require prior approvals for U.S. operations of a foreign parent company supporting the foreign parent company and subsidiaries or affiliates thereof to sell the company's foreign-origin defense articles to the U.S. Government or U.S. companies Such activities should be viewed sensibly as normal, international business operations, not involving unaffiliated intermediaries, and therefore should not be captured by brokering regulations;

- provided examples 1 to 7 are not reflective of the complex global business transactions of today. The complex web within the suggested rule for exemptions i.e. exemptions for certain scenarios but not for others, will inevitable increase the risk for non-compliance for a global company since these different scenarios will have to be included into the compliance systems. It is likely that applications for registration and prior approval will be made out of caution more than from true requirement;

- Proposed Section 129.4(c)(1) and 129.8(a)(2)(i)-(iii), state in part that information must be provided by the intended registrant or applicant, respectively, whether it "is the subject of an indictment or has otherwise been charged (e.g., by information) for or has been convicted of violating... **foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated** in Sec. 120.27 of this subchapter... 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". A requirement to compare US criminal statutes with those of EU member states is in our view impractical, and the release of such information possibly contrary to EU law. It is not clear to ASD why, after decades of operating the ITAR, it is considered necessary that such information need to be provided.

We believe that these concerns, if not taken into account in the final rule, will positively discourage collaboration between our member companies and US defence exporters, with detrimental consequences for the present Administration's aim of enhancing US exports and encouraging defence cooperation with allies and interoperability between allies.

ASD has no wish to give additional currency to the present trend in Europe among companies and their customers towards the development of defence equipment which is 'ITAR free', but we fear that the proposed brokering regulations as they stand will be seen in terms of a measure to extend the jurisdiction and the competitive advantage of the United States rather than to fill a loophole in the Arms Export Control Act with regard to the activities of US persons wherever located and foreign persons in the US.

ASD therefore urgently proposes reconsideration of the proposals as they stand. Our preference would be to see brokering redefined to cover those activities not already controlled under other parts of the ITAR i.e. regulations should be honed to require prior brokering approval only for when no other U.S. export authorization would be applicable for regulation. Alternatively to see an exemption for activities controlled elsewhere in the ITAR and if that is not acceptable, consideration of Exclusion of activities carried out by any part of a company on behalf of another part and Exemption for foreign end items containing USML parts and components, provided that their export etc had been properly authorised.

To the minimum the current brokering regulation definition of "brokering" should remain i.e. the phrase "who acts as an agent for others" and likewise should current regulation "in return for a fee, commission, or other consideration" be retained since this will give some guidance and indication to companies.

It could here be pointed to the *Black's Law Dictionary* definition of broker, "An agent employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation commonly called 'brokerage'." (see http://blackslawdictionary.org/broker/)

Regulations should be written to be clear and precise, to avoid confusion and misinterpretation, and should not need to be further explained by voluminous guidance not part of the regulations.

Our view is that the many other important reform initiatives ongoing from the U.S. administration should take precedent over finalizing this suggested rule, or at least time should be given before implementing the proposed rule to allow for inclusion of the many detailed comments to be expected on this for industry important question.

ASD is looking forward to a continuous dialogue regarding US Export Control reform efforts.

Very truly yours,

Michael von GIZYCKI

Secretary General

National Defense Industrial Association

2111 Wilson Boulevard, Suite 400
Arlington, Virginia 22201-3061
Tel: (703) 522-1820 • Fax: (703) 522-1885
Web page: http://www.ndia.org

The Voice of the Industrial Base

February 17, 2012

Mr. Robert S. Kovac
Managing Director
PM/DDTC, SA-1, Room 1200
Directorate of Defense Trade Controls
Bureau of Political Military Affairs
U.S. Department of State
Washington, DC 20522-0112

Subject: Response to the Proposed Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions - 76 FR 78578, RIN 1400-AC37

Dear Mr. Kovac:

The National Defense Industrial Association (NDIA), which is comprised of 1,761 corporate and 96,732 individual members, appreciates the opportunity to comment on the proposed revisions to the ITAR related to brokers and brokering activities. NDIA fully supports changes to regulations that can assist in stemming illicit brokering activities of defense articles and services that run counter to U.S. foreign policy and national security interests. However, NDIA believes that the proposed rule, as drafted, would broaden this regulation beyond both the scope and intent of the original legislation behind it, but without providing additional clarity and with the imposition of many unintended consequences. We believe these proposed changes could have a significant negative impact on legitimate, U.S. government approved defense trade with no corresponding enhancement to U.S. national security. The unintended consequences of the new rule include the broadening of the definition of brokering activities to extend to the entire defense supply chain, including subcomponent suppliers, resulting in potential liabilities that are beyond the ability of legitimate and licensed exporters to monitor; adding unnecessary duplicate licensing requirements; and requiring burdensome paperwork that discourages international cooperation and makes legitimate U.S. defense exports less competitive.

NDIA respectfully recommends that the proposed rule be postponed or withdrawn for a period of time sufficient to enable a new review based on input from the U.S. defense industry, our international allies and partner nations, and to provide a new review of the proposed rule by the Defense Trade Advisory Group (DTAG). Examples of NDIA member companies' concerns with the proposed rule are outlined below.

The proposed rule appears contrary to the intent of the U.S. Government's constructive efforts to accomplish needed export control reform. The broad expansion of who is a broker, coupled with the extended but vaguely defined range of brokering activities, appears to create an environment where almost any activity remotely associated with any defense company and its suppliers would be subject to this rule. The President and the Secretaries of State, Defense, and Commerce have publicly pushed for higher walls around fewer things. This proposed rule expands the current scope of regulatory oversight by removing the requirement that persons act as an agent or act for consideration (e.g., a fee). Under the wording of the proposed rule, almost any act, whether direct or indirect, substantive or inconsequential, could be regulated under the proposed rule. The parties impacted could be far removed from the sale, export, transfer, etc., and still be considered a broker. This puts higher walls around significantly more items and activities, many of which have nothing to do with facilitating the sale of a defense article. It introduces a higher degree of uncertainty with respect to brokering and has the potential to significantly increase the cost and time to industry with respect to compliance, while at the same time unnecessarily disadvantaging legitimate U.S. defense exports.

The proposed changes to §129.2(a), definition of Broker, defines a broker as a person who "engages in brokering activities" and removes any requirement or regard for compensation (for example, fee, commission, or other consideration) to be considered engaged in the business of brokering. The proposed definition appears to be significantly broader than the language in the Arms Export Control Act, which states a broker is a person who engages "in the business of brokering activities." A person who "engages in the business" is one who engages "in a regular and systematic course of conduct in order to obtain profit or gain."

Further, per Black's Law Dictionary, a "broker" is defined as "any person who acts as an agent for others" in negotiating or arranging contracts, purchases, sales or transfers of defense articles and services. This phrase is critical to ensure people who are not involved in the actual execution of a sale are not needlessly included in the broker definition by the regulations. Under the new rule, a broker would be anyone engaged in "brokering activities," regardless of whether he/she was acting as an agent. Removing the phrase "who acts as an agent for others" from the current definition of broker will broadly and unnecessarily expand the scope of persons and activities considered to be involved in brokering, potentially requiring any person assisting with a transaction or assisting a person who is assisting with a transaction to register. This includes a company that subcontracts any aspect of a defense transaction (e.g., part procurements from suppliers and certain warehouses) or even a trade association that arranges a discussion between the governments and industry representatives. These parties, regardless of how far they are removed from "the business of brokering activities" and although they do not seek a fee or commission could all be considered a "broker" under the proposed regulations.

The proposed change to §129.2(b) regarding brokering activities, is unnecessarily broad and difficult to interpret. The proposed change defines brokering activity to mean "*any action to facilitate* the manufacture, export, re-export, import, transfer, or retransfer of a defense article or defense service." We believe the phrase "any action to facilitate" is unreasonably vague to apply in an everyday practice. Likewise, the imprecise wording "*or otherwise assisting* in the purchase, sale, transfer, loan, or lease of a defense article or defense service" provided in the clarifying example at 129.2(b)(2), would appear to allow the DDTC to define a wide range of third parties

as brokers if they contract with or support a U.S. contractor of ITAR controlled items. Examples include manufacturing non-ITAR items incorporated into, or sold in a system with USML items, an airline that transports an individual to a meeting, or a hotel where that individual holds a meeting.

Proposed §129.2(d) would regulate brokering activities of foreign persons not located in the United States. This change appears to exceed the intent of the authorizing legislation with regard to regulating the brokering activities of foreign persons. The House report (104-519) states "Section 151 requires U.S. persons (and foreign persons located in the U.S.) involved in defense trade of U.S. and non-U.S. defense equipment or technology…" As such, it does not appear the legislation was intended to apply to foreign persons located outside of the U.S. Under the new regulatory proposal, foreign persons could be subject to U.S. brokering regulations for activities that take place outside the United States. In some cases, allied foreign nationals would be in violation of their own country's laws or European Union laws if they complied with U.S. the proposed new brokering regulations. This new regulatory registration requirement is significant. For example, a brokering registration (and the associated administrative burdens) could apply to a foreign person negotiating a deal between two foreign entities, if the article in question had any U.S. content. Or, a foreign person negotiating a deal for the import into the United States of a foreign item without U.S.-origin content would be subject to the new brokering requirements. In addition, the proposed regulations would require part-time employees and contractors of foreign subsidiaries, who generally make up a large percentage of the workforce within foreign subsidiaries, to register as a broker separately, even if the subsidiary is identified in the U.S. parent company's registration. The impact of this proposed regulation of foreign persons outside the U.S. is that it doubles or triples regulation on top of already adequately regulated activities. The ITAR already effectively regulates the lawful export, import, and transfer of defense articles and services. The proposed brokering rule would add registration and regulatory approval requirements that would not further increase national security but which would burden U.S. firms and make them less competitive.

The proposed changes to §129.6 and §129.7, regarding prior approval are expansive. These changes appear to negate the administration's past efforts to reduce unnecessary administrative burden by eliminating the prior approval requirement in §126.8. The proposed definition of a broker, coupled with who has to register as a broker and with this significant expansion in prior approval for brokering activities, would cause a significant increase in the submission of brokering license applications to the DDTC. This change also undoes the clear line regarding license applications that was set by the elimination of §126.8. With the current prior approval/notification requirement eliminated (except for 126.1 countries) and the prior approval for brokering limited to very small part of the USML, the bulk of industry could rely on drawing a line of requiring DDTC approval at the export of technical data, defense articles, and/or defense services. This proposed rule nullifies that line and will make the determination of who needs to obtain a license for prior approval, and more importantly, at what point in the business development and sale process they need to obtain it, a very complicated question.

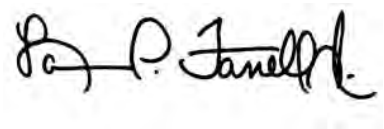
The proposed change to §126.13 would require all brokers to be listed on a license application. This is problematic given the extremely broad proposed definition of both a broker and brokering activities, including such remotely associated parties as a bank providing a

standard line of credit. It will be extremely difficult to just list registered brokers involved in any transaction. We believe it will be impossible to accurately list all brokers. In addition, would existing export licenses or approvals remain valid if the status of one or more brokers listed in the license changed, or if the U.S. exporter could not obtain from DDTC the current status of a broker's registration?

The proposed change ties registration to the definition of a regular employee. For contract employees, this definition requires they be located at the company facility to be considered a regular employee. This will create situations whereby such employees would be covered under a company registration for their brokering activities until they travel on company related business, at which point they would no longer be so considered, and have to immediately register with the DDTC as a broker. We recommend the definition of a regular employee be amended to remove the requirement regarding the employment facility. The proposed rule would also require that temporary employees working on an assembly line in the U.S. register as brokers.

NDIA's member companies have indicated many significant concerns with the proposed rule, including the ability of industry to successfully implement it. NDIA believes that the new definitions of brokering and brokering activities, coupled with the extraterritoriality expansion to include foreign persons outside the United States, would result in foreign companies designing out U.S. ITAR articles or seeking non-U.S. products to avoid the associated U.S. ITAR liability and cost. This will limit the willingness of foreign companies and individuals, potentially including some currently registered brokers, to support U.S. defense transactions. We urge the Department to further study this proposed rule and refer it to the Defense Trade Advisory Group in order to afford industry the opportunity to fully vet these changes and to ensure the national security objectives of the U.S. are met without legal objections and with the absolute minimum negative impact to U.S. industry.

Sincerely and respectfully,



Lawrence P. Farrell Jr.
Lt. General USAF (Ret)
President and CEO

Rolls-Royce North America Holdings Inc.
Rolls-Royce Corporation at Indianapolis
2001 S. Tibbs Ave, Speed Code S31D
Indianapolis, IN 46241 USA

February 17, 2012

Daniel L. Cook, Chief
Compliance and Registration Division
Office of Defense Trade Controls Policy
Department of State
12th Floor, SA-1
2401 E. Street NW
Washington DC 20037

Submittal via Regulations.gov Portal

Reference: RIN 1400-AC37 [Public Notice 7732]
Proposed Rule

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

Dear Mr. Cook,

Rolls-Royce North America Holdings Inc. (Rolls-Royce) is pleased to respond to the December 19, 2011 Federal Register Notice requesting comments on the proposed amendment of *Registration and Licensing of Brokers, Brokering Activities, and Related Provisions*.

Rolls-Royce appreciates the opportunity to review and comment on the proposed amendment to the International Traffic in Arms Regulations (ITAR) with regards to Brokering. Rolls-Royce agrees this is a critical regulation to protect U.S. foreign policy and national security interests by registering those individuals/entities involved in brokering activities. The understanding was to capture activities not included in licensing. Rolls-Royce also agrees the current brokering language required clarification.

The proposed language, however, causes considerable concern regarding the expanded scope for brokering. The following ramifications would occur if the proposed language is adopted without modification:

- Significant increase in burden on U.S. industry with regards to compliance costs and affect on foreign markets
- Increase in “ITAR free” products

- Significant increase for DDTC with regards to administration of brokers
- Significant increase on exporters and contractors to duplicate efforts with regards to licensing and brokering

The proposed language would appear to create new "brokering" activities throughout the Rolls-Royce supply chain, corporate structure and existing Authorizations. This in turn would duplicate existing safeguards to no apparent purpose. In particular, the proposed language appears to recast transactions in existing Distribution Agreements as "brokering," and to recast entities in those DA's as "brokers." This in turn creates a need to register and report which duplicates what already is required under a DA.

