

Title: Current Landscape of DDTC Brokering Regulations

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Summary: Brokering issues under the International Traffic in Arms Regulations (ITAR) can be particularly complex, presenting unique compliance challenges.

Recently, the Directorate of Defense Trade Controls (DDTC) initiated new measures aimed at enhancing the brokering reporting process to ensure that annual reports are submitted consistently and accurately.

Learn more about key takeaways, including the challenges of current brokering requirements and an overview of the recommendations currently under consideration by the DDTC.

Link: <https://www.bipc.com/current-landscape-of-ddtc-brokering-regulations>

Article: Navigating the International Traffic in Arms Regulations (ITAR) is a multifaceted task. One of the three core activities that the ITAR regulates, aside from (1) the export of defense articles including technical data, and (2) the provision of defense services, is (3) brokering activities, to which the ITAR dedicates a whole chapter. Part 129 of the ITAR is pivotal for U.S. persons (both individuals and entities), as well as certain foreign entities engaged in brokering activities.

Brokering issues under the ITAR can be particularly complex, presenting unique compliance challenges. Recently, the Directorate of Defense Trade Controls (DDTC) initiated new measures aimed at enhancing the brokering reporting process to ensure that annual reports are submitted consistently and accurately. This article outlines the current brokering requirements and provides an overview of the recommendations currently under consideration by the DDTC.

The Evolution of Brokering Activities in U.S. Defense Trade

The landscape of U.S. defense trade has seen significant changes over the years, particularly concerning brokering activities. A pivotal moment in this evolution occurred in 1996 when the Arms Export Control Act (AECA) was amended to introduce specific provisions for the registration of brokers under Section 38. This amendment was a response to growing concerns about the role of U.S. parties — especially third-party intermediaries — in foreign arms transactions.

The intent behind the AECA amendment was to close a perceived loophole that allowed U.S. individuals and entities to engage in brokering activities without sufficient transparency. Extending regulatory authority to encompass brokering activities was seen as a critical step in ensuring that arms exports aligned with U.S. foreign policy objectives and national security interests.

In 1997, brokering regulations were formally integrated into the ITAR under Part 129, which established an annual reporting requirement. The regulations did not, however, specify a deadline for submitting these reports, a lack of clarity that would later become a focal point for regulatory improvement.

Fast forward to 2013, when DDTC proposed new rules aimed at revising the ITAR's brokering regulations and establishing a clearer timeline for submissions. This rule linked the submission of brokering reports to the registration renewal process and provided some clarity as to the information needed for annual reports; however, it fell short of establishing a specific format for these submissions.

Despite these changes, DDTC continues to receive annual brokering reports that often lack a clear structure, resulting in outdated or incomplete data. In light of this, the Defense Trade Advisory Group (DTAG) is now focused on evaluating alternative methods for brokering reporting in line with ITAR § 129.10(b) to achieve more accurate, consistent, and timely submissions while streamlining the review process.

Issues and Recommended Solutions

The ITAR mandate that registered brokers submit an annual report to DDTC detailing their brokering activities from the preceding year; however, it lacks guidance on the format and organization of these submissions. Section 129.10(b) outlines essential components, including:

- Identification of the broker, including name, address, and registration code, along with a signature from an authorized official certifying the report's accuracy.
- A comprehensive description of each brokering activity, including the unique identification number assigned by DDTC for any approvals or exemptions.
- Detailed information on all participants involved in the brokering activities, including their names, addresses, nationalities, locations, and roles.

- Quantitative and qualitative descriptions of the defense articles or services, including their U.S. dollar value.
- Information on any compensation received or expected by participants, both direct and indirect, along with the source of that compensation.

Current guidelines provide minimal clarity regarding reporting procedures, leading to inconsistent submissions and unnecessary burdens on registrants. For instance, registrants must certify the absence of brokering activities when none have occurred. Moreover, the ITAR Compliance Program Guidelines offer limited insight into broker reporting obligations, highlighting the need for more detailed guidance.

To improve the situation and establish a standardized report format, the DTAG has made several recommendations in a recently issued “White Paper.”

Some of those recommendations are:

“To minimize the risk of violations related to brokering activities under the ITAR, the Directorate of Defense Trade Controls (DDTC) advises brokers to implement the following measures:

- ***Develop Comprehensive Policies and Procedures:*** Brokers should establish clear policies and procedures for obtaining prior authorization for brokering activities, reporting these activities, and maintaining accurate records related to brokering.
- ***Clarify Brokering Activities:*** It is crucial for brokers to understand which actions fall under the definition of brokering activities as specified by ITAR. Brokers should assess their involvement in such activities to ensure compliance.
- ***Review Exemptions:*** Brokers should familiarize themselves with the available exemptions to the brokering requirements. Understanding these exemptions can help in navigating regulatory obligations more effectively.
- ***Timely Submission of Reports:*** Brokers must ensure that they submit their annual brokering reports to DDTC within the specified deadlines to maintain compliance and avoid potential penalties.

