

ALERT

DDTC PROPOSES COMPLETE OVERHAUL OF BROKERING REGULATIONS

The State Department Directorate of Defense Trade Controls (“DDTC”) has published its proposed amendments to the brokering regulations in Part 129 of the *International Traffic in Arms Regulations* (“ITAR”).

SUMMARY

DDTC is proposing a complete overhaul of the brokering regulations, and its revisions cover everything from the definitions (what activities do and do not constitute “Brokering Activities”) to exemptions from the registration, licensing and reporting requirements, the procedures for obtaining prior approval, when such approval would be required, and general housekeeping. In addition, DDTC is proposing new exemptions and detailed guidance on obtaining prior approval, when such authorization is required. To aid industry, DDTC puts forth illustrative examples of activities that constitute brokering and activities that do not constitute brokering.

ACTION BY CLIENTS

Industry members should review the proposed changes carefully because they may change the way business is conducted. If appropriate, comments on the proposed regulations should be sent to DDTC. The deadline for submitting comments is **February 17, 2012**.

CURRENT REGULATIONS STILL IN EFFECT

Please bear in mind that the Federal Register Notice referenced herein is a *proposed rulemaking*. These revisions have not been finalized or adopted. Consequently, companies and individuals must continue to abide by the *current regulations* in ITAR Part 129 unless and until the proposed revisions are made final, at which time DDTC will publish the final rule in the *Federal Register*.

DISCUSSION OF PROPOSED AMENDMENTS

What follows is a broad overview of some of the proposed changes DDTC has put forward. Given the breadth of the proposed revisions, the following information is not all-inclusive. Therefore, we are attaching a copy of the complete *Federal Register* Notice for reference.

A. Definitions

1. *Broker and Brokering Activities*

The starting point for interpreting and applying the brokering regulations necessarily begins with whether the action in question constitutes a *brokering activity*. The proposed revisions would change the definitions of “broker” and “brokering activities” to read as follows:

“Broker:” any person ... who engages in brokering activities.”

“Brokering activities:” 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 presents this new language to more closely track the definition of brokering activities in the Arms Export Control Act. It is important to note that the proposed regulations would actually *expand* the activities subject to the ITAR because the phrases “who acts as an agent for others” and “in return for a fee, commission, or other consideration” would be eliminated. Companies have relied upon these qualifying phrases when determining whether certain activities constitute brokering.

Indeed, the proposed regulations state that brokering activities include “soliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service.” This list is not exclusive, and engaging in the business of brokering activities requires only one action.

2. *Who Is A Broker – The Foreign Agent*

The current regulations state that brokering activities includes activities by foreign persons *subject to U.S. jurisdiction*. Exactly what makes a foreign person subject to U.S. jurisdiction has caused a lot of confusion in industry, and for several years this issue has been the center of contention, debate and legal challenge. DDTC has addressed this issue by proposing new language to “clarify” when a foreign person’s activities are subject to the ITAR brokering provisions.

If adopted, the new brokering regulations will capture foreign persons who undertake “brokering activities” while they are physically located in the United States, or when they are (a) located outside the United States and dealing in U.S.-origin defense articles or defense services, (b) involved in the importation into the United States of a defense article or defense service of any origin, or (c) acting on behalf of a U.S. person. Take note – under this new language, foreign persons never have to step foot in the United States, nor do they have to handle U.S. products. All they will have to do is act on behalf of a U.S. person (to what extent is not explained), or be involved in a transaction that results in an import into the United States of a defense article or defense service.

In light of the expanding definition of brokering activities, this clarification will impact U.S. companies (including importers) who use foreign agents or who take part in transactions involving foreign agents. U.S. companies must think about how these changes, if adopted, will affect their responsibilities and liabilities for third parties under the ITAR.

That said, there is a notable change included in the proposed revisions that will enable registrants to include in their registration statements their eligible foreign brokers listed and identified as their exclusive brokers. See the discussion below on the proposed registration exemptions.

B. Registration Requirements and Exemptions

If there is a positive note within the proposed amendments it is that the new regulations may streamline the registration process and eliminate the requirement for multiple registrations and fees, prior approvals, and reporting for manufacturers and exporters if the required conditions are met. In summary:

- (i) An entity registered under Part 122 (manufacturer or exporter of defense articles, or provider of defense services) would no longer have to submit a separate broker registration, pay a separate registration fee, apply for prior approval, or file year-end brokering reports.
- (ii) The registration, fee, prior approval and reporting exemption would extend to all entities within a single corporate group of a registrant: (a) U.S. person subsidiaries, joint ventures, and other affiliates listed and covered in the registration statement; (b) “bona fide and full-time regular employees;” and (c) foreign person brokers listed and identified on the registration statement as the exclusive brokers of the registrant. However, the brokering activities of any of these entities would either have to be limited to the registrant’s defense articles/services subject to export approval under the ITAR (question whether “subject to export approval” includes or excludes exports qualified for license exemptions), or be undertaken on behalf of the registrant involving only defense articles/services located and obtained from a manufacturer or source in the United States for export outside the United States under ITAR approval.

It is important to keep in mind that all entities, including foreign brokers, who a U.S. manufacturer or exporter identifies in its registration statement, are necessarily included in the certification statement pertaining to convictions, indictments, debarment, etc. This will require the registrant to exercise significant due diligence to ensure its certification is completely accurate and truthful. In addition, the recordkeeping requirements remain in place for all entities.

Persons exempt from separate registration, prior approval, or reporting are subject to the U.S. Government’s policies on embargoes and other proscriptions.

C. Prior Approval Requirements

The proposed revisions would eliminate the prior notification requirements (always confusing to industry). Instead, prior approval would be required for all brokering activities, unless of course an exemption applies (for example, those discussed above). Subject to certain important limitations, the proposed revisions would exempt from prior approval (a) brokering activities within and destined exclusively for NATO, any member country of NATO, Australia, New Zealand, Japan and South Korea and (b) activities involving only U.S.-origin defense articles that are not Significant Military Equipment and foreign government or international organization end-users.

The U.S. Government exemption would be amended to make clear that the exemption applies only to persons under a direct contract with a U.S. Government agency for the sole use by the

U.S. Government agency or for carrying out foreign assistance or sales program authorized by law and subject to control of the president by other means. However, use of this exemption would not be automatic as it would require either (i) prior concurrence from DDTC, or (ii) the subject contract contains an explicit clause stating the contract supports 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. There is no language in the proposed regulations that explains “control” or “other means equivalent.”