The following are Rolls-Royce specific comments and recommendations:

§129.2(a) – Broker
The removal of the term "who acts as an agent for others" significantly increases the scope of persons and activities believed to be involved in brokering. The definition of broker now lies in the definition of "brokering activities". The number of potential new registered "brokers" will add a significant administrative burden for DDTC, U.S. contractors and their foreign suppliers. The amount of potential violations, both by U.S. and non-U.S. citizens would also significantly increase as expanded scope will undoubtedly capture vast numbers not truly engaged in brokering. Rolls-Royce requests reconsideration of the proposed definition of Broker.

The term "in return for a fee, commission or other consideration" implied inclusion for Part 130. Removal of this term does not remove the ambiguity between duplication of efforts for Part 129 and Part 130. Rolls-Royce recommends clearer language to reduce duplication of reporting.

§129.2(a) – Brokering activities
The modification of the term "Broker" places additional weight on the term "Brokering activities". The scope of activities has been expanded as well by including the language "any action to facilitate". The expanded scope exposes the entire global industry to brokering. The lack of clarification will substantially increase administrative burden for DDTC, U.S. citizens and non-U.S. persons.

§129.2(e)(1)
The note following this exclusion from brokering activities states: "(e.g., not for export, which includes transfer in the United States to a foreign person)". This is part of the current language in §129(a)(2). This is in direct conflict with the definition of "Export" per §120.17 and is a source of confusion. Rolls-Royce recommends clarifying the exemption.

§129.3(b)(2)
The language included in this specific article is in direct conflict with §129.2(b)(1). This also conflicts with the direction in the proposed §129.5 which states "regardless of whether the person involved in such activities has registered or is exempt from registration under §129.3". The proposed §129.3(b)(2) does include language to clarify the exemption but leaves too much to interpretation. Rolls-Royce recommends clarification of §129.3(b)(2) with §129.2(b)(1).

§129.3(b)(3)
The proposed language lists additional exemptions from registrations including "their bona fide and full-time regular employees". This is in direct conflict with the recent language added per §120.39 which defines a regular employee. This also is in direct conflict with Article 3.9 of the Agreements Guidelines regarding Contract Employees. The addition of "bona fide" and "full-time" proposed in this clause may increase the burden on contract employees. Rolls-Royce suggests consistency with current regulatory language.

§129.3(b)(4)
The proposed language in this part includes reference to "bona fide" as per the previous recommendation. There is also a reference to "acting as an end user". The language goes on to exclude "acting as a reexporter or retransferor" and includes the term "generally exempt". These points seem to contradict §129.2 and are too vague and left open for multiple interpretations. Rolls-Royce recommends clarifying the proposed language to remove the ambiguity.

§129.3(e)
The proposed language includes "is generally a precondition". This language is ambiguous and leaves too much for interpretation. Rolls-Royce recommends a more concrete stance.

§129.7(a)
This entire entry should be deleted since those in violation of Part 129 would not seek prior approval.

§129.7(c)
Delete in its entirety due to the duplication of this part and §129.7(e).

§§129.8(b)(5) and 129.9(a)(5)
Both items may already be captured in Part 130. This appears to be a duplication of reporting for U.S. exporters. This is based on the broad scope included in the definition of "Brokers" and "Brokering activities".

Rolls-Royce appreciates the endeavor regarding Brokering and we share the commitment to improve and clarify the regulations. The proposed language, if adopted, will complicate, duplicate and weaken U.S. industry's efforts to market globally. Rolls-Royce does welcome the effort and acknowledges the enhanced direction provided in the proposed amendment.

Sincerely,

William J. Merrell
Vice President, Global Trade Compliance
Rolls-Royce North America Inc.

GE
Aviation

Kathleen L. Palma
Executive
International Trade Compliance

1299 Pennsylvania Ave NW
Washington, D.C. 20004-2414
United States of America

T 202 637 4206
F 202 330-5119
kathleen.palma@ge.com

Mr. Daniel Cook
Chief, Compliance and Registration Division
U.S. Department of State
Office of Defense Trade Controls Compliance
PM/DDTC, SA-1. 12th Floor
2401 E Street, NW, (SA-1)
Washington, D.C. 20037

February 16, 2012

Subject: ITAR Amendments — Part 129

Reference: Public Notice: 7732

Dear Mr. Cook:

The General Electric Company, acting through its GE Aviation business unit (GE), submits the following comments for the referenced proposed changes to 22 CFR Part 129, and other related changes. GE appreciates the Department's effort to clarify controls on brokers and brokering related to defense articles and defense services.

First GE believes that the Department's proposal makes several significant and positive changes, including:

- Allowing 3rd parties to be listed and identified as brokers on U.S. exporter registration statements; and
- Allowing companies registered under Part 122 and part 129 to consolidate into a single registration filing.

The key points and specific comments that we have regarding the Brokering Rule changes fall into two general categories:

Those involving the Scope of Persons and Activities Regulated under Part 129, and "must do" . . .

- Allow U.S. exporters registered pursuant to part 122 to include U.S. and foreign person third parties to be listed and identified as brokers in their Statements of Registration.
- Clearly state that activities undertaken within the corporate family of a single registrant do not qualify as brokering under part 129.
- Allow U.S. exporters to satisfy the part 129.6 prior approval requirement via a separate export approval (e.g., DSP-5 marketing license).
- Clarify the definition of "brokering activities" to ensure it does not sweep in unintended activities unrelated to facilitation of export transactions.

- As necessary, expand the current exemptions to ensure the brokering requirements do not extend into normal business activities not related to facilitation.
- Clarify that record-keeping requirements triggered by the brokering rules do not extend into activities unrelated to facilitation.

Those Necessary for Clarification of the Brokering Rules and "highly recommended" . . .

- Provide a definition of "affiliate" similar to the definition currently in ITAR Section 120.37.
- Expand the exclusion of attorney activities in 129.2(e)(3).
- Clarify the end-user activities that define applicability of the exemption under 129.3(b)(4).
- Clarify the activities that must be reported under 129.4(c)(ii).
- Clarify the broker parent rule in 129.4(d).
- Clarify the timing of notifications under 129.4(e).
- Clarify what parties require prior approval in 129.6.
- Clarify the information required to be provided under 129.8(b)(5).

SPECIFIC COMMENTS ON SCOPE OF PART 129 REQUIREMENTS

1. Part 129.2 Definitions.

GE believes that the definition of "broker" should track the language set forth by Congress in the Arms Export Control Act, 22 U.S.C. § 2778(b)(ii) to reflect Congress's intent to regulate persons who are engaged in the "business of brokering activities". Removal of the concept of acting "as an agent for others" from the current rule is not fully consistent with the statutory language. That language reflected a Congressional intent to regulate persons working as intermediaries in a "business" distinct from one of the direct parties to the transaction, not persons engaged in normal activities within such direct parties and having no intermediary function. However, the revised rule has the sweeping effect of causing officers, directors, employees, subsidiaries and other components within a business enterprise of commonly controlled entities acting in a capacity for the function of the enterprise as a whole to be potentially included in the class of persons regulated under Part 129. If DDTC does not like the term "agent" the use of the term "intermediary" could also fulfill the purpose of the statute. The potential increase in scope to a range of normal business activities without a more clear definition is concerning.

GE recommends simplifying the proposed regulation by changing 129.2(a) as follows (changes in **RED**):

> *"Broker* means any person (as defined by 129.14 of this subchapter) who engages in **the business of** brokering activities **as an intermediary for others with respect to the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service**."[1]

[1] Alternatively, a change to the definition of "brokering activities" could be made as follows: *"Brokering activities* means any action **as an intermediary for others** to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service. . . ."

GE also proposes a new subparagraph[2] be added to section (e) to clearly identify activities that would not be considered to be brokering activities under this rule, as follows:

> (4) "Activities undertaken by subsidiaries, joint ventures and other affiliates of persons registered pursuant to part 122 of this subchapter, listed and covered in their Statement of Registration, on behalf of any affiliate so listed."[3]

GE also urges the Department to consider defining "facilitate" so that Part 129 is not so overinclusive.

2. Part 129.3 Requirement to register.

If DDTC accepts GE's recommended changes above, there will be no need for an exemption for a company's affiliates or employees. Accordingly, reference to those persons should be removed from this section.

However an alternate approach would be to expand the exemption under Section 129.3(b) as follows (changes in **RED**):

> "(3) Persons registered pursuant to part 122 of this subchapter, ~~their U.S. person~~ **including** subsidiaries, joint ventures, and other affiliates listed and covered in their Statement of Registration, ~~their bona fide and full-time regular employees~~ and their Eligible (*see* § 120.1 of this subchapter) foreign person brokers of persons registered pursuant to part 122 of this subchapter listed and identified as their ~~exclusive~~ brokers in their Statements of Registration, whose brokering activities (A) involve ~~only such registered persons'~~ defense articles or defense services **of registered person (including affiliates)** that are currently subject to an export approval under this subchapter obtained by the part 122 registrant or will require such an approval prior to their export, or (B) **involve defense articles or defense services of other parties whose products and/or services are or are to be integrated with or incorporated into those of the registered person (including affiliates), or (C)** are on behalf of the part 122 registrant and involve only defense articles and defense services that are located and obtained from a manufacturer or source in the United States for export outside the United States under an export approval under this subchapter. Such persons are **deemed to be** registered under part 129 but are not required to submit a separate broker registration or pay a separate broker registration fee and are exempt from prior approval, and reporting , but are still required to perform the recordkeeping requirements of part 129 (*see* § 129.11 of this subchapter).
>
> Notes:

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d

[2] In addition to the new paragraph, appropriate section numbering changes will be required to sections (e) and (f).

[3] While similar, we do not suggest using the definition of "regular employee" in Part 120.39, which was designed for the context of substantive contacts in licensed transactions. Permanence and longevity of employment have no particular relevance to whether an individual is working for the employing company or working as an intermediary.

a. GE commends DDTC on its proposal to allow consolidation of part 122 and part 129 registration for a corporate family in a single registration, which should include US and foreign subsidiaries and affiliates as listed on a party's registration.

b. There is no need to specifically call out the employees of a registrant. It is well understood under parts 122 of the ITAR that there is no requirement for individual employees of a registrant to be separately authorized. Omitting references to employees has the virtue of keeping the language shorter and simpler. If DDTC feels compelled to reference employees specifically, the following complete phrase should be added, "their ~~bona fide and full time regular~~ employees and other individuals working exclusively at the company's direction." These changes are necessary to ensure that part time or short term employees performing normal business functions are not inadvertently required to register, obtain prior approval and/or report under Part 129.

c. GE also appreciates the ability to include certain foreign person brokers on the registration statement of the Part 122 registrant. However, GE recommends giving registrants the flexibility to include brokers that do not work exclusively for the registrant on their registration, with the understanding that such listing would make registrants accountable solely for the activities that the broker undertakes on behalf of that registrant.

d. Many U.S. products either incorporate or are incorporated into products of other businesses, including foreign parties. The participation of the broker in a transaction involving such products should not exclude a broker from the registrant's registration statement merely because of the integration of the registrant's products with others.

In addition to the above, GE recommends adding a new exemption under 129.3(b)(5) as follows:

"(5) Persons whose activities include only:
(i) Consultations unrelated to the sale or transfer of a defense article;
(ii) Hosting trade shows;
(iii) Activities of foreign government officials related to trade promotion."

3. Part 129.8 Procedures for obtaining prior approval.

Where an export approval is involved, the information sought by 129.8 is substantially the same information that is included in the license application submittal. Therefore, to avoid unnecessary duplication, GE recommends allowing U.S. exporters to satisfy the part 129.6 prior approval requirement via a separate export approval (e.g., DSP-5 marketing license).

GE recommends changing 129.8(a) as follows (changes in **RED**):

(1) "All requests for prior approval of brokering activities must be made to the Directorate of Defense Trade Controls and be signed by an empowered official~~, and include the following information~~. **The requirement of this section for prior approval shall be met by either of the following:**

a) A license or other authorization issued under this subchapter that includes all of the information identified in part 129.8(b)(1-5); or

b) A separate written request that includes the following information:

i. The applicant's name, , . . ;
ii. A certification on whether:
***
. . . enumerated in 120.27 of this subchapter."

CLARIFYING COMMENTS AND SUGGESTED CHANGES

GE recommends the following clarifications and other changes to the proposed rules:

1. Change 120.40 as follows (changes in **RED**):

> "An *affiliate* of a registrant is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such registrant. **Control means one or more 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 person owns 25 percent or more of the outstanding voting securities unless another person controls an equal or larger percentage**."

The scope of the definition of "affiliate" turns in part on control. "Control", however, is a term that can have different meanings in different contexts. GE recommends the clarification of the meaning of this term in Section 120,40, by adding a definition similar to Section 120.37.

2. Change 129.2(e)(3) as follows (changes in **RED**):

> "Activities that do not extend beyond administrative services, such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, or activities by an attorney that do not extend beyond providing legal advice to ~~a broker~~ **persons involved in an export**. "

Business today can involve multiple parties and complex regulatory regimes. Attorneys, both outside and in-house, are involved in most aspects of a transaction and are likely engaged by every party to an export. Exempting only those attorneys providing advice to the "broker" in a transaction unnecessarily sweeps in attorneys who provide legal advice given to the other parties. There is no more need to oversee such advice for other parties under the broker rules than there is for brokers themselves.

3. Change 129.3(b)(4) as follows (changes in **RED**):

> "(4) Persons . . . exported pursuant to a license, ~~or~~ approval **or exemption** under parts 123, … ."

This is to enable inclusion of persons who receive items lawfully under an applicable exemption.

4. Change 129.4(c)(ii) as follows (changes in **RED**):

> "(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 . . . under the laws of a foreign country~~."

It is not reasonable to expect parties to determine what if any foreign rules may apply to their activities without a specific enumeration of laws that may be potentially applicable.

5. Change 129.4(d) as follows (changes in **RED**).

"(d) "A Broker . . .. If the broker **parent** 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 recordkeeping requirements in § 129.11 of this subchapter. The foreign person broker **parent** is subject to the same eligibility and certification criteria as the registrant;"

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This paragraph is directed to brokers who are parent companies. These changes are to make that clear in the application of the entire paragraph.

6. Change 129.4(e) as follows (changes in **RED**).

"(e) A registrant must, within five days of **receiving notice of** the event, provide the Directorate of Defense Trade Controls a written notification, signed by a senior officer . . .."

.

Given the complexity of business enterprises and business relationships world-wide, the cognizant individuals within the registrant who are responsible for providing this notification may not become aware of the event immediately when it involves a third party who is listed on the registrant's registration statement as a broker.

7. If Section 129.4(f) is intended to apply to brokers listed on a registration statement, it is unduly burdensome as it will require registrants to maintain an ability to obtain advance information about sales or transfers involving third parties listed as foreign brokers. Most sophisticated businesses maintain a high level of confidentiality when it comes to such transactions. Furthermore, current DDTC processes involving name changes and change in control of persons listed on licenses already provide DDTC with the ability to monitor ownership changes involving authorized persons. GE believes it would be simpler to address DDTC's concerns by creating a regulatory provision that would automatically invalidate any broker registration or approval if a transfer is made to any person or country proscribed in 126.1.