In addition, several key issues and challenges have been identified by DTAG concerning the reporting obligations: These challenges include:

1. Lack of Standardization

DDTC has observed significant variability in the format and organization of brokering reports submitted by registrants. This inconsistency complicates efforts for effective consolidation, internal review, and analysis.

From industry's perspective, ITAR § 129.10(b) and the agency guidance lack clear specifications regarding the structure and content of annual reports. Consequently, registrants face uncertainty about how to organize information and what format to use for submissions. Each registrant tends to create its own reporting template to fulfill these obligations, resulting in discrepancies in presentation, even for similar data elements, which can vary from year to year.

2. Outdated and Incomplete Information

DDTC frequently encounters challenges as registrants request extensions for submitting reports or providing submissions that are incomplete. These issues hinder DDTC's ability to conduct thorough data analysis for effective oversight and policy formulation.

From industry's perspective, there is significant confusion regarding the specific data requirements outlined in ITAR § 129.10(b). Registrants may struggle to collect or access essential information, resulting in delays and incomplete reports. Additionally, there are instances when reporting is required before certain information is finalized. This challenge is tied to the broad interpretation of "brokering activities."

3. Ambiguities in Defining Brokering Activities

The defense trade industry faces significant challenges due to the lack of clarity in defining brokering activities, particularly when such activities do not lead to a sale or extend over multiple years. Registrants struggle to understand the reporting obligations for indirect participants and activities that cross various approval periods. For instance, ITAR § 129.10(b)(2) requires the identification of "all persons who participated in the activities," but this broad language may inadvertently include more individuals than DDTC intended.

4. Duplicative Reporting

The defense trade industry expresses uncertainty regarding the reporting process when brokering activities involve multiple brokers beyond the registrant submitting the report. Additionally, ongoing brokering activities that extend over several years may lead to repetitive reporting, further complicating compliance.

These challenges, both individually and in combination, impede a registrant's ability to effectively gather and maintain necessary records.

In light of the above, DTAG has issued the following recommendations:

1. Narrowing the Reporting Scope for Brokering Activities: Not all brokering activities necessitate prior approval from DDTC. The Working Group recommended reevaluating whether reporting should be confined to instances that require advance approval under § 129.4, as the approval process inherently involves government oversight that mitigates risks. Adopting this approach would not only streamline the

reporting process but also significantly reduce paperwork, making compliance more manageable for registrants.

2. The DTAG Working Group recognized the complexities involved in interpreting the expansive definition of “brokering activity” and recommended to refine the concept of “brokering activity” so they can apply only to those brokering activities that culminate in a sale or other form of transfer.

Currently, § 129.2(b) describes “brokering activities” as any actions taken on behalf of another party to facilitate the manufacture, export, permanent import, transfer, reexport, or retransfer of defense articles or services, whether they originate from the U.S. or elsewhere. While § 129.2(b)(1) offers specific examples of what constitutes brokering actions, it is important to note that this list is not exhaustive. It encompasses a range of activities, including soliciting, promoting, negotiating, contracting, arranging, or otherwise aiding in the purchase, sale, transfer, loan, or lease of defense articles or services.

3. Also, the DTAG recommended a more precise definition of the individuals involved in “brokering activities.” This definition should focus specifically on the seller, manufacturer, purchaser, source, customer, and end user, as well as any parties with whom the registrant has direct interactions. This targeted approach, they argue, will enhance the accuracy of reports, as registrants will have a clearer understanding of the roles and existence of these individuals, making it easier to obtain the necessary information for reporting. Moreover, this refinement is expected to reduce delays that often occur when reporters seek information from parties not directly involved.

4. The fourth recommendation addresses the issue of minimizing “duplicate reporting.” DTAG recognized that completely eliminating duplicate submissions may be difficult; however, implementing a specific reporting template could enable DDTC to more effectively identify and manage duplicate reports from different registrants. By reducing the incidence of duplicate submissions, the burden on DDTC to consolidate information for review and analysis will be alleviated, while also simplifying the reporting process for industry participants.

5. Focusing on Direct Consideration: The Working Group recommended revising reporting requirements to concentrate solely on the direct consideration received by the registrant. This practical approach can simplify compliance and enhance the accuracy of reports.

6. Establishing a Standardized Reporting Format: To facilitate effective analysis and consolidation of information, the Working Group requested the development of a standardized reporting template to guide registrants in their submissions.

As the regulatory landscape surrounding brokering activities under the ITAR continues to evolve, it is crucial for stakeholders to adapt to these changes to ensure compliance and support U.S. national security interests. The recommendations

recently put forth by the DTAG aim to streamline the reporting process, clarify obligations, and reduce the burden on registrants. By implementing these changes, DDTC can enhance the accuracy and consistency of brokering reports, ultimately fostering a more efficient and transparent defense trade environment.

Buchanan has a team of national security, export controls & economic sanctions attorneys with vast experience advising on brokering related issues and compliance with the ITAR and additional US export control laws and regulations.