The proposed revisions recognize there are instances where an applicant for prior approval will not have all the information required for a request. In such cases, broker applicants would have the opportunity to explain the omission, and DDTC would have discretion to take this into account when evaluating a request for prior approval.

The above analysis is for informational purposes only and is not intended to be construed or used as general legal advice. It does not anticipate all areas in which the proposed revisions could affect a business. Questions about this information can be directed to:

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Issued in Seattle, Washington, on December 12, 2011.

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DEPARTMENT OF STATE

22 CFR Parts 120, 122, 126, 127, and 129

RIN 1400-AC37

[Public Notice 7732]

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

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State proposes to amend part 129 of the International Traffic in Arms Regulations (ITAR) relating to brokers and brokering activities. Amendments are also to be made to related provisions of the ITAR. 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.

DATES: The Department will accept comments on this proposed rule until February 17, 2012.

ADDRESSES: Interested parties may submit comments within 60 days of the date of publication by one of the following methods:

- *Email:*

DDTCResponseTeam@state.gov with the subject line, "Brokering Rule Comments."

- *Internet:* At *www.regulations.gov*, search for this notice by using this rule's RIN (1400-AC37).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment

period via the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov*. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT:

Daniel L. Cook, Chief, Compliance and Registration Division, Office of Defense Trade Controls Compliance, Department of State, 12th Floor, SA-1, 2401 E Street NW., Washington, DC 20037; or email: *DDTCResponseTeam@state.gov*, with the subject line "Brokering Rule Comments."

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

Background

The Arms Export Control Act was amended in 1996 (Pub. L. 104-164) to provide for the regulation of brokering activities. The following year, implementing regulations were added to the ITAR in part 129. These regulations have remained unchanged except for two minor technical changes.

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

Revisions Relevant to Industry Concerns

Changes are proposed to key provisions involving definitions, registration, licensing, exemptions, and reporting procedures. Some of these changes will result in a reduction of burden to the affected public. New exemptions are proposed, requirements for prior notification would be eliminated, and detailed guidance on obtaining a brokering authorization would be provided. The proposed

changes also provide additional specificity regarding the applicability of these regulations to foreign brokers operating overseas.

Summary of Major Changes

Definitions of Broker and Brokering Activities

The definitions in current § 129.2(a) and (b) would be amended to clarify the terms "broker" and "brokering activities." The revision also would more closely track the statutory definition of brokering activities 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 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. Under current definitions, part 129 applies to U.S. persons who conduct brokering activities in the U.S. or abroad. It also applies to foreign persons who conduct brokering activities in the U.S., or abroad if subject to U.S. jurisdiction. Proposed § 129.2(d)(3)-(5) clearly indicate when a foreign person's brokering activities are subject to the ITAR.

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.

Brokering and U.S. Government Employees

New § 129.2(e)(1) would continue to exclude from the definition of "brokering activities" actions by U.S. persons in the United States that are limited to facilitating U.S. domestic sales or transfers. New § 129.2 (e)(2) would add a new exclusion from the definition of "brokering activities" for such activities by employees of the U.S. Government acting in an official capacity. The proposed exclusion would clarify that the U.S. Government and its officers or employees acting in an official capacity are not merely exempt from the requirements to register and obtain licenses, but rather are not covered by part 129 at all.

Registration Requirements and Exemptions

Editorial and technical revisions would be made to certain registration and related registration exemption provisions in § 129.3.

Persons exclusively in the business of insuring would be added to those persons exempt from registration in § 129.3(b)(2), as their insuring activity is similar to that of banks and financing. Such persons would also be exempt from the requirements in § 129.6 for prior approval for brokering activities, as well as reporting and recordkeeping requirements in §§ 129.10 and 129.11.

New § 129.3(b)(3) concerns persons registered pursuant to part 122 of this subchapter, including their U.S. subsidiaries, joint ventures, and other affiliates listed 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 Statement of Registration, whose brokering activities: (a) Involve only the defense articles or services that are currently subject to export licenses obtained by the part 122 registrant or will require a license prior to their export by the registrant; or, (b) 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. Such persons are not required to obtain a separate part 129 registration, and would be exempt from the requirements in § 129.6 for prior approval for brokering activities as well as reporting requirements in § 129.10, but would still have recordkeeping requirements as specified in § 129.11.

New § 129.3(b)(4) would exempt from registration 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, 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. Such persons would also be exempt from the requirements in § 129.6 for prior approval for brokering activities, as well as reporting and recordkeeping requirements in §§ 129.10 and 129.11.

New § 129.3(c) would specify that persons exempt from registration are subject to the policy of embargoes and other proscriptions in § 129.5.

New § 129.3(d) would specify that if new § 129.3(b)(3) is not applicable, U.S. persons who are registered as a

manufacturer or exporter in accordance with part 122, including their U.S. or foreign subsidiaries, joint ventures, and other affiliates listed and covered on their Statement of Registration, and who are required to register under part 129, are not required to submit a separate broker registration or pay a separate broker registration fee as long as they have listed and identified themselves as brokers within their manufacturer or exporter Statement of Registration. All other requirements of part 129 would apply to such brokers and their brokering activities.

Registration Statement and Fees

The revisions would consolidate most broker registration requirements in § 129.4 rather than referring to certain requirements in part 122 (*e.g.*, notification of changes in information in registration submissions, notice of transfer of ownership or control to foreign persons and special provisions for mergers and acquisitions). In addition, the requirements for submissions by foreign person brokers are clarified. A broker not otherwise exempt from registration or not listed under a part 129 registration submission in accordance with § 129.4(c) would continue to be required to register and pay a registration fee of \$2,250 per year (*see* § 129.4(a)). The Statement of Registration would be required to be signed by a senior officer who has been empowered by the intended registrant to sign such documents (*see* § 129.4(a)). The registrant must also submit documentation that it is incorporated or otherwise authorized to do business in the United States or, in the case of a foreign person registrant, in the relevant foreign jurisdiction (*see* § 129.4(a)).

Section 129.4(b) would be revised to reflect that a person who is required to register as a broker must do so annually and pay a registration fee of \$2,250. This revision was made so readers would no longer need to refer to § 122.3. In addition, 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. We therefore want to consolidate most broker-related requirements in one section and make the navigation of the ITAR simpler.