GE recommends deleting section 129.4(f) in its entirety and replacing it with the following:

"(f) Any registration or approval under this Part 129 shall immediately be deemed invalid with respect to any parent, subsidiary, joint venture or other affiliate listed as a broker on any Statement of Registration pursuant to Section 129.3 if any sale or transfer of ownership or control of any person so listed is made to any person referred to in 126.1 of this subchapter, without first obtaining the approval of the Directorate of Defense Trade Controls."

8. Change 129.6 as follows (changes in **RED**):

"Except as provided in § 129.7 of this subchapter, no person who is required to register as a broker**, or who is exempt from registration,** pursuant to § 129.3 of this subchapter may engage in the business of brokering activities . . .."

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This clarification addresses what seems to be an oversight.

9. Change 129.8(b)(5) as follows (changes in **RED**):

"(5) The type of consideration received or expected to be received, directly or indirectly **by the broker** (consideration includes, for example, 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): . . .."

The reporting of fees and commissions is already covered by Part 130. We can see no added benefit to requiring it to be reported again under these rules.

Thank you for the opportunity to provide you our comments. If you have any questions or require additional information concerning this submission, please contact the undersigned at (202) 637-4206 or by e-mail at: kathleen.palma@ge.com or Mr. George Pultz at (781) 594-3406 or by email at george.pultz@ge.com.

Sincerely,

Kathleen Lockard Palma
Executive
International Trade Compliance

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

Section of International Law
740 15th Street, NW
Washington, DC 20005
Phone: (202) 662-1660
FAX: (202) 662-1669
http://www.americanbar.org/intlaw

February 21, 2012

VIA eRulemaking Portal: Docket No. DOS-2011-0146-0001

Mr. Daniel L. Cook
Chief, Compliance and Registration Division
Office of Defense Trade Controls Compliance
U.S. Department of State
12th Floor, SA-1,
2401 E Street, N.W.
Washington, DC 20037

REF: RIN 1400-AC37

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

Dear Mr. Cook:

The American Bar Association ("ABA") Section of International Law ("Section") appreciates the opportunity to comment on the proposed rule published by the U.S. Department of State, Directorate of Defense Controls ("DDTC") on December 19, 2011 (76 Fed. Reg. 78,578) to revise the International Traffic in Arms Regulations ("ITAR") concerning the licensing of brokers, brokering activities, and related provisions (the "Proposed Rule").

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA, and accordingly, they should not be construed as representing the policy of the ABA itself.

The ABA is the largest voluntary professional association in the world. The Section, with over 20,000 members, is the ABA leader in the development of policy in the international arena, the promotion of the rule of law, and the education of international law practitioners. Many of its members are experienced in the export control laws of the United States and other countries.

I. EXECUTIVE SUMMARY

The Section applauds DDTC's efforts to revise the brokering rules. As DDTC explained in a prior draft of the proposed rule in 2009, the need to revise these requirements is driven in large part by the need to "reduce the potential for duplicative licensing, to simplify procedures and to reduce unnecessary burdens on industry."[1] We support these policy objectives, which we note DDT C has not stated as forcefully in the current Proposed Rule.

Unfortunately, we believe that the current Proposed Rule fails to achieve these objectives, and in fact would greatly increase the potential for duplicative licensing, further complicate registration and licensing procedures, and significantly increase burdens on industry. As such, we are grateful for this opportunity to express our concerns with the Proposed Rule, as well as to offer recommendations to help DDTC achieve its stated objectives.

First, we are concerned that the definitions of "broker" and "brokering activities" in the Proposed Rule are overbroad and unconstitutionally vague. As discussed in Part III below, the proposed definitions would create confusion and uncertainty, because they do not clearly set forth the activities that constitute "facilitation" of defense-related activities, and because they remove well-settled, legally justified, and important limitations of the term "brokering" to the activities of persons who serve in an intermediary role on behalf of another person for consideration. DDTC has authority under the Arms Export Controls Act ("AECA") to interpret the scope given to the term "brokering activities" more narrowly than it proposes, and should do so for a number of legal reasons. Accordingly, we urge DDTC to modify the Proposed Rule to state expressly that a "broker" remains, as commonly understood, a person who acts on behalf of another, as an intermediary and for compensation.

A related concern with the Proposed Rule is DDTC's interpretation of the AECA language of being "in the business" of brokering activities. DDTC has stated the position that merely engaging in one instance of the enumerated activities is sufficient to constitute being in the "business" of brokering. This view is inconsistent with the ordinary meaning of being in a particular business, which involves an intent to engage in a regular course of conduct for livelihood or profit. Under DDTC's approach, anyone could become an ITAR-regulated "broker" on an incidental basis, perhaps without even recognizing that he or she is acting in such a capacity.

The Section also is concerned with the extraterritorial jurisdiction elements of the Proposed Rule. The extraterritorial application of the brokering registration, prior approval, reporting, and recordkeeping requirements to foreign persons located outside the United States is inconsistent with the AECA, relevant U.S. jurisprudence interpreting the AECA, and norms of international law, as the ABA previously has stated in correspondence to the U.S. Department of State on brokering issues, dated February 27, 2008 (copy attached as Exhibit 1). While DDTC has specified in the Proposed Rule four situations when a foreign person's brokering activities are subject to regulation under the ITAR, at least two and perhaps three of those situations are inconsistent with existing law and the authority that Congress has granted to DDTC. The broad application of the brokering registration requirement to foreign persons located outside the United States is unnecessary, because all persons remain subject to the provisions of the AECA and ITAR requiring a State Department license or other approval for the export or reexport of U.S. origin defense articles and services. *See* ITAR § 120.17.

The Proposed Rule lacks clarity concerning the scope of responsibility for the acts of brokers that the proposed rule would impose on an exporter. Accordingly, the Section recommends that DDTC identify precisely the circumstances that trigger an exporter's responsibility for a broker's compliance, and explain the specific ITAR-related actions of a broker for which an exporter bears responsibility. This should be expressed through a separate regulatory provision that explains the meaning of the "broker" language in proposed ITAR § 127.1(b).

The Section has the following additional comments and concerns regarding certain other sections of the Proposed Rule:

(1) The exclusion from brokering for activities in the United States contained in proposed Section 129.2(e)(1) should be consistent with the definition of "export" and should apply both to U.S. and foreign brokers.

(2) The exclusion from brokering activities relating to legal advice provided to a broker by an attorney in proposed Section 129.2(e)(3) should be revised to clarify that brokering activities do not include any kind of legal advice or any export compliance services provided by an attorney to a client.

(3) Proposed Section 129.3(b)(3) (Exemptions from Requirement to Register) should be amended to clarify that foreign subsidiaries can register with their parent companies and should allow non-exclusive brokers to register with more than one U.S. manufacturer.

(4) Proposed Sections 122.2 (Submission of Registration Statement) and 122.4 (Notification of Changes) should be amended to impose notification requirements on the foreign brokers, not on ITAR Part 122 registrants.

(5) Consistent with the language of the AECA and Congressional intent, proposed Section 129.4 should be amended to replace a certification about unnamed foreign criminal statutes with specific descriptions of the foreign laws in question.

All of the foregoing recommendations are discussed in more detail below.

II. BACKGROUND

The brokering requirements are set forth in ITAR Part 129, which came into effect following a 1996 amendment to Section 38 of the AECA.[1] The AECA brokering amendment is codified at 22 U.S.C. § 2778(b)(1)(A)(ii) and reads in its entirety as follows:

> (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)

[1] Section 38 of the AECA, 22 U.S.C. 2778, was amended to add brokering requirements by Section 151 of Pub. L. No.104-164 (1996); the ITAR was subsequently amended (62 Fed. Reg. 67276 (Dec. 24, 1997)).

> of this section, 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.[2]

The AECA neither makes reference to nor defines a "broker," but instead regulates persons who engage in the "business of brokering activities." The term "brokering activities" is not defined, but examples are given to illustrate what types of activities fall within the scope of the term:

> [s]uch 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.

As currently promulgated by DDTC, ITAR § 129.2(a) defines a "broker" as:

> any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration.

And ITAR § 129.2(b) currently defines "brokering activities," in pertinent part as:

> acting as a broker as defined in § 129.2(a), and includes the financing, transportation, freight forwarding, or taking any other action that facilitates the manufacture, export, or import or [*sic*] a defense article or defense service, irrespective of its origin.

Over the years since the brokering requirements took effect, DDTC has acknowledged the need to provide greater clarity on their intended meaning and scope. In a report to Congress in 2003, DDTC announced that it was beginning a review of ITAR Part 129 to accomplish that objective.

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[2] 22 U.S.C. § 2778(b)(1)(A)(ii).

Six years later, in December 2009, DDTC published on its website an unofficial draft Federal Register notice of a proposed comprehensive rewrite of Part 129.[3] At the same time, DDTC also published on its website recommendations of the Defense Trade Advisory Group ("DTAG") concerning the draft rule,[4] but the 2009 draft rule was never officially published for comment, and in its place the Proposed Rule was published on December 19, 2011.

Section 129.2(a) of the 2009 draft rule would have redefined a "broker" merely as any person "who engages in brokering activities," deleting the term "acts as an agent for others . . . in return for a fee, commission, or other consideration" from the current definition. And Section 129.2(b) of that rule defined "brokering activities" as taking:

> any action of an intermediary nature to facilitate the manufacture, export, reexport, 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 described above.

In the Supplementary Information section of that draft rule, DDTC explained that one of the goals of the proposed ITAR amendment was to "reduce unnecessary burdens on industry" and that the revised definitions were intended to "more closely track the statutory definition of brokering activities" as well as to "clarify that brokering activities consist of 'any action of an intermediary nature' to facilitate a defense article or defense service transaction."

In the Proposed Rule, DDTC uses the same definition of a "broker" as proposed in the 2009 draft: namely, any person "who engages in brokering activities." Like the 2009 draft rule, the Proposed Rule deletes the term "acts as an agent for others . . . in return for a fee, commission, or other consideration" from the current definition. Section 129.2(b) of the Proposed Rule defines "brokering activities" as:

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[3] Draft Federal Register Notice, *supra* note 1.

[4] Annotated Draft Federal Register Notice, *Amendments to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, Related Provisions, and Other Technical Changes* (undated), http://www.pmddtc.state.gov/DTAG/documents/Part129BrokeringComments.pdf; Defense Trade Advisory Group, *Part 129 Working Group Comments to DDTC Proposed Rule* (December 4, 2009), http://www.pmddtc.state.gov/DTAG/documents/BrokeringWGPresentation.ppt. The DTAG is a federal advisory committee composed of private sector representatives who advise the State Department on U.S. defense trade policy, law, and regulation. For more information on the DTAG, *see* generally DDTC's website at http://www.pmddtc.state.gov/DTAG/index.html.

any action to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service. Such action includes, but is not limited to:

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

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

DDTC explains that the Proposed Rule seeks to "more closely track the statutory definition of brokering activities in the Arms Export Control Act, which provides that 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. The proposal deletes 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." *See* 76 Fed. Reg. at 78,578.

Finally, Section 129.2(c) of the Proposed Rule provides that "engaging in the "business of brokering activities requires only one action as described above" (*i.e.*, only one instance of any of the specific actions listed in proposed Section 129.2(b).

III. THE PROPOSED APPROACH TO "ENGAGE IN THE BUSINESS OF BROKERING ACTIVITIES" IS OVERBROAD.

The Section has two concerns with the proposed approach to implementing the AECA phrase "engaged in the business of brokering activities." First, and most importantly, DDTC has authority to interpret the scope given to the term "brokering activities" more narrowly than it proposes, and should do so for a number of legal reasons. Second, the AECA term "business of brokering activities" should be interpreted to include only persons who engage in brokering activities as a regular course of trade or business with the principal objective of livelihood and profit, and not persons who only engage in only one instance of brokering activities.

A. "Brokering Activities" Should Be More Narrowly Defined.

1. DDTC Does Not Have to Define "Brokering Activities" Broadly.

The AECA does not require DDTC to define "brokering activities" in the ITAR broadly to include "any action to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service" as well as "assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service."

While the AECA states that "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," DDTC retains discretion to identify which activities other than "financing, transportation, [and] freight forwarding" constitute an "action that facilitates the manufacture, export, or import of a defense article or defense service." In other words, "financing, transportation, [and] freight forwarding" are specifically identified by the AECA as constituting

"brokering activities." But for all other activities, DDTC has discretion to identify those activities that "facilitate the manufacture, export, or import of a defense article or defense service" and therefore constitute "brokering activities."

The Proposed Rule recognizes that DDTC has such discretion, as it interprets the AECA to allow DDTC to exclude "administrative services," "translation services," and certain legal services from the scope of "brokering activities." As a matter of statutory interpretation, the exclusion of these services necessarily depends on the agency's interpretation of the AECA to mean that these services do not "facilitate the manufacture, export, or import of a defense article or defense service" and therefore are not "brokering activities." Accordingly, the Proposed Rule properly recognizes that DDTC has discretion to determine those activities that do, or do not, "facilitate the manufacture, export, or import of a defense article or defense service."

2. DDTC Should Interpret "Brokering Activities" in Light of the Plain Meaning of the Term.

As a matter of statutory interpretation, it is appropriate to construe a statutory definition of a term with reference to its plain meaning.[5] The appropriate scope of activities that "facilitate the manufacture, export, or import of a defense article or defense service" should be determined with reference to the plain meaning of the term "brokering activities."

The plain meaning of "brokering activities" is that such activities involve acting as an intermediary in return for compensation. Black's Law Dictionary (9th ed. 2009) defines a "broker" generally as:

> [a]n agent who acts as an intermediary or negotiator, esp. between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation.

The Black's Law Dictionary definition continues, in pertinent part, to provide that:

> "[t]he most important determining factor of what constitutes a 'broker' is whether the party is dealing for itself or for another. A broker may, by contract, have title to property pass through it (though usually it does not), and it may, by contract, collect from the consumer, but a broker does not deal on its account. Two preliminary requirements must be met for a finding that an individual is acting as a broker: (1) the person is acting for compensation; and (2) the person is acting on behalf of someone else." 12 Am. Jur. 2d Brokers § 1 (1997).

Accordingly, the plain meaning of "brokering activities" would include the elements both of acting as an intermediary (for another person) and acting for compensation.

3. The Term "Brokering Activities" Should Be Interpreted in Light of the Meaning of the Terms That Accompany It in the Statute.

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[5] *See* NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 27:2 (7th ed. 2011) ("The presumption should be that a fair interpretation of the meaning of words as defined in the definition section should control.").