Section 129.4(c) would be revised to reflect that there is no longer a requirement for a separate transmittal letter. The new requirements for intended broker registrants are certain certifications to be made on the Statement of Registration that previously were provided via the transmittal letter.

In § 129.4(c)(1), specific references to certain senior officers or officials would be added. In order for DDTC to obtain a certification of eligibility status as to all parties listed in a registration, this paragraph would also expressly require certifications to cover the registrant's parent or any subsidiary, joint venture, other affiliate, or other persons required to be listed in the Statement of Registration. In addition, this paragraph would clarify that disclosure is required of any form of charge of listed U.S. criminal statutes as well as indictment in order to eliminate uncertainty or misinterpretation of whether someone who has waived indictment and is criminally charged by "information" must notify DDTC. Certification requirements would be supplemented with a provision for part 129 registrants to disclose any convictions or indictments or other charges for violating foreign criminal statutes dealing with subject matter similar to the listed U.S. statutes or ineligibility under the laws of a foreign country to participate in export, import, or brokering activities. (A similar requirement is added to a broker's application for prior approval of brokering activities (*see* § 129.8(a)).

Section 129.4(c)(2) would contain the certification on whether the registrant is subject to foreign ownership or control and would add clarifications on when this requirement applies and would specifically require a foreign owned or controlled registrant to explain such ownership or control, including the identities of all ultimate owners or control persons.

New § 129.4(d) would recognize expressly the discretion of DDTC to permit a broker that is a parent of a U.S. or foreign person registered as a broker under part 129 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.

New § 129.4(e) would specify that notifications of changes in registration information be signed by a senior officer, and provide that certain changes be communicated within five days of the event and other material changes at the time of annual registration renewal.

New § 129.4(f) would require notice 60 days in advance of any transfer to foreign ownership or control of a broker, any parent, subsidiary, or other affiliate listed and in the Statement of Registration.

New § 129.4(g) would provide procedures that must be followed in the

case of an acquisition or merger involving a registered broker.

Policy on Embargoes and Other Proscriptions

Section 129.5 would be amended to provide explicitly that exemptions from prior approval in § 129.7 do not apply to brokering activities involving countries or other persons subject to embargoes and other proscriptions cited in § 129.5 (e.g., those involving countries or other persons referred to in § 126.1 or subject to a restriction published in the **Federal Register**). A provision in current paragraph (d) would be removed because it is redundant of paragraph (b); paragraphs would be re-designated, accordingly.

Exemptions From Prior Approval Requirement

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

The exemption for brokering activities arranged within the North Atlantic Treaty Organization (NATO), NATO member countries, Australia, Japan, New Zealand, or the Republic of Korea would be amended to make it clear that the brokering activities must be undertaken wholly within these countries, and the defense articles and services must be located within and destined for NATO or such countries (see § 129.7(c)).

A new exemption would be added for brokering activities outside of NATO member countries, Australia, Japan, New Zealand, or the Republic of Korea that involve U.S.-origin defense articles that are not significant military equipment (SME) and where the end-use is limited to foreign government and international organization end-users (see § 129.7(d)).

The list of excluded items in § 129.7(e) would be expanded to cover certain sensitive defense articles and services (e.g., man-portable air defense

systems or "MANPADS," night vision equipment, spacecraft items that are SME, submersible vessels, directed energy weapons, and miscellaneous articles in U.S. Munitions List Category XXI). Additional technical and clarifying changes would also be made to various exclusions.

Prior Notification

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

Procedures for Obtaining Prior Approval

The information required in a request for prior approval submitted by a broker is revised and clarified in proposed new § 129.8. A provision adding a certification would be added in § 129.8(a) so that a request must include a statement on whether the broker applicant or its senior officers or officials have been indicted or otherwise charged (e.g., by information or convicted by foreign governments for violating any national statutes similar to those listed in § 120.27 or are ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in defense trade under the laws of a foreign country. (See similar requirement in § 129.4 for a broker's Statement of Registration certification.)

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

Proposed § 129.8 recognizes that some of the information to be required by that section may not be available at the time a request for prior approval is submitted (e.g., the quantity and value of defense articles or services to be brokered). The broker would be required to identify what information is omitted and provide an explanation. DDTC has the discretion to take such circumstances into account in deciding whether to

approve the request with or without conditions or to deny the request.

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

Guidance

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

Reports

Section 129.10 would be re-titled and revised to require that reports be submitted annually with the registration renewal submission, or within 30 days after expiration of registration if not renewing, for brokering activities the preceding year and to clarify the information required in the reports. Currently, the regulations do not provide a specific time period for submission of these reports, but via the DDTC Web site we have requested submissions in January. We are proposing this new reporting schedule in order to consolidate registration renewal with report submission, which we believe will improve reporting accountability and lessen the burden on industry.

Records

New § 129.11 would provide that records on brokering activities must be maintained in accordance with § 122.5.

Examples of Brokering Activities and License Application or Other Approval Requirements

Described below are several examples of conduct that constitute brokering activities and how the ITAR applies to such activities. These examples are illustrative only and are not exhaustive.

Example 1: A U.S. person learns of an upcoming U.S. Government solicitation for procurement of foreign defense articles that are significant military equipment (SME) and located abroad for delivery to a foreign government in South America. The solicitation will not be in support of a U.S. Government foreign assistance or sales program otherwise authorized by law. In advance of the solicitation, the U.S. person contacts several foreign manufacturers, personally visits their facilities to assess their capabilities to meet product specifications, and obtains guidance on the export procedures of the governments of the

countries where the defense articles are manufactured. Upon being awarded the contract by the U.S. Government, the U.S. person arranges for delivery from the manufacturers in the foreign countries to the South American government identified in the U.S. Government contract. The U.S. person is engaged in brokering activities and would be required to register under part 129 prior to initiating such activities. If the U.S. person is already registered as a manufacturer or exporter under part 122, it could meet part 129 registration requirements simply by amending its form DS-2032 Statement of Registration to add broker as a registration type and other required information (e.g., U.S. and foreign subsidiaries and affiliates also engaged in brokering activities); there would be no requirement for a separate broker registration submission or fee.

Example 2: A foreign person signs an agreement with a U.S. manufacturer/exporter registered with DDTC under part 122 to act as a broker exclusively for the registrant and is listed on the registrant's statement of registration as an exclusive broker. The agreement obligates the foreign person to purchase and distribute (or resell) to specified foreign governments in the Middle East the SME defense articles of the part 122 registrant. The part 122 registrant has obtained a DSP-5 license for technical data and a Warehouse & Distribution Agreement authorizing the foreign person to receive and present technical data to promote sales and to warehouse and distribute the defense articles. The foreign person is engaged in brokering activities, but assuming the foreign person meets eligibility and other criteria, he would be exempt under § 129.3(b)(3) from separate registration, prior approval, and reporting under part 129 with respect to the foregoing activities on behalf of the part 122 registrant. However, the foreign person would be subject to the policies and proscriptions of § 129.5 as well as recordkeeping requirement of proposed § 129.11.

Example 3: A foreign person seeks buyers for certain U.S.-origin SME defense articles previously exported through commercial channels to a foreign government of a NATO-member country. The foreign person enters into a representational arrangement with the foreign government to find a buyer. The foreign person contacts potential buyers in the U.S. and overseas and ultimately identifies a foreign government in Southeast Asia that wishes to procure the defense articles. The foreign person arranges for an in-country demonstration of the defense articles and negotiates the terms of the sale. The foreign person has engaged in brokering activities and would be required to register under part 129 and to obtain DDTC approval prior to initiating such activities. In addition, the foreign government seller would be required to obtain a reexport authorization under ITAR § 123.9(d) before reselling or reexporting such defense articles.

Example 4: A U.S. manufacturer/exporter, registered with DDTC under part 122, provided U.S. SME defense articles for export by the U.S. Department of Defense through the Foreign Military Sales Program to a foreign government in the Middle East.

Several years later, the foreign government asks the U.S. manufacturer/exporter to find buyers for the defense articles. The foreign government will use proceeds from the sale to upgrade its inventory with more modern defense articles from the same U.S. manufacturer. The U.S. company solicits and identifies a foreign government buyer in a sub-Saharan African country and negotiates the terms of sale on behalf of the Middle Eastern government. The U.S. manufacturer/exporter company is engaged in brokering activities and would be required to register under part 129 and obtain approval from DDTC under part 129 prior to engaging in such activities. As provided in proposed § 129.3(d), the manufacturer/exporter, having already registered under part 122, would not be required to file a separate broker registration or pay a separate fee, provided that it discloses that it engages in brokering activities in its registration. The Middle Eastern government owner would also be required to obtain reexport authorization for the FMS-origin defense articles from the Department of State's Office of Regional Security and Arms Transfers prior to reselling or reexporting such defense articles.

Example 5: A U.S. manufacturer of a defense article enters into a sales contract with a government end-user in a South American country and then obtains an export license from DDTC to export the defense article. The manufacturer engages a freight forwarder to arrange pick-up, containerization, transportation, and delivery to the end-user. The freight forwarder is engaged in brokering activities. However, so long as activities do not extend beyond freight forwarding, the freight forwarder will not be required to register, as provided by proposed § 129.3(b)(2). The freight forwarder, as well as any other person exempt from registration, must still comply with § 129.5 (policy on embargoes and other proscriptions).

Example 6: A bank in a Caribbean island country approaches a U.S. manufacturer of a defense article. The bank proposes to provide financing, through letters of credit that the bank issues, for the sale of the manufacturer's defense articles to a government end-user in Asia. As an inducement to perform the financing, the bank arranges introductions with a procurement official of the Asian government. The bank is performing activities beyond financing and is engaged in brokering activities (i.e., arranging introductions). The bank would be required to register with DDTC under part 129 and would be required to obtain prior approval unless its activities qualify for an exemption under § 129.7.

Example 7: A European manufacturer of a defense article incorporates U.S. origin defense articles (i.e., parts and components on the U.S. Munitions List). The European manufacturer negotiates a sales contract with a government end-user in a Middle Eastern country. In doing so, the European manufacturer employs a foreign person from that country to perform translation services during the negotiation. The foreign person is not engaged in brokering so long as that person's activity does not extend beyond administrative services such as translation

pursuant to proposed § 129.2(e)(3). Release to the foreign person of technical data on the U.S.-origin defense articles would require a license from DDTC. In addition, the European manufacturer would be exempt from registration, prior approval, reporting, and recordkeeping requirements under part 129, assuming all of the conditions of § 129.3(b)(4) are met. However, the policies and proscriptions of § 129.5 would apply.

Other Revisions

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

Section 120.1(a) would be amended to add reference to "other relevant authorities in the Arms Export Control Act (22 U.S.C. 2751 *et seq.*)" that are implemented by the ITAR. Sections 120.1(a)–(c) would be amended to update the title of the Deputy Assistant Secretary.

Section 120.1(c)'s heading would be changed to "Receipt of Licenses and Eligibility" and the text would be restructured into two subparagraphs. Subparagraph (1) would identify the kinds of licenses and other approvals that U.S. and/or foreign persons are qualified to receive and would add a clarification that foreign as well as U.S. persons may receive prior approvals for brokering activities. Subparagraph (2) would list the circumstances that would make a person generally ineligible to be involved in activities regulated under the ITAR. The latter provision would include clarification that it applies to foreign as well as U.S. persons and that ineligibility also attaches to a criminal charge (e.g., by information) as well as indictment, an interim suspension under § 127.8, or policy of denial under § 126.7(a).

Section 120.1(d) would be amended to clarify that exemptions provided by the ITAR do not apply to transactions in which the source or manufacturer, broker, or other participant in brokering activities (in addition to the exporter or party to the export) is generally ineligible, unless prior authorization granted by the DDTC. Also, an obsolete reference to § 126.7(c) would be deleted.

Section 120.20 would be amended to add "or other approval" to the title and provide a definition for "other approval."

Section 120.25(a)(4)(i), the definition of "Empowered Official," would be amended to add a reference to brokering activities. Paragraph (b) would be added to clarify that the empowered official of a foreign person broker may be a foreign person who otherwise meets the criteria for such an official in paragraph (a). Paragraph (c) would be added to specify that a person may not serve as an empowered official if such person is

ineligible under § 120.1(c)(2); has been convicted of violating any foreign criminal statutes similar to that referred to in that section; is ineligible to contract with, or to receive an import or export license from any foreign government agency; or is a citizen or national of any country or is a person referred to in § 126.1.

New § 120.40 would add a definition of “affiliate.”