Accepted rules of statutory interpretation provide that a word may be defined by an accompanying word, and ordinarily the coupling of words denotes an intention that they should be understood in the same general sense.[6]

The statutory phrase "engages in the business of brokering activities" means that "brokering activities" should be interpreted to include a necessary element of "compensation." As discussed further in Section III.B below, the term "engage in business" generally is defined in U.S. statutes and regulations to include an element of seeking profit. It would be consistent with the phrase in which "brokering activities" is contained, and therefore appropriate, for DDTC to interpret "brokering activities" to include as a necessary element that the activity is undertaken for compensation.

Other relevant terms include "financing," "transportation," and "freight forwarding," as these are activities that the AECA specifically identifies as "brokering activities." The term "brokering activities" should be construed in light of the specific activities that Congress has identified as constituting "brokering activities." Importantly, each of these activities is an enterprise that is normally carried out by one person on behalf of another, and for compensation. The presence of these terms further confirms it would be appropriate for DDTC to interpret "brokering activities" to cover only a person acting for another person, for consideration.

4. DDTC Should Interpret "Brokering Activities" in a Manner That Is Consistent with Its Long-Standing Practice.

The current ITAR definition of "broker" – dating back to 1997 – states that a "broker" is one "who acts as an agent for others . . . in return for a fee, commission, or other consideration." As discussed in Part II above the Proposed Rule would remove from this definition the limiting language "acts as an agent for others . . . in return for a fee, commission, or other consideration," with the stated goal of tracking more closely the statutory definition of brokering activities.

Long-standing agency interpretations of the statutes they administer receive substantial deference. Accordingly, DDTC would be entitled to substantial deference if it exercises its discretion to continue to interpret the term "brokering activities" to mean activities carried out, for consideration, by one person acting as the agent of another person.

In contradistinction, when an agency reverses its long-standing interpretation of a statute, and promulgates new regulations reflecting a changed interpretation that is inconsistent with past practice and for which no adequate explanation is provided, as DDTC proposes to do in the Proposed Rule, the new regulations may not benefit from the same degree of deference. This well-settled position was stated in a decision by then-Circuit Court Judge Ruth Bader Ginsburg in which she rejected the view of the Office of Foreign Assets Control ("OFAC") regarding the scope of its authority under the Trading with the Enemy Act ("TWEA"). *American Airways Charters, Inc. v. Regan*, 746 F.2d 865 (D.C. Cir. 1984). In ruling that OFAC's interpretation of its authority was overbroad in light of Congressional intent in enacting the statute, the court held that:

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[6] *See, e.g.,* NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 47:16 (Thomson/West, 7th ed. 2007). *See also Holloway v. United States*, 526 U.S. 1, 6, 119 S. Ct. 966, 969, 143 L. Ed. 2d 1 (1999) (statutory term should be interpreted based on its placement and purpose in the statutory scheme).

> Even if OFAC's view of the law did not implicate constitutional concerns, the agency's insistence that we owe its construction deference would be dubious. Far from representing a consistent, longstanding agency interpretation, OFAC's current position apparently represents a sharp departure from prior practice.

Id. at 874. In doing so, Judge Ginsburg cited a 1981 decision of the U.S. Court of Appeals for the Fifth Circuit, which held that "the Treasury's interpretation of its authority [under TWEA] is neither contemporaneous with the statute's enactment, nor consistent with its earlier views. These facts considerably reduce the deference paid to its current position. *Tagle v. Regan*, 643 F.2d 1058, 1068 n.13 (5th Cir. 1981)." *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (stating that unexplained inconsistency in a new interpretation of a statute by an agency may be deemed to be arbitrary and capricious).

The Section recognizes that DDTC has had concerns with the term "agent," as this term may be interpreted to limit the scope of brokering activities to situations in which two parties have expressly created an agency relationship between them, with the broker agreeing to act as the agent of another party, as the broker's principal. That interpretation may not be consistent with Congressional intent, and we support using an alternative term such as "intermediary" rather than "agent." The term "intermediary" is consistent with DDTC's long-standing interpretation of the term "agent" in this context as extending beyond the principal-agent relationship. In the 2009 draft rule, DDTC proposed using the term "action of an intermediary nature" to define the term "brokering activities."

5. DDTC Should Define "Brokering Activities" in a Manner That Is Not Unconstitutionally Vague.

If DDTC does not place appropriate boundaries on the term "brokering activities," and defines the term as it has proposed to cover any "action to facilitate" a broad range of activities relating to defense articles and services, there is a substantial concern that the rule would be unconstitutionally vague.

The AECA does not define the term "facilitate." To interpret this term, persons subject to the ITAR would have to consider the plain meaning of "facilitation." "Facilitation" itself is defined in Black's Law Dictionary as:

> [t]he act or an instance of aiding or helping; esp. in criminal law, the act of making it easier for another person to commit a crime.

In the context of brokering, just about any activity linked to defense trade could be interpreted to "aid" or "help" the manufacture, export, import or transfer of a defense article or defense service. Although Section 129.2(e) of the Proposed Rule excludes from the scope of brokering "[a]ctivities that do not extend beyond administrative services," many non-administrative actions could be viewed as "aiding" in defense trade. For instance, if a supplier sells non-ITAR items to a defense company, this appears to aid the company's defense business. Similarly, if a hotel hosts a defense trade conference, a consultant assists with defense trade compliance, or an advertising agency that assists a defense contractor with preparing glossy brochures to be used at the Paris Air Show, these actions appear to aid defense trade. Innumerable additional examples could be given. Absent

further clarity, it would be extremely difficult for persons to conform their conduct to the proposed law without effectively boycotting all defense companies.

When a law does not clearly explain the practices that are required or prohibited so that a reasonable person is able to understand what is required in order to comply, and when such a law instills a fear of unpredictable enforcement, it is susceptible of a challenge under the Constitution as being void for vagueness. *See, e.g., United States v. Williams*, 553 U.S. 285, 305 (2008) (a "conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement"). The proposed definition of brokering activities carries both criminal and civil penalties for noncompliance, while failing to supply any prescriptive behavioral perimeters, and thus falls squarely within *Williams*.

As noted earlier, the Proposed Rule defines "brokering activities" to include "any action to facilitate the manufacture, export, reexport, import, transfer, or retransfer of a defense article or defense service," and also to include "otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service." These phrases are boundless, leaving reasonable persons unable to determine whether they face potential liability for engaging in activities that DDTC may determine serve to "facilitate" or "assist" defense trade.

To avoid unconstitutional vagueness in its rule, DDTC should exercise its authority to interpret and apply the AECA more narrowly.

B. The Proposed Rule's Approach to the "Business of Brokering Activities" Is Contrary to the AECA.

The Proposed Rule's approach to the "business of brokering activities" is inconsistent with the express terms of the AECA. Proposed ITAR § 129.2(c) provides that being "in the business of brokering activities" requires only one instance of any enumerated activity. While the AECA does not define what Congress meant by being "in the business" of brokering activities, interpreting this term to apply to a single action would be inconsistent with the ordinary meaning of this term and its meaning in other statutes and regulations, and would compound the potential unconstitutional vagueness of the Proposed Rule.

The language in the Proposed Rule is inconsistent with the plain meaning of being in the business of doing something, which involves an intent to engage in a regular course of conduct for profit. Black's Law Dictionary (9th ed. 2009) defines "business" as "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain."

In a number of other statutes Congress has provided a definition of being "in the business" of a particular activity, and these definitions reflect the plain meaning of that term as engaging in a regular and systematic course of conduct in order to obtain profit or gain. For example, the Gun Control Act applies to a dealer that is "engaged in the business of selling firearms at wholesale or

retail."[7] 18 U.S.C. § 921(a)(11)(A). This Act defines "engaged in the business" to mean that a person "devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases or firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." 18 U.S.C. § 921(a)(21)(C) (emphasis added). In other contexts, U.S. law similarly considers persons as engaged in a "business" where they are regularly or frequently undertake activity in order to obtain profit or gain.[8]

DDTC similarly should interpret the phrase "engages in the business of brokering activities" to include only persons who engage in brokering activities as a regular course of trade or business with the principal objective of livelihood or profit. It is inconsistent with the plain meaning of that language in the AECA for the Proposed Rule to define a person to be in the "business of brokering activities" based upon a single action to "facilitate" defense trade.

Finally, the approach in the Proposed Rule would compound the problem of unconstitutional vagueness described above. Persons would potentially face civil and criminal liability for a single action, without having taken any actions demonstrating an intent to engage in brokering as a regular course of conduct and for compensation.

IV. BROKERING REGULATORY REQUIREMENTS SHOULD NOT BE APPLIED TO FOREIGN PERSONS LOCATED OUTSIDE OF THE UNITED STATES.

The extraterritorial application of the brokering registration, prior approval, reporting, and record keeping requirements to foreign persons located outside the United States is inconsistent with the AECA, relevant U.S. jurisprudence interpreting the AECA, and norms of international law. While DDTC has specified in the Proposed Rule four situations when a foreign person's brokering activities are subject to regulation under the ITAR, at least two and perhaps three of those situations are inconsistent with existing law and the authority Congress has granted to DDTC.

Proposed Section 129.2 establishes a new definition of "broker" and "brokering activities" subject to ITAR regulation. Subsection (d) identifies the scope of brokering activities by U.S. and foreign persons that are subject to the ITAR as follows:

> (1) by any U.S. person wherever located; (2) by any foreign person located in the United States; (3) by any foreign person located outside the United States involving a U.S.-origin

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[7] Section 922(a)(1)(A) of the Gun Control Act of 1968 provides that it is unlawful for any person except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.

[8] *See* 47 U.S.C. § 231(e)(2)(B) (defining term "engaged in the business" to mean: "a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)"; 24 C.F.R. § 3400, App. B ("An individual who acts (or holds himself or herself out as acting) as a loan originator in a commercial context and with some degree of habitualness or repetition is considered to be 'engaged in the business of a loan originator.' An individual who acts as a loan originator does so in a commercial context if the individual acts for the purpose of obtaining anything of value for himself or herself, or for an entity or individual for which the individual acts, rather than exclusively for public, charitable, or family purposes.").

> defense article or defense service; (4) by any foreign person located outside the United States involving the import into the United States of any defense article or defense service; or (5) by any foreign person located outside the United States acting on behalf of a U.S. person.

Under the international law principle of "nationality" jurisdiction, DDTC can assert the authority, as conferred by the AECA, to regulate the activities of U.S. persons (defined to include U.S. citizens, U.S. lawful permanent residents, and other U.S. protected individuals as defined under U.S. immigration laws), wherever they may be. *See* Restatement (Third) of the Foreign Relations Law of the United States (the "Restatement (Third)"), Section 402(2). Under the "territorial" principle of jurisdiction, which holds that a sovereign can prescribe and apply its laws to conduct within its territory, foreign persons who are physically present in the United States are clearly subject to regulation by DDTC. *See* Restatement (Third), Section 402(1). But extraterritorial application of the brokering requirements generally is inconsistent with the territorial principle. Since Sections 129.2(d)(3)–(d)(5) apply the extraterritorial principle to regulate the conduct of foreign persons outside of the United States, they are in conflict with the general formulation of the territorial principle.

Proposed Sections 129.2(d)(3)–(d)(5) also are inconsistent with standard principles of statutory construction, the legislative history of the AECA, and applicable jurisprudence. Under standard principles of statutory construction, Congress legislates with a presumption against extraterritoriality. *See, e.g., EEOC v. Arabian Am. Oil. Co. ("ARAMCO")*, 499 U.S. 244, 248 (1991). Federal laws apply only within the territorial jurisdiction of the United States unless Congress provides "affirmative evidence" to the contrary. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176 (1993). This intention must be "clearly expressed." *ARAMCO*, 499 U.S. at 248.

The text of the AECA is silent on the extraterritorial application of the brokering provisions, and therefore does not provide any "affirmative evidence" or "clear express[ion]" that Congress intended the brokering requirements to apply to foreign persons who are outside the territorial jurisdiction of the United States. While the AECA refers to "every person" for purposes of regulating conduct, Congress did not intend the brokering registration provisions to apply generally to foreign persons outside the United States, since such a reading would compel DDTC to regulate foreign persons brokering foreign-origin defense articles affecting U.S. foreign commerce and therefore having merely an indirect effect within the territory of the United States. This is an untenable approach, which will engender significant conflicts with allied countries, and will interfere with the legitimate exercise of sovereignty by many governments. As articulated in Section 403(2) of the Restatement (Third), compelling factors against extraterritorial exercise of jurisdiction include: "[t]he extent to which other states regulate such conduct and the degree to which such regulation is generally accepted; [t]he extent to which another state may have an interest in regulating the activity; and [t]he likelihood of conflict of the proscription with regulation by another state." These factors provide a strong basis for a limited reading of the jurisdictional reach of DDTC over "every person."

Analysis of the legislative history of the AECA further reveals the absence of any evidence indicating Congressional intent to apply the brokering registration requirements extraterritorially. The House Report on the brokering amendment stated that the AECA as then in effect "does not authorize the Department to regulate the activities of U.S. persons (*and foreign persons located in the United States*) brokering defense transactions overseas (except for transactions involving a small number of terrorist countries). . . . This provision provides those authorities." House Report 104–519, Part 1,

at 11–12 (emphasis added). As indicated by this language, the AECA's brokering registration requirements must be limited in its extraterritorial application to two classes of persons: (1) U.S. persons, wherever located; and (2) foreign persons located in the United States (who may engage in brokering activities abroad).

Judicial precedent also supports the conclusion that the brokering registration requirements are not intended to apply to foreign persons located outside of the United States. In *United States v. Yakou*, the U.S. Court of Appeals for the District of Columbia affirmed the dismissal of an indictment, on the grounds that the "aiding and abetting" provision in the AECA brokering amendment did not apply to a foreign person acting outside the United States. The Court recognized that the United States did not argue that the defendant, Yakou, was "otherwise subject to the jurisdiction of United States." *United States v. Yakou*, 393 F.3d 231 (D.C. Cir. 2005), as amended by court order.

In its ruling, the Court discussed the presumption against extraterritoriality, and the text and legislative history of the brokering statute, and concludes:

> In the Brokering Amendment, then, Congress was concerned with both United States brokers of arms and foreign brokers of arms located in the United States, but not with foreign brokers located outside the United States, see id., even though each type of individual could be involved in brokering activities affecting the United States. . . .
>
> Congress has not expressed with the requisite clarity that it sought to apply the Brokering Amendment and, by extension the ITAR's brokering provisions, in such an extraterritorial manner [i.e., to apply to "non-U.S. persons located and acting outside the United States."] [citations omitted] . . . Accordingly, while the Brokering Amendment and the ITAR have extraterritorial effect for "U.S. persons," they do not have such effect for "foreign persons," like Yakou, whose conduct occurs outside the United States.

Proposed Sections 129.2(d)(3)–(d)(5) do not comport with the language of the AECA or Congressional intent when amending the AECA to authorize the regulation of brokering. Nor are they consistent with the *Yakou* decision regarding the limits to extraterritorial application of U.S. regulatory jurisdiction under the AECA. This conclusion is buttressed by the specific language of the proposed regulation.

For example, Section 129.2(d)(3) would cover a foreign person located outside the United States "involving a U.S.-origin defense article or service." This provision would apply to foreign persons who are supporting or facilitating the export of non-U.S. origin defense articles where those defense articles contain even small amounts of U.S. content or are produced using some limited amount of U.S. technology or technical assistance. The proposed language goes beyond the expressed Congressional intent and the *Yakou* decision.

Proposed Section 129.2(d)(5) would regulate foreign persons outside the United States "acting on behalf of a U.S. person." This provision creates concern because the term "acting on behalf of" is devoid of definitional parameters and therefore can be interpreted to mean almost anything. Again, this provision is inconsistent with the express intent of Congress and the *Yakou* decision.

As currently formulated in the Proposed Rule, and as set forth above, the imposition of brokering registration requirements on foreign persons outside of the United States cannot be justified by the

"effects doctrine." However, even assuming the existence of a premise for jurisdiction to prescribe foreign transaction controls under the "effects doctrine," and extension of the territoriality principle, countervailing considerations of international comity require deference to the territorial state. Pursuant to Section 403 of the Restatement (Third), the following factors should be considered in determining whether a state may exercise jurisdiction to regulate an activity having connections with another state, even where a basis to proscribe conduct may exist:

(1) The extent to which the proscribed activity has a substantial, direct and foreseeable effect within the proscribing state's territory.

(2) The extent to which there are connections, such as nationality, residence, or economic activity between the proscribing state and the person principally responsible for the activity or the persons sought to be protected by the proscription.

(3) The character of the proscribed conduct, its importance to the proscribing state, the extent to which other states regulate such conduct and the degree to which such regulation is generally accepted.

(4) The existence of justified expectations that might be protected or hurt by proscribing conduct.

(5) The importance of the proscription to the international, political, legal or economic system.

(6) The extent to which the proscription is consistent with the traditions of the international system.

(7) The extent to which another state may have an interest in regulating the activity.

(8) The likelihood of conflict of the proscription with regulation by another state.

The Restatement (Third) specifically addresses the regulation of foreign transactions of U.S.-controlled foreign companies. The view expressed, is that a state may not regulate the activities of such a foreign corporation, other than under exceptional circumstances, applying as criteria for such an exception whether such regulation would be essential to implement a program that furthers a major national interest that can be carried out effectively only if applied to such foreign subsidiaries and whether the regulation would be likely to conflict with the laws or policies of the state exercising territorial jurisdiction. It is doubtful that other countries would acknowledge the validity of extraterritorial jurisdiction as set forth in Section 129.2(d)(3)–(d)(5), based on the standards set forth in the Restatement (Third). Indeed, we understand that several other countries prohibit brokering in their jurisdictions, so that registering as a broker may constitute *de facto* evidence that the registrant has violated their local law.

For the reasons discussed above, based on principles of statutory construction enunciated by the U.S. Supreme Court, as applied to the text and legislative history of the brokering provision, and consistent with norms of international law, the AECA brokering registration amendment may not be applied broadly to foreign persons located outside the United States. The AECA's brokering

registration requirement must be limited to two classes of persons: (1) U.S. persons, wherever located; and (2) foreign persons located in the United States (who may engage in activities abroad).

V. COMMENTS CONCERNING PROPOSED SECTION 127.1

Proposed Section 127.1(b) provides that "any person who is granted a license or other approval or acts pursuant to an exemption under this subchapter is responsible for the acts of employees, agents, brokers, and all authorized persons to whom possession of the ~~licensed~~ defense article or technical data has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad." (Emphasis and strike-through added.)

The Federal Register notice explains simply that "responsibilities imposed on a person granted a license also apply to a person who 'acts pursuant to an exemption,' and that such responsibilities include acts of brokers." 76 Fed. Reg. at 78,582.

The proposed amendment provides insufficient clarity regarding the responsibility of an exporter for the acts of brokers, and we recommend that DDTC explain the parameters of this responsibility in order to guide the exporting community. We have identified the following issues.

First, the language leaves unclear what relationship with a broker triggers the exporter's responsibility for the broker's acts. It is ambiguous whether the language "to whom possession of the defense article or technical data has been entrusted" modifies all antecedent persons (*i.e.*, "employees, agents, brokers, and all authorized persons") or just modifies "all authorized persons." If this language modifies all antecedent persons, it does not appear to have meaning with respect to brokers, since brokers generally would not obtain "possession of the defense article or technical data." A broker's role generally is to "facilitate" a transaction, as DDTC explains in its definition of "brokering activities" in proposed Section 129.2(b). And if the language only modifies "all authorized persons," then it does not define the relationship with a broker that triggers exporter responsibility. Therefore, it is unclear what relationship with a broker triggers exporter responsibility. The "possession" language has meaning in the context of persons who receive defense articles, but not in the context of brokers. The current approach effectively states that all exporters are responsible for the acts of all brokers.

DDTC may intend that an exporter is responsible for a broker's actions when the broker has engaged in brokering activities on the exporter's behalf with respect to an article that the exporter has received a license to export. If so, we believe this should be clearly stated.

Second, assuming that an exporter is responsible for a broker's actions, it is unclear whether the exporter is responsible for all of a broker's actions or only those actions that relate to activities on the exporter's behalf. As drafted, the language is not limited, in that it imposes liability on the exporter for "the acts of . . . brokers." For instance, it would appear that if a broker files a report pursuant to proposed Section 129.10, and does not report brokering activities concerning activities that were not on the exporter's behalf, the exporter could nonetheless be held responsible for the broker's violation. In other words, the draft amendment would appear to make an exporter responsible for all of a broker's compliance with the ITAR, even for actions which do not relate to the broker's activities on the exporter's behalf. Such a broad approach would be problematic for brokers and exporters. It would be difficult, if not impossible, for an exporter to obtain information from a broker regarding its compliance relating to actions that do not relate to the broker's activities

on the exporter's behalf, because these actions likely would involve proprietary information of third parties. Yet without this information, the exporter would not be able to ensure that the broker was complying with the ITAR, and therefore would not be able to protect itself against liability under proposed Section 127.1(b).

DDTC may intend that the exporter is responsible for the broker's acts relating to the broker's activities on the exporter's behalf (*e.g.*, is responsible for the broker's acts of registering with DDTC and reporting on activities with respect to activities on the exporter's behalf related to USML defense articles). If so, we believe this should be clearly stated.

Third, it is unclear whether the proposed language would apply to the ITAR-controlled actions that brokers actually execute on an exporter's behalf. The Proposed Rule would make exporters responsible for "the acts of ...brokers ... regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad." It is unclear whether registration under Part 129 is an act "regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad." Similarly, it is unclear whether reporting under Part 129 is such an act. DDTC may intend that exporters are responsible for the broker's acts of registering with DDTC, obtaining any necessary brokering approvals, filing required reports, and record keeping. If so, we believe this should be clearly stated.

The Section recommends that DDTC more clearly set forth the circumstances that trigger an exporter's responsibility for a broker's compliance, and more clearly explain the specific ITAR-related actions of a broker for which an exporter bears responsibility. This would best be accomplished through a separate provision explaining the meaning of the "broker" language in Section 127.1(b). While such explanations could be provided in the Supplementary Information, this approach is always a concern from a transparency perspective, because the Supplementary Information does not appear in the Code of Federal Regulations. If exporters must go back and research the original Federal Register notice in order to correctly apply the rule, this not only imposes a burden on them but also is likely to result in either non-compliance or unnecessary measures by them.

VI. OTHER COMMENTS REGARDING OTHER SECTIONS OF THE PROPOSED RULE TO CLARIFY ITS APPLICATION AND MAKE IT MORE EFFECTIVE AND EFFICIENT

The Section offers additional comments and concerns regarding other sections of the Proposed Rule, as follows:

(1) The exclusion from brokering for activities in the United States contained in proposed Section 129.2(e)(1) needs to be consistent with the definition of "export" and should apply both to U.S. and foreign brokers.

(2) The text regarding the exclusion from brokering activities relating to legal advice provided to a broker by an attorney set forth in proposed Section 129.2(e)

(3) should be amended to clarify that brokering activities do not include any kind of legal advice or any export compliance services provided by an attorney to a client.

(3) Proposed Section 129.3(b)(3) (Exemptions from requirement to register) should be amended to clarify that foreign subsidiaries can register with their parent companies and should allow non-exclusive brokers to register with more than one U.S. manufacturer.

(4) Proposed Sections 122.2 (Submission of Registration Statement) and 122.4 (Notification of Changes) should be amended to impose notification requirements on the foreign brokers, not the ITAR Part 122 registrants.

(5) Consistent with the language of the AECA and Congressional intent, proposed Section 129.4 should be amended to replace a certification about unnamed foreign criminal statutes with specific descriptions of the foreign laws in question.

These recommendations are discussed in more detail below.

A. Proposed Section 129.2(e)(1) – the Exclusion for U.S. Activities – Should Be Amended to Clarify That Foreign Persons Engaging in Wholly Domestic Transactions Are Not Brokers, and to Correct the Definition of Export.

The definition of "brokering" set forth in proposed Section 129.2 excludes from the scope of brokering, "[a]ctivities by a U.S. person in the United States that are limited exclusively to U.S. domestic sales and transfers (e.g., not for export, which includes transfer in the United States to a foreign person)." Section 129.2(e)(1). Activity to facilitate wholly U.S. domestic transactions should be excluded from the definition of brokering. This is consistent with Congressional intent when the AECA was amended in 1996 as well as with the current Part 129.

The exclusion should apply both to U.S. and foreign persons as long as the transaction is a wholly U.S. domestic transaction (*i.e.*, neither an import nor an export transaction) and the parenthetical example of what is a domestic sale or transfer should be deleted since it offers a description of "export" that is inconsistent with the existing definition of export set forth in ITAR § 120.17.

The proposed language limits the exclusion from brokering activities to U.S. persons supporting domestic transfers within the United States. This proposal is not a departure from the current Part 129, which provides that brokering "does not include activities by U.S. persons that are limited exclusively to U.S. domestic sales or transfers (e.g., not for export or re-transfer in the United States or to a foreign person)." But foreign persons, whether located in the United States or abroad, can be involved in supporting wholly U.S. domestic defense sales. We can discern no basis within the AECA to distinguish between U.S. persons and foreign persons who are engaged solely in supporting U.S. domestic arms transfers. To ensure that foreign persons engaged in cross-border trade are not excluded from the scope of brokering activity, we propose the following amended language for Section 129.2(e)(1) to clarify the scope of the exclusion:

> Activities by a U.S. or foreign person that are limited exclusively to a U.S. domestic sale or transfer of defense articles or services located within the United States (*i.e.*, the sale or transfer does not involve the export or import of a defense article or service). (emphasis added).

The parenthetical example of what constitutes a domestic sale or transfer, as set forth in proposed Section 129.2(e)(1), does not comport with existing law. The parenthetical describes a domestic sale as "not for export, which includes transfer in the United States to a foreign person." But this description conflicts with the existing definition of export in the ITAR. Section 120.17 of the ITAR defines when an activity within the United States constitutes an export, and that definition includes: (a)(2) "transferring registration, control, or ownership to a foreign person [in the U.S.] of any aircraft, vessel, or satellite [on the USML];" (a)(3) "disclosing . . . or transferring in the United States any defense article to an embassy, any agency or subdivision of a foreign government;" (a)(4) "disclosing . . . or transferring technical data to a foreign person [in the United States];" (a)(5) "performing a defense service on behalf of . . . a foreign person [in the United States]."

The parenthetical in proposed Section 129.2(e)(1) suggests that the transfer of any defense article to a foreign person in the United States is an export, which is inconsistent with the existing definition of "export" in the ITAR. Proposed Section 129.2(e)(1) should be amended as set forth above, the existing proposed parenthetical should be deleted, and the existing definition of "export" in Section 120.17 should be applied consistently throughout the ITAR, including Part 129.

Clarification also is needed with respect to proposed Section 129.7 relating to exemptions from prior approval. Proposed Section 129.7(c) sets forth the exemption for prior approval for brokering activity within NATO, its member countries, and Australia, Japan, new Zealand, and the Republic of South Korea ("NATO plus countries"). Subsection (c)(2) states that no prior approval is required for brokering activity exclusively within NATO plus countries, as long as the they do not pertain to defense articles or services excluded from the exemption by paragraph (e) of Section 129.7. Paragraph (e)(14) includes foreign defense articles and defense services described on the USML, other than those involved in brokering activities meeting the criteria of paragraphs (c)(1) and (c)(2) of Section 129.7.

It is not clear what the scope of the exemption is for foreign defense articles being brokered within NATO plus countries. It would appear that the exemption from prior approval was intended to cover all USML-like foreign defense articles and services, except those listed in subsections (e)(1)-(e)(13). If this is accurate, we propose that subsection 129.7(c)(2) be revised to state "The brokering activities do not pertain to the defense articles or defense services that are excluded from this exemption by subparagraphs (e)(1)-(e)(13), including foreign defense articles and services that would fall within these subparagraphs."

B. Proposed Section 129.(e)(3) (Exclusion for Legal Advice by an Attorney to a Broker) Should Be Revised to Clarify That Brokering Activities Do Not Include Any Legal Advice or Any Export Compliance Services Provided by an Attorney to a Client.

Proposed Section 129.2(e)(3) provides that "brokering activities" not include, *inter alia*, "activities by an attorney that do not extend beyond providing legal advice to a broker." The Section agrees that legal advice provided by an attorney to a broker should be excluded from the definition of brokering activities, and that such an exclusion is consistent with the legislative intent of Congress when it passed the brokering amendment to the AECA.

However, the current text of proposed Section 129.2(e) is ambiguous, and therefore, could be construed to mean that only legal advice provided by an attorney to a broker is deemed not to fall within the definition of brokering activities. If so, any other kind of legal advice, including export

compliance counseling, could fall within the scope of the definition of "brokering activities," which would mean that all law firms with attorneys that provide export guidance to clients other than brokers would have to register as brokers and seek prior approval from DDTC before providing any such guidance in many instances.

We believe that DDTC does not intend to impose such constraints on the ability of attorneys to provide compliance guidance to their clients. Nor do we believe that DDTC wishes to create the significant administrative burdens that would be involved in having to process many thousands of requests from law firms to provide simple compliance guidance to clients on an annual basis.