Section 122.2(b)(1) would be amended to add specific references to certain senior officers or officials, including secretary, partner, or member. This paragraph would also expressly require certifications to cover the registrant’s parent or any subsidiary, joint venture, other affiliate, or other persons required to be listed in the Statement of Registration. This paragraph would also be clarified to require disclosure of any criminal charge (e.g., an information), as well as indictment of a listed crime. Paragraph (b)(2) of this section would be amended by adding a provision that would specifically require a foreign owned or controlled registrant to explain such ownership or control, including the identities of all ultimate owners or control persons. Also, a redundant provision concerning U.S. incorporation documentation would be deleted from this paragraph.

Section 122.4(a) would be amended to specify that notifications of changes in registration information be signed by a senior officer, and to provide that certain changes be notified within five days of the event and other material changes at the time of annual registration renewal.

The authority citation for part 126 would be amended to add a reference to § 40A of the Arms Export Control Act (22 U.S.C. 2781). Section 126.1(a) would be amended to clarify that the reference to the exception to the prohibition on use of exemption is found in paragraphs (c) through (e) of § 123.17. It would also add a reference to § 129.5 that contains restrictions imposed on brokering activities involving countries, areas, and persons referred to in § 126.1.

Section 126.1(b) would be amended to add after “[a] defense article licensed” the words “or otherwise authorized for export, temporary import, reexport, or retransfer.”

Section 126.13 would be amended by re-designating paragraph (c) as (d) and adding a new paragraph (c) that would require all applications for license or approval to identify all brokers and described their activities with respect to the transaction subject to the application.

Section 127.1(b) would be amended to specify 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.

Section 127.1(c) would be amended to change the reference from § 120.1(c) to § 120.1(c)(2) and to clarify that this provision applies to ineligible persons themselves. Section 127.1(c)(1) would be amended to delete the words “debarred, suspended, or” before “ineligible person,” as an ineligible person includes one who has been debarred or suspended. Also, § 127.1(c)(2) would be amended to add a reference to “or brokering activities” after “defense article, defense service”; delete the words “the furnishing of any” before “defense service”; replace reference to “for which a license or approval is required” with “subject to this subchapter”; and delete the words “debarred, suspended, or” before “ineligible person.”

Section 127.2(b)(13) would be amended to add a reference to “brokering activities” to the definition of documents to which the prohibition against misrepresentation and omission of facts in § 127.1(a) applies.

Section 127.7(a) would be amended to add a specific reference to brokering activities to the scope of debarment and to replace the words “for which a license or approval is required by this subchapter” with “subject to this subchapter.”

Section 127.8 would be amended to add a reference to brokering activities to the scope of an interim suspension order and to delete obsolete references to notice and other provisions relating to § 127.7(c). Also, the words “for which a license or approval is required by this subchapter” would be replaced with “subject to this subchapter.”

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from § 553 (Rulemaking) and § 554 (Adjudications) of the Administrative Procedure Act. Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 60-day provision for public comment and without prejudice to its determination that controlling the import and export of

defense services is a foreign affairs function.

Regulatory Flexibility Act

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

Unfunded Mandates Act of 1995

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

Executive Order 13175

The Department has determined that this proposed rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

Small Business Regulatory Enforcement Fairness Act of 1996

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

Executive Orders 12372 and 13132

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

Executive Order 12866

The Department is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department

has reviewed the proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Order.

Executive Order 13563

The Department of State has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Executive Order 12988

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

Paperwork Reduction Act

The Paperwork Reduction Act ("PRA," 44 U.S.C. 3501 *et seq.*) requires all Federal agencies to analyze proposed regulations for potential burdens on the regulated community created by provisions in the proposed regulations that require the submission or retention of information. The information collection requirements must be submitted to the Office of Management and Budget (OMB) for approval. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of its continuing effort to reduce paperwork and respondent burden, and to conform with the requirements as set forth in this proposed rule, the Department of State proposes to change the reporting requirements on the following collections: DS-2032, Statement of Registration (approved by the Office of Management and Budget [OMB] under control number 1405-0002); the Annual Brokering Report (OMB control number 1405-0141); and Brokering Prior Approval (OMB control number 1405-0142). This notice serves to inform the general public and Federal agencies of the opportunity to comment on these information collections in accordance with the PRA.

Summary of Proposed Collections: The Department of State is seeking OMB approval for the information collections described below.

- **Title of Information Collection:** DS-2032 Statement of Registration.
- **OMB Control Number:** 1405-0002.
- **Type of Request:** Revision of Currently Approved Collection.
- **Originating Office:** Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
- **Form Number:** DS-2032.

- **Respondents:** Business and Nonprofit Organizations.
 - **Estimated Number of Respondents:** 12,000.
 - **Estimated Number of Responses:** 12,000.
 - **Average Hours per Response:** 1 hour.
 - **Total Estimated Burden:** 12,000 hours.
 - **Frequency:** Annually and on occasion.
 - **Obligation to Respond:** Mandatory.
 - **Title of Information Collection:** Annual Brokering Report.
 - **OMB Control Number:** 1405-0141.
 - **Type of Request:** Extension of Currently Approved Collection.
 - **Originating Office:** Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
 - **Form Number:** None.
 - **Respondents:** Business and Nonprofit Organizations.
 - **Estimated Number of Respondents:** 1,515.
 - **Estimated Number of Responses:** 1,515.
 - **Average Hours per Response:** 2 hours.
 - **Total Estimated Burden:** 3,030 hours.
 - **Frequency:** On Occasion.
 - **Obligation to Respond:** Mandatory.
 - **Title of Information Collection:** Brokering Prior Approval (License).
 - **OMB Control Number:** 1405-0142.
 - **Type of Request:** Extension of Currently Approved Collection.
 - **Originating Office:** Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.
 - **Form Number:** None.
 - **Respondents:** Business and Nonprofit Organizations.
 - **Estimated Number of Respondents:** 1,515.
 - **Estimated Number of Responses:** 150.
 - **Average Hours per Response:** 2 hours.
 - **Total Estimated Burden:** 300 hours.
 - **Frequency:** On Occasion.
 - **Obligation To Respond:** Required to Obtain Benefits.
- DATES:** The Department will accept comments from the public on these information collections up to 60 days from date of publication in the **Federal Register**.
- FOR FURTHER INFORMATION CONTACT:** Comments and questions regarding the collections listed in this notice should be directed to Daniel L. Cook, Chief, Compliance and Registration Division, Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls, Department of State,

12th Floor, SA-1, 2401 E Street NW., Washington, DC 20037; or email DDTCResponseTeam@state.gov, with the subject line "Brokering Rule Information Collections."