Further, DDTC apparently intended in the Proposed Rule to exclude from "brokering activities" the advice that attorneys provide to their clients. The Supplementary Information to the Proposed Rule states:

> "New § 129.2(e)(3) would clarify that brokering does not include activities that do not extend beyond administrative services such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, or does not include activities beyond the provision of legal advice by an attorney to his client."

76 Fed. Reg. at 78,578 (emphasis added). This statement demonstrates DDTC's apparent intent that brokering does not include legal advice that attorneys provide to their clients.

DDTC should revise the text of proposed Section 129.2(e) to clarify that brokering activities do not include any kind of legal advice or any export compliance services provided by an attorney to a client. Such revised text would provide much needed clarity and prevent unintended consequences that could hinder the ability of attorneys to provide export compliance guidance to clients.

C. Section 129.3(b)(3) (Exemptions from Requirement to Register) Should Be Amended to Clarify that Foreign Subsidiaries Can Register with Their Parents and to Allow Non-Exclusive Brokers to Register with More Than One U.S. Manufacturer.

Proposed Section 129.3(b)(3) exempts certain persons from the requirement to register separately under Part 129, and to seek prior approval and report to DDTC on brokering activities. The proposed language identifies the following parties as eligible for this exemption: "person registered pursuant to part 122 of this subchapter, their U.S. person subsidiaries, joint ventures, and other affiliates listed and covered in their Statement of Registration, their bona fide and full-time regular employees, and their eligible . . . foreign person brokers listed and identified as their exclusive brokers in their Statements of Registration . . . ."

This provision should be amended in two ways. First, foreign subsidiaries of Part 122 registrants should be included within the scope of eligible parties that can qualify for the exemption. Second, foreign person brokers should be eligible for the exemption even if they are not the exclusive broker to any single U.S. registrant under Part 122.

Regarding foreign subsidiaries of U.S. registrants under Part 122, we see no material reason to omit these subsidiaries from the scope of this exemption, especially if foreign person brokers who are not affiliated with a registrant can otherwise qualify (as they do). We believe this was DDTC's intent in writing the provision, but that the phrase "foreign subsidiary" was inadvertently omitted. Assuming

a foreign subsidiary of a U.S. registrant is acting as a broker in a manner not dissimilar to an unaffiliated foreign person broker, such foreign subsidiaries should be eligible. In most instances, a foreign subsidiary of a U.S. registrant will be subject to more extensive management controls, will be more familiar with the ITAR, and will have greater transparency vis-à-vis the U.S. registrant than an unaffiliated foreign person broker. For these reasons, we see no compelling reason for omitting foreign subsidiaries from the scope of proposed Section 129.3(b)(3).

Similarly, the provision should be amended to delete the reference to "exclusive" as a qualifier for foreign person brokers who can qualify for the exemption. In practice, there will be a very limited number of foreign brokers who will be exclusive to a single ITAR Part 122 registrant. A major defense contractor may have an exclusive broker in a particular country, but smaller ITAR registrants may share their brokers with other smaller registrants. For this reason, the exclusivity provision will likely discriminate against smaller ITAR registrants and their brokers. At the same time, the provision would also unduly limit the utility of this exemption and therefore the effort of DDTC to respond to the concerns of industry with regard to regulatory burden and avoiding redundant requirements. As long as a broker who acts for various Part 122 registrants is identified on the individual Part 122 registrant statements, and such brokers are engaged in brokering activities related to the sale of U.S.-sourced defense articles exported by the registrant and licensed by DDTC, the agency would have full visibility over the activities of the broker – for each individual Part 122 registrant who uses the broker, and with regard to any defense article export that is being licensed by DDTC (regardless of the applicant). Eliminating the requirement of exclusivity will not compromise the ability of DDTC to monitor the activities of such foreign person brokers.

D. Sections 122.2 (Submission of Registration Statement) and 122.4 (Notification of Changes) Should Be Amended to Impose Notification Requirements on the Foreign Brokers, Not the Part 122 Registrants.

Proposed Section 122.2(b)(1) would significantly expand the scope of information a Part 122 registrant needs to provide to DDTC regarding criminal charges, eligibility for contracting, and export licensing restrictions pertinent to senior officers and board members.

First, the proposed change would extend this requirement to the parent (or parents) of the registrant, as well as to all subsidiaries, joint ventures or other affiliates of the registrant, regardless of the level of control or ownership. Such a change would significantly increase the burden on and compliance risk for registrants, especially in situations where the registrant may not have the necessary control or ownership to have access to such information. This may also cause conflicts with data protection laws in various countries, such as in the European Union. DDTC should reconsider this proposed expansion, especially in light of potential difficulties with managing conflicting legal mandates. At a minimum, it would be prudent to limit this requirement to entities that are wholly-owned by the registrant, as well as by U.S. parent organizations.

Second, the proposed regulation would require a registrant to secure the same information for foreign person brokers (and their executive management and board members) listed on the registration statement. Again, given the potential absence of ownership or control over a foreign person broker, as well as potential data privacy conflicts, this provision would significantly increase the compliance risk for U.S. person registrants under Part 122, and reduce the utility of the various exemptions DDTC has made available for brokers who are identified on a Part 122 registrant's registration statement. One possible modification would be to require a Part 122 registrant to

inform DDTC of any criminal charges, ineligibility or export licensing restrictions when they are known to the registrant. Alternatively, DDTC could modify this provision to require any foreign broker listed on a Part 122 registration statement to supply such information itself to DDTC through the registrant, thereby placing the burden and regulatory risk on the party that has access to the information.

Third, under proposed Section 122.4(a)(1), a Part 122 registrant will be required to notify DDTC of any changes in the criminal charges, contract eligibility and export licensing restrictions applicable to persons identified in proposed Section 122.2(b)(1). Again, this would appear to place undue regulatory burden and risk on the Part 122 registrant, especially in the context of foreign person brokers identified on the registration statement.

In order to avoid discouraging registrants to list brokers and take advantage of available exemptions, proposed Section 122.4(a)(1) should make clear that the foreign person broker is required to notify the Part 122 registrant of any changes in the eligibility criteria of the broker or its executive management and board members, and then this information can be provided by the Part 122 registrant to DDTC. In this way, the responsibility and risk of non-compliance is properly allocated to the person with access to the relevant information.

Finally, proposed Section 122.4(a)(2) contains ambiguous language that does not clarify the circumstances in which changes in the foreign person broker need to be notified to DDTC. As written, the last sentence of this section suggests that a Part 122 registrant must notify DDTC within 5 days of any change in the establishment, acquisition, or divestment relating to a foreign broker that is listed on the registration statement. Given the likely absence of ownership or control over a foreign person broker by a Part 122 registrant, and the likely difficulty of monitoring the corporate and organizational changes of a foreign person where there is no such control or ownership, this proposed regulatory requirement would impose undue liability on the Part 122 registrant. If DDTC believes that such information about a foreign person broker is necessary, it should place the requirement to supply such information on the broker itself, and not the Part 122 registrant, as DDTC has separately done for broker registrations under Part 129.4.

E. Proposed Section 129.4 and Corresponding Provisions Should Be Amended to Replace a Certification about Unnamed Foreign Criminal Statues with a More Specific Description of the Foreign Laws in Question.

Proposed Part 129.4(c) requires the intended brokering registrant to include a certification by an authorized senior officer of the following:

> (1) Whether the intended registrant, chief executive officer, president, vice presidents, secretary, partner, member, other senior officers or officials (*e.g.*, comptroller, treasurer, general counsel), or any member of the board of directors of the intended registrant, or of any parent, subsidiary, or other affiliate or other person required to be listed in the Statement of Registration:
>
> > (i) Is the subject of an indictment or has otherwise been charged (*e.g.*, by information) for or has been convicted of violating any U.S. criminal statutes enumerated in Sec. 120.27 of this subchapter or <u>foreign criminal statutes</u>

enumerated in Sec. 120.27 of this subchapter . . .

The Section understands the rationale for including foreign statutes similar to the U.S. criminal statutes listed in ITAR § 120.27 in the certification and update requirements for brokers. However, the Section respectfully submits that the proposed certification requirement is unworkable as a legal and practical matter, and should be revised to cover the key conduct of interest.

While some of these statutes are well-known and it is a relatively easy task for a foreign broker to determine which foreign statutes are equivalent (*e.g.*, the AECA), others are less obvious. In particular, asking foreign brokers to locate the foreign equivalent to a repealed or unconstitutional law, or an incorrect citation is problematic. Still others – such as those relating to U.S. embargoes, such as the Trading with the Enemy Act or the International Emergency Economic Powers Act – not only do not have equivalents outside the United States, but in some countries, such as our close trading partners Canada, Mexico and the European Union, actually have foreign equivalents prohibiting compliance with these U.S. laws.

In addition, requiring a prospective registrant to make a determination as to whether unnamed foreign statutes relate to subject matter similar to the precisely enumerated U.S. laws is a vague and subjective exercise that would create substantial legal peril for good faith actions that could later be deemed by DDTC to be inconsistent with its own unpublished criteria. In this respect we reiterate the concerns we raised over the vagueness of the term "brokering activities" in Section III.A.5 above.

Even setting aside these difficulties, the Section questions whether foreign brokers can legally under applicable privacy laws ask their officers, directors, and others to provide information regarding all indictments and conviction, unless there is a clear nexus between the indictments and convictions and the brokering activities.

The Section respectfully submits that DDTC can accomplish the laudable purpose behind the proposed certification requirement, while avoiding these problems by identifying the specific laws in question or limiting the requirement to laws related to brokering activities. For example, the following is one possible definition:

> Is the subject of an indictment or has otherwise been charged (*e.g.*, by information) for or has been convicted of violating any U.S. criminal statutes enumerated in Sec. 120.27 of this subchapter or foreign criminal statutes governing the export of defense articles and services, the export of dual use equipment, software or technology, corruption of government officials, classified information, terrorism, treason or sabotage. . . .

By identifying the laws in question in such a way that foreign brokers can communicate them to the officials in straightforward terms, such a provision should avoid many of the difficulties matching specific U.S. statutes with foreign laws and reduce the risks of violating local privacy laws.

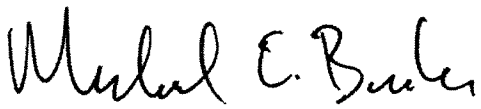
Similar language also should be used in proposed Section 120.25(c) [Empowered Official]. Moreover, the text in proposed Section 120.25(c) should be amended to make it clear that it applies only for purposes of foreign persons who wish to serve as an empowered official for a broker who is a foreign person, because the proposed text, as written in the Proposed Rule, could potentially

prohibit U.S. persons from serving as empowered officials. As proposed, and if applied to U.S. persons, any U.S. person who is ineligible to contract with any foreign government agency may not be an empowered official. There very well could be scenarios where a U.S. person has not violated any U.S. or foreign criminal statutes, but may nevertheless be prohibited from contracting with a foreign government agency, such as in instances involving countries that participate in the Arab League's boycott of Israel. Recognizing that there is no intention of prohibiting such U.S. persons from serving as empowered officials, the Section urges DDTC to make the necessary amendments to the text in proposed Section 120.25(c).

* * * * *

We believe that by inviting comment DDTC has signaled its good faith commitment to promulgate a Final Rule that takes into full account and appropriately mitigates the considerable concerns that we and others have respectfully identified. We would be pleased to elaborate on our recommendations, as well as to provide suggested regulatory language to address these concerns. Thank you for your consideration of the Section's comments.

Respectfully submitted,



Michael E. Burke,
Chair, ABA Section of International Law
Encl.

EXHIBIT 1

Defending Liberty
Pursuing Justice

William H. Neukom
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

February 27, 2008

John B. Bellinger III
Legal Adviser to the Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Mr. Bellinger:

On behalf of the American Bar Association, I am writing with respect to the requirement in the Arms Export Control Act (AECA) that certain persons involved in brokering defense trade transactions register with the Department of State. We understand that the Department plans to publish a revised regulation regarding this issue. As discussed below, the ABA has two major concerns. First, we recommend the Department ensure that its proposed approach is consistent with generally accepted international law principles against extraterritorial trade measures. Second, we urge that the Department formulate its brokering registration requirement in a manner that is consistent with the AECA, based upon standard principles of statutory construction, the AECA's legislative history and a decision by the Court of Appeals for the District of Columbia Circuit.

Background

The AECA requires registration by "every person" who engages in brokering activities with respect to the manufacture, export, import or transfer of a defense article or defense service, regardless of origin. See AECA § 38(b)(1)(A), 22 U.S.C. § 2778(b)(1)(A)(ii). The International Traffic in Arms Regulations (ITAR), which implement the AECA, apply the provision to "U.S. person[s], wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States." 22 C.F.R. § 129.3(a) (2007). According to our information, the Department of State interprets the AECA as authorizing the Department to require registration of any foreign person, wherever located, who is involved in brokering a defense trade transaction involving a U.S.-origin defense article.

The Department is currently revising 22 C.F.R. Part 129. While a proposed regulation has not yet been published, a State Department official responsible for this revision has stated publicly that the revised regulation will clarify that all foreign persons involved in brokering U.S.-origin defense articles will be required to register, and indeed that this is the Department's interpretation of the AECA and its current regulation.[1]

[1] See The Export Practitioner, April 2007, quoting Directorate of Defense Trade Controls Compliance Director David Trimble.

General Considerations

We ask that the Department take into account the appropriate limitations on U.S. assertions of extraterritorial jurisdiction. The American Bar Association's established policy is that the United States should regulate extraterritorial trade with caution. See ABA Report and Recommendation, available on-line at http://www.abanet.org/intlaw/policy/tradecustoms/tradesanctions.pdf (attached). The Report in support of this Recommendation explains that extraterritorial foreign trade control measures, such as the brokering registration requirement here, are inconsistent with the most widely accepted basis in international law for prescribing legal rules of conduct, namely the territorial principle. The Report also summarizes the "effects doctrine," an extension of the territorial principle, under which a country may proscribe or sanction conduct that occurs outside its borders, where such conduct has, and is intended to have, "substantial effects" within its territory. Here, however, the State Department has sought to regulate extraterritorial trade transactions without demonstrating the substantial effects within the United States that would occur if all foreign persons located outside the United States and promoting sales of U.S. origin defense articles are not required to register as brokers. Finally, the Recommendation explains the numerous policy concerns that caution against extraterritorial application of U.S. foreign trade control measures.

U.S. Legal Analysis

In addition to the above fundamental considerations, we ask that the Department formulate a brokering registration requirement that is consistent with the AECA, based upon standard principles of statutory construction, the AECA's legislative history and a recent decision by the Court of Appeals for the District of Columbia Circuit.

The AECA should be construed to apply extraterritorially only if, and to the extent that, Congress has clearly expressed its intention to do so. Under standard principles of statutory construction, Congress legislates against the backdrop of a presumption against extraterritoriality. See, e.g., EEOC v. Arabian Am. Oil. Co. ("ARAMCO"), 499 U.S. 244, 248 (1991). Federal laws are deemed to apply only within the territorial jurisdiction of the United States unless Congress provides "affirmative evidence" to the contrary. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 176 (1993). This intention must be "clearly expressed." ARAMCO, 499 U.S. at 248.

The text of the AECA is silent on the extraterritorial application of the brokering provision, and therefore does not provide any "affirmative evidence" or "clear express[ion]" that Congress intended the brokering provision to apply outside the territorial jurisdiction of the United States. Moreover, the structure of the AECA – i.e., the AECA brokering provision's application to foreign-origin defense articles, not just U.S.-origin defense articles -- shows that Congress did not intend the brokering registration provision to apply generally to foreign persons. If the AECA applied generally to foreign persons, then the brokering provision would require registration by foreign persons brokering foreign-origin defense articles, which would be an untenable approach.

The legislative history demonstrates that Congress only intended the provision to apply extraterritorially in specific circumstances. The House Report on the brokering amendment stated that the AECA as then in effect "does not authorize the Department to regulate the activities of U.S. persons (and foreign persons located in the United States) brokering defense transactions overseas

(except for transactions involving a small number of terrorist countries)... This provision provides those authorities." House Report 104-519, Part 1, at 11-12.

Accordingly, based on principles of statutory construction enunciated by the U.S. Supreme Court, as applied to the text and legislative history of the brokering provision, the AECA brokering registration amendment may not be applied broadly to foreign persons located outside the United States. The Act's brokering registration requirement is limited in its extraterritorial application to two classes of persons, namely, U.S. persons and foreign persons located in the United States (who may engage in activities abroad). A foreign person located outside the United States may not be subjected to the brokering registration requirement. (All persons, of course, remain subject to the AECA and ITAR rules that require a State Department license for the export or reexport of U.S. origin defense articles and services. See 22 C.F.R. §§120.9, 120.17.)

The conclusion that the brokering registration requirement was not intended to apply to foreign persons located outside the United States is supported by a recent opinion of the U.S. Court of Appeals for the District of Columbia Circuit. See United States v. Yakou, 393 F.3d 231 (D.C. Cir. 2005), as amended by court order, available at http://pmddtc.state.gov/docs/yakou_case.pdf. The Court affirmed the dismissal of an indictment, on the grounds that the "aiding and abetting" provision in the AECA brokering statute did not apply to a foreign person acting outside the United States. The Court discussed the presumption against extraterritoriality, and the text and legislative history of the brokering statute, and concluded:

> In the Brokering Amendment, then, Congress was concerned with both United States brokers of arms and foreign brokers of arms located in the United States, but not with foreign brokers located outside the United States, see id., even though each type of individual could be involved in brokering activities affecting the United States...
>
> Congress has not expressed with the requisite clarity that it sought to apply the Brokering Amendment and, by extension the ITAR's brokering provisions, in such an extraterritorial manner [i.e., to apply to "non-U.S. persons located and acting outside the United States."] [citations omitted] ... Accordingly, while the Brokering Amendment and the ITAR have extraterritorial effect for "U.S. persons," they do not have such effect for "foreign persons," like Yakou, whose conduct occurs outside the United States.

As noted earlier, the ITAR applies the brokering registration requirement to foreign persons located outside the United States who are "otherwise subject to" U.S. jurisdiction. 22 C.F.R. § 129.3(a) (2007). Because the United States did not argue that Yakou was "otherwise subject to" U.S. jurisdiction, the Yakou court did not address the issue of whether the brokering registration requirement does, in fact, apply to this class of persons. In our view, however, the AECA does not authorize the Department to apply the brokering registration requirement to foreign persons located outside the United States. Again, this follows from established principles of statutory construction, as applied to the text and legislative history of the relevant provision.

The ABA encourages your engagement in ensuring that the State Department's approach in this area is fully consistent with the authorizing statute, as well as international legal principles regarding

extraterritorial measures. We would be pleased to meet with you and other Department officials to discuss this issue at your convenience.

Thank you for your attention to this important matter. For additional information or to arrange a meeting, please don't hesitate to contact Kristi Gaines in the ABA's Governmental Affairs Office at 202-662-1763.

Sincerely,

William H. Neukom

Enclosure

cc: John Rood, Acting Under Secretary for Arms Control and International Security
Stephen Mull, Acting Assistant Secretary for Political-Military Affairs

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 3-4, 1998

RESOLVED, that the American Bar Association recommends that the United States adhere to the following principles in the adoption and maintenance of export controls and economic sanctions measures:

First, to consult with, and seek the support and cooperation of, foreign governments sharing common objectives in devising and carrying out programs to constrain foreign trade and investment detrimental to shared U.S. national security and foreign policy objectives.

Second, to refrain from the adoption or maintenance of extraterritorial foreign trade control measures that do not conform to jurisdictional principles of international law as generally accepted by the international community and create the potential for conflicts with other nations, including:

- Controls on foreign trade transactions of foreign corporations, where those transactions have no jurisdictional relationship to the United States other than ownership interests of U.S. nationals in the foreign corporations;

- Controls on foreign trade transactions of foreign parties, where those transactions have no jurisdictional relationship to the United States other than the U.S. origin of transaction products, content or technology; and

- Retaliatory trade sanctions on foreign parties by reason of their foreign trade transactions, where those transactions have no jurisdictional relationship to the United States and are not in violation of any U.S. law that conforms to jurisdictional principles of international law.

REPORT*

I. Explanation of the Recommendation

This Recommendation would put the American Bar Association ("ABA") on record in favor of U.S. cooperation with like-minded countries in the adoption of measures that further U.S. national security and foreign policy objectives, and express opposition to extraterritorial U.S. foreign transaction controls that do not comport with generally accepted international law jurisdictional principles and create the potential for conflicts with foreign nations.

The Recommendation supports U.S. participation in international efforts, including the Nuclear Non-Proliferation Treaty, the Australia Group and the Missile Technology Control Regime, to constrain the spread of weapons of mass destruction and the means for their delivery. It also supports U.S. participation in the "Wassenaar" arrangement, as the successor to COCOM, to control "dual use" product and technology exports through collective national security efforts. Finally, it supports multinational controls to address unacceptable international conduct, such as those adopted under United Nations auspices to deal with the Iraq invasion of Kuwait in 1990 and unrest in Bosnia in 1992.

The Recommendation does not endorse, or criticize, unilateral U.S. foreign trade control measures, such as those that have been imposed in recent years on, for example, Libya, Iran, Burma and Sudan, and, more recently, India and Pakistan. However, it does oppose the inclusion in such unilateral programs of extraterritorial features that are not consistent with international law jurisdictional norms and that create the potential for conflict with other nations. Such extraterritorial features include the "person subject" features of certain Treasury Department programs that purport to control transactions of foreign

corporations owned by U.S. parties, the non-consensual "reexport" control features of certain Commerce and Treasury Department foreign trade control programs, and certain "retaliatory" trade control sanctions imposed on foreign parties in third countries that trade or invest in targeted countries.

The objectives sought to be achieved by these extraterritorial measures generally can be achieved by other techniques consistent with international law jurisdictional principles. For example, consistent with this Recommendation, U.S. companies may be prevented from authorizing or facilitating objectionable foreign transactions of their foreign affiliates. And foreign parties may be required, as a condition of the right to receive U.S. exports of sensitive products or technology, to agree to limit the use and reexport of such items. Finally, consistent with this Recommendation, foreign parties that engage in objectional foreign trade or investment may be deprived of discretionary U.S. government largess, such as eligibility for federal contracts, even though there is no U.S. jurisdictional nexus with the trade transactions giving rise to such sanctions.

The Recommendation would supersede and replace a recommendation adopted by the House of Delegates in 1983. The 1983 resolution was more narrowly drafted to deal with certain extraterritorial features of the Export Administration Act of 1979, in the context of Cold War considerations then still prevailing and the aborted 1982 Soviet gas pipeline sanctions. The resolution recommended here is framed more broadly to address a growing variety of multilateral and unilateral U.S. foreign trade control measures, some of which have attracted intense international concern, including blocking measures.

II. Terms Used in the Recommendation

The term "extraterritorial foreign transaction control measures," as used in this Recommendation, means U.S. government measures that prohibit, regulate or penalize international trade transactions of foreign nationals, including export-import trade between foreign countries and foreign cross-border investment and funds transfers, that take place entirely outside the territory of the United States.

Consistent with international law norms, the term "foreign nationals," as used in this Recommendation, includes business entities, such as corporations, partnerships and other ventures with centralized management, that, irrespective of ownership by or managerial accountability to United States parties, are organized in and operate under the laws of foreign countries, and have their principal managerial offices in foreign countries. The term "foreign nationals" does not include unincorporated foreign branches of U.S. corporations.

As used in this Recommendation, the term "retaliatory trade sanctions" means U.S. measures that deprive a foreign party of access to U.S. exports, the right to import into the United States, the right to entry for its personnel into the United States and similar punitive measures, in retaliation for lawful international trade transactions, i.e., transactions with other countries that do not contravene U.S. laws that are consistent with international law jurisdictional principles.

However, the term "retaliatory trade sanctions," as used here, is not intended to include ineligibility for discretionary U.S. governmental benefits, such as U.S. government foreign economic assistance, governmental agency loans or other financing or investment guarantees, or eligibility to contract with the federal government, except to the extent that such rights may be afforded to nationals of a foreign country under a treaty to which the United States is a party. Nor does the term "retaliatory sanctions" include punitive actions, such as the denial of U.S. export trading privileges, that are imposed upon foreign nationals by reason of unlawful diversions of U.S. exports in contravention of consensual undertakings or other violations of U.S. trade controls that are consistent with international law jurisdictional norms.

III. Background

For more than 50 years, since the end of World War II and, particularly, since the inception of the Cold War, the United States has regulated U.S. export trade and, to a degree, foreign trade transactions having some connection with the United States, in the interests of U.S. national security, foreign policy and other national objectives. Increasingly, in recognition of the diffusion of technology and the inability to

accomplish national objectives through unilateral controls, the United States has sought the cooperation and assistance of like-minded nations.

The earliest of these cooperative efforts was the "Coordinating Committee" of the NATO and other closely allied countries that sought to restrict the flow of military and "dual use" technologies to the Soviet Union and other communist nations during the Cold War period. More recently, the United States has been the leader in establishing the Nuclear Suppliers Group, the Australia Group and the Missile Technology Control Regime to deter the proliferation of weapons of mass destruction, as well as the Wassenaar Arrangement, successor to COCOM, to restrict the flow of weapons and sensitive dual use technologies to countries of common concern.

Freed of Cold War veto threats, the United States also has sought support from other nations through the United Nations Security Council to counteract objectionable foreign conduct by means of multilateral trade sanctions and related measures that have targeted, for example, Iraq (after its 1990 invasion of Kuwait) and the Federal Republic of Yugoslavia (after its interventions in Bosnia and Croatia). This Recommendation expresses support for these multilateral trade control measures as the appropriate means for the accomplishment of shared objectives through international cooperation, consistent with international law norms.

In recent years the United States has also acted unilaterally to impose trade sanctions on particular countries and parties considered to be acting contrary to important national interests. Typically, these unilateral sanctions programs prohibit U.S. export-import trade with the target country and bar most or all business and financial dealings by U.S. persons with the target countries or parties. Examples include comprehensive trade sanctions imposed on Libya in 1986, on Iran in 1995 and on Sudan in 1997. Narrower programs restrict certain business activity with Burma, India and Pakistan. Former sanctions programs targeted Haiti, Nicaragua and Panama. This Recommendation does not express opposition to such unilateral controls, provided they do not incorporate extraterritorial features, although many observers believe that at least some unilateral controls are not effective and may damage longer-run U.S. objectives.

The United States has incorporated extraterritorial features in a number of its foreign transactions control programs. Through its Foreign Assets Control Regulations, under the authority of the 1917 Trading with the Enemy Act, the Treasury Department has prohibited foreign corporations owned or controlled by persons in the United States from engaging in trade and commerce with several Asian countries, currently limited to North Korea but formerly also including the People's Republic of China, Vietnam and Cambodia. A similar prohibition has applied to trade with Cuba on the part of U.S.-controlled foreign companies but, until 1992, such trade was routinely licensed. As described below, the removal of this licensing authority has given rise to serious controversy with other nations.

A less well-known but significant example of extraterritorial foreign trade control is the "reexport" scheme embodied in the Commerce Department's Export Administration Regulations that prohibits certain unlicensed exports from foreign countries of (i) U.S.-origin and U.S.-content products and technology, and (ii) the foreign-made "direct products" of U.S.-origin technology. Similar reexport provisions have found their way into some Treasury Department economic sanctions programs. These reexport controls do not depend, for the most part, on actual or presumed consensual undertakings by foreign recipients of U.S. products or technology.

In recent years the United States has resorted, largely through legislative initiatives, to measures that deny governmental benefits or impose sanctions on foreign parties that engage in objectionable trade with or investment in third countries or parties. One of these measures, Public Law 104-172, styled "The Iran and Libya Sanctions Act of 1996," requires the President, unless he exercises certain waiver powers, to take at least two of six specified actions against foreign persons that make significant investments (initially, $40 million or more within a one-year period) that contribute to the development of the petroleum resources of Iran or Libya. There are a number of antecedents to the Iran and Libya Sanctions Act under which U.S. actions may or must be taken against foreign parties that engage in foreign trade disfavored by U.S. policy. Some of these actions withdraw discretionary U.S. government benefits, such as

government contract eligibility or Export-Import Bank financing, and to that extent do not conflict with this Recommendation. Other actions deny access to U.S. trade or travel and to that extent are not consistent with this Recommendation.

Another controversial 1996 measure, Public Law 104-114, popularly styled the "Helms-Burton Act" for its principal Congressional sponsors, creates a new right for U.S. nationals to sue foreign persons in U.S. courts and recover treble damages by reason of foreign trade or investment in Cuba that is deemed to involve "trafficking" in properties confiscated by the Castro regime as long as 30 years ago. Although this feature of the Helms-Burton Act has been characterized as extraterritorial, it also has been defended as vindicating rights of persons whose properties were confiscated in violation of international law. The President so far has suspended the right to sue under Helms-Burton and this Recommendation does not address this feature. Another Helms-Burton provision that has become operative directs the Secretary of State to bar entry into the United States of foreign nationals who are officials of entities engaged in trafficking, as well as the immediate families of such individuals.