Abstract of Proposed Collections: The export, temporary import, temporary export and brokering of defense articles, defense services and related technical data are licensed by the Directorate of Defense Trade Controls in accordance with the International Traffic in Arms Regulations (22 CFR parts 120-130) and Section 38 of the Arms Export Control Act. Those of the public who manufacture or export defense articles, defense services, and related technical data, or the brokering thereof, must register with the Department of State. Persons desiring to engage in brokering activities must submit an application or written request to conduct the transaction to the Department to obtain a decision whether it is in the interests of U.S. foreign policy and national security to approve the transaction. Also, registered brokers must submit annual reports regarding all brokering activity that was transacted, and registered manufacturers and exporter must maintain records of defense trade activities for five years. We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Methodology: These forms/information collections may be sent to the Directorate of Defense Trade Controls via mail, personal delivery, or fax.

Summary of Proposed Changes to the Information Collections: The proposed changes to the DS-2032, Statement of Registration, follow the proposed changes to ITAR part 129 that would allow manufacturers/exporters to register as brokers on the same form, with one registration fee. In addition, the form will ask for more information regarding company structure, specifically for information on intermediary parents, if applicable. Finally, the form will have a separate statement of certification for those registering as brokers.

The revised regulations provide that the Annual Brokering Report collection would be submitted with the DS-2032, as an attachment. New information that is to be required on the report includes the following: brokering registration code; signature and certification of the report by an empowered official; identification of all parties involved in the brokering transaction (currently, the regulations require only the identification of purchasers and recipients); and identification of the source of any consideration paid for the brokering transaction.

Clarification of the requirements for obtaining Brokering Prior Approval will result in the applicant providing additional information, to include the following: Categorization of the types of defense articles and services to be brokered, including whether the items are significant military equipment; identification of the type of sale that is to be brokered (commercial or under the Foreign Military Sales program); listing of any consideration expected to be received; and signature of an empowered official certifying the information provided is complete and accurate.

List of Subjects

22 CFR Part 120

Arms and munitions, Classified information, Exports.

22 CFR Part 122

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

22 CFR Part 126

Arms and munitions, Exports.

22 CFR Part 127

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

22 CFR Part 129

Arms and munitions, Exports, Technical assistance.

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

PART 120—PURPOSE AND DEFINITIONS

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

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

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

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

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

(b)(1) *Authorized officials.* All authorities conferred upon the Deputy Assistant Secretary for Defense Trade and Regional Security or the Managing Director of Defense Trade Controls by this subchapter may be exercised at any time by the Under Secretary of State for Arms Control and International Security or the Assistant Secretary of State for Political-Military Affairs unless the Legal Adviser or the Assistant Legal Adviser for Political-Military Affairs of the Department of State determines that any specific exercise of this authority under this paragraph may be inappropriate. (2) In the Bureau of Political-Military Affairs, there is a Deputy Assistant Secretary for Defense Trade and Regional Security (DAS—Defense Trade and Regional Security) and a Managing Director of Defense Trade Controls (MD—Defense Trade Controls). The DAS—Defense Trade and Regional Security and the MD—Defense Trade Controls are responsible for exercising the authorities conferred under this subchapter. The DAS—Defense Trade and Regional Security is responsible for oversight of the defense trade controls function. The MD—Defense Trade Controls is responsible for the Directorate of Defense Trade Controls, which oversees the subordinate offices described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section.

* * * * *

(c) *Receipt of Licenses and Eligibility.*

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

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

(ii) A foreign person may receive a reexport or retransfer approval; and

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

Requests for a license or other approval other than by a person referred to in paragraphs (c)(1)(i) and (c)(1)(ii) of this section will be considered only if the applicant has registered with the Directorate of Defense Trade Controls pursuant to part 122 or 129 of this subchapter, as appropriate.

(2) Persons who have been convicted of violating the criminal statutes enumerated in § 120.27 of this subchapter, who have been debarred pursuant to part 127 or 128 of this subchapter, who are subject to indictment or are otherwise charged (e.g., by information) for violating the criminal statutes enumerated in § 120.27 of this subchapter, who are ineligible to contract with or to receive a license or other form of authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive an export license or other approval from any other agency of the U.S. Government, or who are subject to a Department of State policy of denial, suspension, or revocation under § 126.7(a) of this subchapter, or to interim suspension under § 127.8 of this subchapter, are generally ineligible to be involved in activities regulated under the subchapter.

(d) The exemptions provided in this subchapter do not apply to transactions in which the exporter, any party to the export (as defined in § 126.7(e) of this subchapter), any source or manufacturer, broker or other participant in the brokering activities, is generally ineligible as set forth in paragraph (c)(2) of this section, unless prior written authorization has been granted by the Directorate of Defense Trade Controls.

3. Section 120.20 is amended by revising the title and text to read as follows:

§ 120.20 License or other approval.

License means a document bearing the word “license” issued by the Managing Director, Directorate of Defense Trade Controls, or his authorized designee that permits the export, temporary import, or brokering

of a specific defense article or defense service controlled by this subchapter.

Other approval means a document issued by the Managing Director, Directorate of Defense Trade Controls, or his authorized designee, that approves an activity regulated by this subchapter (e.g., approvals for brokering activities or retransfer authorizations), or the use of an exemption to the license requirements as described in this subchapter.

4. Section 120.25 is amended by revising paragraph (a)(4)(i), removing paragraph (b) from reserved status, and adding paragraph (b) and (c), to read as follows:

§ 120.25 Empowered Official.

(a) * * *

* * * * *

(4) * * *

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

* * * * *

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

(c) A person who is ineligible within the meaning of § 120.1(c)(2) of this subchapter, or who is the subject of an indictment or has otherwise been charged (e.g., by information) for or has been convicted of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or who is ineligible to contract with any foreign government agency, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country, or who is a citizen or national of a country or other person referred to in § 126.1 of this subchapter, may not be an empowered official.

5. Section 120.40 is added to read as follows:

§ 120.40 Affiliate.

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.

PART 122—REGISTRATION OF MANUFACTURERS AND EXPORTERS

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

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

7. Section 122.1 is amended by revising paragraphs (a), (b), (b)(1), (b)(2), and (b)(3) to read as follows:

§ 122.1 Registration requirements.