IV. Conflicts with Foreign Laws

The efforts of the United States government to punish or regulate foreign trade transactions outside its borders have given rise to serious controversy with important U.S. trading partners. For example, the prohibition on third-country trade with China by U.S.- controlled foreign companies (included in the definition of any "person subject to the jurisdiction of the United States") was the subject of a well-known case in the French courts, and led to serious conflicts with Canada and European countries until that prohibition was ended in 1971.

In 1982 then-President Reagan directed the Commerce Department to utilize "person subject" and other authorities in the Export Administration Act of 1979 to bar foreign subsidiaries and licensees of U.S. companies from providing foreign-made equipment to be used in a gas pipeline from the Soviet Union to Western Europe. The pipeline measure gave rise to strong protests by our West European allies and, for a time, threatened the NATO alliance. Within a few months the President was compelled to withdraw the pipeline sanctions. However, before the President's action, the pipeline sanctions had provided the impetus for the issuance of blocking orders by the British government under the Protection of Trading Interests Act of 1980, the first such moves to nullify U.S. foreign transaction controls and the model for later actions in Canada, Mexico and the European Union.

Similar conflicts arose, notably with Canada, several countries in Latin America and some European countries, under the parallel provisions of the Cuban Assets Control Regulations, adopted in 1963 in the wake of the Castro revolution. However, an exception for certain third country trade transactions of "persons subject," and later a liberally administered licensing regime for such transactions, limited this conflict, until the passage of the Cuban Democracy Act in 1992 barred further licensing. That law prompted widespread foreign criticism and led to the adoption of blocking measures in both Canada and the United Kingdom. These blocking measures prohibited British and Canadian companies, notwithstanding their ownership by U.S. persons, from complying with the U.S. embargo of Cuba, thereby placing such companies at risk of violating either U.S. law or the law of the country of their nationality and in which they conduct business.

The Canadian blocking order was significantly strengthened and amended in January, 1996. After the passage of the Helms-Burton Act, the Canadian parliament amended Canada's Foreign Extraterritorial Measures Act, the statutory foundation for its 1992 and 1996 blocking orders, to expand the government's authority to compel production or to suppress foreign production of records, block foreign judgments, provide for "claw-back" recovery of Helms-Burton litigation judgments and expenses, and increase penalties for violations of blocking orders.

In October of 1996 Mexico enacted a broad blocking measure, targeting not only the Helms-Burton Act and the extraterritorial features of the U.S. embargo of Cuba, but all similar foreign extraterritorial measures, broadly defined, characterized as being in contravention of international law. This measure prohibits compliance with such foreign measures, denies enforcement of foreign judgments based

thereon and permits parties that have sustained economic losses in foreign proceedings to recover them back in Mexican courts.

Finally, in November of 1996 the Council of Ministers of the European Union approved legislation that precludes nationals of member states from complying with specified foreign extraterritorial foreign trade control measures, including the U.S. embargo of Cuba, the Helms-Burton Act and the Iran and Libya Sanctions Act, except as may be permitted by the European Commission. The E.C. regulation also permits "claw back" recovery in the courts of member states of economic losses sustained by the application of such extraterritorial measures.

The United States has its own blocking measure, antedating all of these foreign initiatives. It was enacted in 1977 in response to the "secondary" features of the Arab boycott of Israel, including the "blacklisting" of U.S. firms and their consequent exclusion from commerce with the boycotting Arab countries by reason of their having past or current trading, investment or financial relationships with Israel. The U.S. antiboycott statute, incorporated into the Export Administration Act of 1979, effectively blocks the application of these secondary boycott features in the United States by prohibiting U.S. persons from complying with such requirements.

Experience has shown that blocking measures are the likely responses of foreign governments to measures of other states that seek to control the trade and investment conduct of nationals of another country. Inevitably, such counter-measures, which themselves are not subject to legitimate criticism on grounds of international law or jurisdiction to prescribe or to enforce, create conflicting legal obligations which interfere with the conduct of international trade.

V. Economic and Foreign Policy Costs

Apart from legal conflicts, extraterritorial foreign transaction controls can have significant economic consequences. Parties in foreign countries understandably are reluctant to procure goods and technology from U.S. suppliers, if the consequence will be to subject their own transactions to U.S. regulation. Thus, the existence of U.S. "reexport" controls, or the potential to impose or expand such controls, may lead foreign parties to "design out" U.S. goods or technology. Similarly, foreign governments and other contractors may prefer not to enter into contracts with U.S.-owned foreign companies that may be regulated as "persons subject to the jurisdiction of the United States" and prevented from fulfilling contract obligations.

It is difficult to quantify these indirect economic costs of extraterritorial foreign transaction controls. The aborted 1982 Soviet gas pipeline controls certainly created a broad recognition in foreign countries of the dangers of relying upon American-connected goods, technology or parties. For example, China and India have maintained significant shares of Russian aircraft in their fleets in order to reduce reliance upon U.S. suppliers. Airbus Industrie, which formerly relied upon U.S. engine suppliers, recently has begun to offer aircraft with engines produced by suppliers not affiliated with U.S. producers.

Extraterritorial U.S. foreign transaction controls also have a significant foreign policy cost. The current controversy over the Helms-Burton Act led the European Union to file a complaint in the World Trade Organization, prompting the United States to assert that the WTO has no authority to address measures that concern U.S. national security and foreign policy and to refuse to participate in the WTO proceedings. This standoff, which could have done seriously damage the effectiveness of the WTO, was at least temporarily resolved by the withdrawal of the European Union complaint in April of 1998, in anticipation of a settlement of disputes over U.S. extraterritorial measures. The 1982 Soviet gas pipeline sanctions presented a similar challenge to the NATO alliance and the COCOM regime.

VI. Considerations of International Law

Territoriality and nationality have long been accepted as the principal bases in international law to prescribe rules of conduct, but in recent years these concepts have been modified to embrace principles of reasonableness and fairness to accommodate overlapping and conflicting interests of states.

International law also recognizes the right of a state to punish a limited class of offenses committed outside its territory by non-nationals that threaten the security or governmental functions of the state and that are generally recognized as crimes, such as espionage.

The most widely accepted basis in international law for prescribing legal rules of conduct is the territorial principle - that a sovereign may prescribe and apply its laws to conduct that takes place within its territory. Foreign trade control measures that restrict exports from the country imposing such controls or imports into that country are consistent with the territorial principle. So too, are blocking measures that prevent the application in a particular country of transaction control measures enacted by another country. Foreign transaction controls that purport to regulate, proscribe or sanction conduct that takes place entirely outside the territory of a state do not satisfy the general formulation of the territorial principle.

Under the "effects doctrine," an extension of the territorial principle, it is stated that a country may proscribe or sanction conduct that occurs outside its borders, where such conduct has, and is intended to have, "substantial effects" within its territory. The "effects doctrine," has had its principal development in the fields of anti-trust and securities law, where effective regulation of the domestic economy cannot be achieved unless some foreign conduct is constrained. The objectionable domestic "effects" of proscribed foreign transactions are less demonstrable, although such controls may complement domestic transaction controls.

Independent of the territorial principle, under international law a sovereign state may prescribe and sanction conduct outside its borders by nationals of that state. For this purpose, a corporation or other private legal entity has the nationality of the state in which it is incorporated. For example, a French corporation owned by a U.S. company is considered to be a national of France, although an unincorporated French branch of a U.S. company would be a national of the United States. The Recommendation recognizes the legitimacy under international law of applying U.S. trade control measures to foreign activities of U.S. business entities and of foreign branches of U.S. companies under the nationality principle, as well as to foreign actions of individuals who are U.S. nationals.

However, the nationality principle does not justify applying U.S. controls to, for example, foreign transactions of a subsidiary of a U.S. company incorporated in France, since such a subsidiary has the nationality of its place of incorporation. There is, of course, no basis in international law for applying the nationality principle to permit a state to regulate trans- actions outside its territory in goods or technology solely by reason of their country of origin. Thus, the reexport provisions of the Export Administration Regulations cannot be supported on that basis. Nor can the nationality principle support "retaliatory" foreign trade control measures such as certain of the provisions of the Iran and Libya Sanctions Act that penalize foreign nationals for "objectionable" foreign trade conduct.

Even assuming the existence of a premise for jurisdiction to prescribe foreign transaction controls, presumably under the effects doctrine extension of the territoriality principle, countervailing considerations of international comity require deference to the territorial state, if the latter's interests are paramount. The Restatement (Third) lists the following factors that should be considered in determining whether a state may exercise jurisdiction to regulate an activity having connections with another state, even where a basis to proscribe conduct may exist. These factors are:

- The extent to which the proscribed activity has a substantial, direct and foreseeable effect within the proscribing state's territory;
- The extent to which there are connections, such as nationality, residence, or economic activity between the proscribing state and the person principally responsible for the activity or the persons sought to be protected by the proscription;
- The character of the proscribed conduct, its importance to the proscribing state, the extent to which other states regulate such conduct and the degree to which such regulation is generally accepted;
- The existence of justified expectations that might be protected or hurt by proscribing conduct;
- The importance of the proscription to the international political, legal or economic system;
- The extent to which the proscription is consistent with the traditions of the international system;
- The extent to which another state may have an interest in regulating the activity; and

- The likelihood of conflict of the proscription with regulation by another state.

The Restatement (Third) addresses specifically one of the three categories of U.S. foreign transaction controls, regulation of the foreign transactions of U.S.-controlled foreign companies. The view expressed there is that a state may not regulate the activities of such a foreign corporation, other than under exceptional circumstances, applying as criteria for such an exception whether such regulation would be essential to implement a program that furthers a major national interest that can be carried out effectively only if applied to such foreign subsidiaries and whether the regulation would be likely to conflict with the laws or policies of the state exercising territorial jurisdiction. It is doubtful that foreign states would acknowledge even such a narrowly drawn justification for U.S. regulation of foreign transactions of U.S.-owned foreign corporations, but in any case it would be very difficult, if not impossible, to justify any existing or past U.S. "person subject" foreign transaction control measure under the Restatement standard.

While not addressed specifically in the Restatement (Third), an application of the general principles of reasonableness set forth above leads to the conclusion that neither the reexport nor retaliatory U.S. foreign transaction controls satisfy international law criteria. While these measures may be expressions of U.S. policies, they are not demonstrably essential to the fulfillment of policy objectives. They are difficult to enforce in practice and vulnerable to blocking measures. They are not consistent with the practices of other nations and are generally objectionable to them. Other means, consistent with international law norms, exist to achieve U.S. policy objectives.

Outside the United States, all forms of extraterritorial transaction controls almost universally are regarded as an illegitimate interference in the affairs of other countries and an effort to compel other countries to accept U.S. foreign policy objectives. Such controls inherently are vulnerable to foreign blocking measures, and such measures are becoming more common. Given these realities, U.S. extraterritorial transaction controls cannot reasonably be supported by application of the effects doctrine and the reasonableness tests of the Restatement (Third).

There are almost no decided cases that squarely address the status of U.S. extraterritorial transaction control measures under international law. In the one court case that arose in the wake of the 1982 Soviet gas pipeline sanctions, a Dutch court held that the application of U.S. foreign trade controls to excuse a Dutch company controlled by a U.S. corporation from performance of a contractual obligation to supply a French company with goods for shipment to the Soviet Union would violate Dutch private international law and ordered the Dutch company to perform the contract. In adopting their 1996 blocking measures, the European Union and the governments of Mexico and Canada have declared that the extraterritorial aspects of the U.S. embargo of Cuba and the Helms-Burton Act violate international law norms.

Notwithstanding recent U.S. retaliatory foreign transaction control legislation, there is evidence of a growing recognition in the United States that such measures are inappropriate and may be counterproductive, if not violative of inter- national law norms. Perhaps the most egregious examples of extraterritorial transaction controls are the "person subject" features of the embargoes of Asian countries and Cuba that purport to regulate conduct of third-country subsidiaries. These measures were promulgated more than 30 years ago, in the context of the Korean War and the 1962 Cuban missile crisis and at a time when the United States so dominated "free world" commerce that no other nation was disposed to seriously challenge such actions.

The effort to replicate this approach in 1982 to interdict the Soviet gas pipeline was a humiliating defeat for the United States. Subsequently instituted U.S. sanctions programs have taken care not to apply to third-country corporations. Rather, the effort of the United States has been to obtain international cooperation in dealing with threatening or unwanted conduct on the part of irresponsible foreign states, both through actions of the United Nations and through international treaties and cooperative arrangements. This pattern of conduct may be viewed as an acknowledgement of the limitations that international law and avoidance of conflict with trading partners place upon foreign transaction control measures.

VII. Alternatives to Extraterritorial Transaction Controls

Objectives sought to be achieved by extraterritorial controls may be achieved more effectively by alternative means that do not raise legitimate objections from foreign parties. For example, in lieu of regulating the conduct of foreign subsidiaries, the U.S. government might, where the circumstances are compelling, limit the participation of U.S. companies in objectionable foreign trade transactions, e.g., the provision of U.S. parent company financial guarantees, technical support, etc. U.S. trade control measures could, consistent with this Recommendation, preclude the involvement of individual U.S. nationals in certain foreign transactions, although such measures generally should not be adopted readily, as they may create a deterrent to efficient operations and employment opportunities for U.S. citizens. Concepts such as evasion, aiding and abetting, conspiracy and the like, well founded in the U.S. legal system, may be applied to constrain actions of persons subject to U.S. legal process who act to undermine foreign trade controls directed to U.S. persons and U.S. exports.

Further, as an alternative to foreign reexport controls, the U.S. government could, where essential national interests necessitate, require U.S. exporters of critical products and technologies to obtain agreement from foreign recipients not to retransfer such items to particular parties or destinations. Such consensual undertakings would not be inconsistent with international law norms. However, to assert that every foreign party in possession of U.S.-origin, or U.S.-content goods or technology has, by acquiring such items, implicitly consented to the panoply of reexport controls, would amount to the imposition of extraterritorial transaction controls that would conflict with this Recommendation.

The most effective means of achieving national foreign trade control policy objectives is through cooperation with countries that share similar goals, the positive objective of this Resolution. The adoption of extraterritorial transaction control measures may be a significant obstacle to the achievement of such international cooperation, creating a climate of mutual distrust where support and understanding should exist. The United States cannot expect, however, that its views will be shared in every case by other major trading nations, and must accept the fact that foreign trade controls may not be the most effective means to deal with much disfavored foreign conduct.

VIII. Conclusion

This Recommendation supports United States cooperation in international efforts to address objectionable foreign trade and investment conduct, but opposes the use of extraterritorial foreign transaction controls that depart from international law jurisdictional norms and create the potential for conflict with other nations. In a world where the United States may exercise wise leadership but cannot achieve unilateral dominion, extraterritorial foreign transaction controls are not an appropriate or effective technique for achieving important national objectives.