(a) Any person who engages in the United States in the business of manufacturing or exporting defense articles or furnishing defense services is required to register with the Directorate of Defense Trade Controls under § 122.2 of this subchapter. For the purpose of this subchapter, engaging in such a business requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service. A manufacturer who does not engage in exporting must nevertheless register. (See part 129 of this subchapter for requirements for registration of persons who engage in brokering activities.)

(b) *Exemptions.* The registration requirements of paragraph (a) of this section do not apply to:

(1) Officers and employees of the U.S. Government acting in an official capacity;

(2) Persons whose pertinent business activity is confined to the production of unclassified technical data only;

(3) Persons all of whose manufacturing and export activities are licensed under the Atomic Energy Act of 1954, as amended; or

(4) * * *

Note: Persons who qualify for the exemptions in paragraphs (b)(2) or (b)(4) of this section remain subject to the requirements for licenses or other approvals for exports of defense articles (including technical data) and defense services and may not receive an export license or approval unless registered under § 122.2 of this subchapter.

* * * * *

8. Section 122.2 is amended by revising paragraphs (b)(1), (b)(1)(i), and (b)(2) to read as follows:

§ 122.2 Submission of registration statement.

* * * * *

(b) * * *

(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 registrant or of its parent, subsidiary, joint venture, or other affiliate or other persons required to be listed in the Statement of Registration:

(i) Has ever been indicted or otherwise charged (e.g., by information) for or convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(ii) * * *

(2) Whether the intended registrant is foreign owned or foreign controlled (as defined in § 120.37 of this subchapter). If the intended registrant is foreign owned or foreign controlled, the certification shall include an explanation of such ownership or control, including the identities of all foreign persons who ultimately own or control the registrant.

9. Section 122.4 is amended by revising paragraphs (a) and (a)(2) to read as follows:

§ 122.4 Notification of changes in information furnished by registrants.

(a) A registrant must, within five days of the event, provide the Directorate of Defense Trade Controls a written notification, signed by a senior officer (e.g., chief executive officer, president, secretary, partner, member, treasurer, general counsel), if:

(1) * * *

(2) There is a change in the following information contained in the Statement of Registration: (i) Registrant's name, (ii) registrant's address, (iii) registrant's legal organization structure, (iv) ownership or control, (v) the establishment, acquisition, or divestment of a U.S. or foreign subsidiary, joint venture, or other affiliate who is engaged in manufacturing defense articles, exporting defense articles or defense services, or otherwise required to be listed on registrant's Statement of Registration.

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

* * * * *

PART 126—GENERAL POLICIES AND PROVISIONS

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

Authority: Sections. 2, 38, 40, 40A, 42, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2781, 2791, and 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p.79; 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; Sec. 1225, Pub. L. 108–375; Sec. 7089, Pub. L. 111–117.

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

§ 126.1 Prohibited exports, imports, and sales to or from certain countries.

(a) *General.* It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. This policy applies to

Belarus, Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela. This policy also applies to countries with respect to which the United States maintains an arms embargo (e.g., Burma, China, and the Republic of the Sudan) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. Information regarding certain other embargoes appears elsewhere in this section. Comprehensive arms embargoes are normally the subject of a State Department notice published in the Federal Register. The exemptions provided in the regulations in this subchapter, except § 123.17(c) through § 123.17(e) of this subchapter, do not apply with respect to articles originating in or for export to any proscribed countries, areas, or other persons referred to in this § 126.1 or to brokering activities involving such countries, areas or persons. (See § 129.5 of this subchapter, which imposes restrictions on brokering activities similar to those in this section.)

(b) Shipments. A defense article licensed or otherwise authorized for export, temporary import, reexport, or retransfer under this subchapter may not be shipped on a vessel, aircraft, spacecraft, or other means of conveyance that is owned by, operated by, leased to, or leased from any of the proscribed countries, areas, or other persons referred to in this section.

* * * * *

12. Section 126.13 is amended by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

§ 126.13 Required information.

* * * * *

(c) All applications for licenses or other approvals under this subchapter and amendments thereto shall identify all brokers and describe the brokering activities involved in the transaction subject to such application or prior notification.

(d) In cases when foreign nationals are employed at or assigned to security-cleared facilities, provision by the applicant of a Technology Control Plan will facilitate processing.

PART 127—VIOLATIONS AND PENALTIES

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

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

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

§ 127.1 Violations.

* * * * *

(b) 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. All persons abroad subject to U.S. jurisdiction who obtain custody of a defense article exported from the United States or produced under an agreement described in part 124 of this subchapter, and irrespective of the number of intermediate transfers, are bound by the regulations of this subchapter in the same manner and to the same extent as the original owner or transferor.

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

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

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any manner in any transaction that may involve any defense article, including technical data, defense service, or brokering activities subject to this subchapter where such ineligible person may obtain any benefit there from or have any direct or indirect interest therein.

* * * * *

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

§ 127.2 Misrepresentation and omission of facts.

* * * * *

(b) * * *

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

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

§ 127.7 Debarment.

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

* * * * *

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

§ 127.8 Interim suspension.

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

* * * * *

PART 129—REGISTRATION AND LICENSING OF BROKERS

18. Section Contents for part 129 is revised to read as follows:

Contents

- Sec.
 129.1 Purpose.
 129.2 Definitions.
 129.3 Requirement to register.
 129.4 Submission of Statement of Registration, registration fees, and notification of changes in information furnished by registrants.
 129.5 Policy on embargoes and other proscriptions.
 129.6 Requirement for prior approval.
 129.7 Exemptions from prior approval.
 129.8 Procedures for obtaining prior approval.
 129.9 Guidance.
 129.10 Reports.
 129.11 Maintenance of brokering records by registrants.

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

Authority: Section 38, Pub. L. 104–164, 110 Stat. 1437, (22 U.S.C. 2778).

20. Section 129.2 is amended by revising paragraphs (a), (b), and (c) and adding paragraphs (b)(1), (b)(2), (d), (e), and (f) to read as follows:

§ 129.2 Definitions.

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

(b) *Brokering activities* means any action 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.

(c) For the purposes of this subchapter, engaging in the business of brokering activities requires only one action as described above.

(d) The activities subject to part 129 include brokering activities:

(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 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.

(e) Brokering activities do not include:

(1) Activities by a U.S. person in the United States that are limited exclusively to U.S. domestic sales or transfers (e.g., not for export, which includes transfer in the United States to a foreign person);

(2) Activities by employees of the U.S. Government acting in an official capacity; or

(3) 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.

(f) The term “*foreign defense article or defense service*” means any non-U.S.-origin article or service described on the U.S. Munitions List. Unless otherwise provided in this part, the terms “*defense article*” and “*defense service*” refer to both U.S. and foreign origin defense articles and defense services described on the U.S. Munitions List. A “*defense article*” and “*defense service*” are determined exclusively in accordance with the ITAR, irrespective of any designation (either affirming or contrary) that may be attributed to same article by any foreign government or international organization.

21. Section 129.3 is amended by revising paragraphs (a), (b), (b)(1), (b)(2), (b)(3), and by adding paragraphs (b)(4), (c), (d), and (e) to read as follows:

§ 129.3 Requirement to register.

(a) Except as provided in § 129.3(b) of this subchapter, any person who engages in brokering activities, as defined by § 129.2 of this subchapter, is required to register with the Directorate of Defense Trade Controls. Registration under this section is generally a precondition for the issuance of prior approval for brokering activities required under part 129 of this subchapter or the use of exemptions from prior approval.

(b) *Exemptions.* Registration, prior approval, or reporting under this section is not required as provided in paragraphs (b)(1) through (b)(4):

(1) Employees of foreign governments or international organizations acting in an official capacity are exempt from registration. Such employees are also exempt from the requirements in § 129.6 of this subchapter for prior approval for brokering activities, as well as reporting and recordkeeping requirements.

(2) Persons exclusively in the business of financing, insuring,

transporting, or freight forwarding, whose activities do not extend beyond financing, insuring, transporting, or freight forwarding, are exempt from registration. Examples include air carriers or other freight forwarders who merely transport or arrange transportation for licensed U.S. Munitions List items, and banks or credit companies who merely provide commercially available lines or letters of credit to persons registered or required to register in accordance with parts 122 or 129 of this subchapter. Such persons exempt from registration are also exempt from the requirements in § 129.6 of this subchapter for prior approval for brokering activities, as well as reporting and record-keeping requirements. However, banks, firms, or other persons providing financing for defense articles or defense services are required to register under certain circumstances, such as 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.

(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 and full-time regular employees, and their eligible (see § 120.1 of this subchapter) foreign person brokers 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 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) 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 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 record-keeping requirements of part 129 (see § 129.11 of this subchapter).

(4) 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 record-keeping requirements.

(c) Persons exempt from registration, prior approval, or reporting as provided in paragraphs (a) and (b) of this section are subject to the policy on embargoes and other proscriptions as outlined in § 129.5 of this subchapter.

(d) If § 129.3(b)(3) of this subchapter is not applicable, U.S. persons who are registered as a manufacturer or exporter in accordance with part 122 of this subchapter, including their U.S. or foreign subsidiaries, joint ventures, and other affiliates listed on their Statement of Registration who are required to register under part 129, are not required to submit a separate broker registration or pay a separate broker registration fee as long as they have listed and identified themselves as brokers within their manufacturer or exporter Statement of Registration. All other requirements of part 129 apply to such brokers and their brokering activities.

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

22. Section 129.4 is amended by revising the section heading, paragraphs (a), (b), and (c), and adding paragraphs (c)(1), (c)(1)(i), (c)(1)(ii), (c)(2), and (d) through (h) to read as follows:

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

(a) An intended registrant must submit a Department of State form DS-2032 (Statement of Registration) by registered or overnight mail delivery to the Office of Defense Trade Controls Compliance, and must submit an electronic payment via Automated Clearing House (ACH) or Society for Worldwide Interbank Financial Telecommunications (SWIFT), payable to the Department of State of a registration fee as set forth in paragraph (b) of this section. ACH is an electronic network used to process financial transactions in the United States and SWIFT is the messaging service used by financial institutions worldwide to issue international transfers for foreign accounts. Payment methods (*i.e.*, ACH

and SWIFT) are dependent on the source of the funds (U.S. or foreign bank) drawn from the applicant's account and not a third party's account. Intended registrants should access the Directorate of Defense Trade Controls Web site at www.pmdt.state.gov for detailed guidelines on submitting an ACH and SWIFT electronic payment. Payments, including from foreign brokers, must be in U.S. currency and must be payable through a U.S. financial institution. Cash, checks, foreign currency, or money orders will not be accepted. The Statement of Registration must be signed by a senior officer (*e.g.*, chief executive officer, president, secretary, partner, member, treasurer, general counsel) who has been empowered by the intended registrant to sign such documents. The intended registrant, whether a U.S. or foreign person, shall submit documentation that demonstrates it is incorporated or otherwise authorized to do business in its respective country. Foreign persons who are required to register shall provide information that is substantially similar in content to that which a U.S. person would provide under this provision (*e.g.*, foreign business license or similar authorization to do business). The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package. Registrants may not establish new entities for the purpose of reducing registration fees.

(b) A person who is required to register must do so on an annual basis upon submission of a completed Form DS-2032 and a fee of \$2,250. Registrants are not required to submit a separate statement of registration and pay an additional fee when provisions in §§ 129.3(b)(3) or 129.4(c) of this subchapter are met.

(c) *Statement of Registration Certification.* The Statement of Registration of the intended registrant shall 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 § 120.27 of this subchapter or foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

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

(2) Whether the intended registrant is foreign owned or foreign controlled (*see* § 120.37 of this subchapter). If the intended registrant is foreign owned or foreign controlled, the certification shall include an explanation of such ownership or control, including the identities of the foreign person or persons who ultimately own or control the registrant. This requirement applies to a registrant who is a U.S. person and is owned or controlled by a foreign person. It also applies to a registrant who is a foreign person and is owned or controlled by a foreign person from the same country or a foreign person from another country.

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

(e) A registrant must, within five days of the event, provide the Directorate of Defense Trade Controls a written notification, signed by a senior officer (*e.g.*, chief executive officer, president, secretary, partner, member, treasurer, general counsel) if:

(1) Any of the persons referred to in § 129.4(b)(1) of this subchapter are indicted or otherwise charged (*e.g.*, by information) for or convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this

subchapter or foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27; or become ineligible to contract with, or to receive a license or other approval to export or import defense articles or defense services from any agency of the U.S. government; or are ineligible to contract with, or to receive a license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country; or

(2) There is a change in the following information contained in the Statement of Registration: (i) Registrant's name, (ii) registrant's address, (iii) registrant's legal organization structure, (iv) ownership or control, or (v) the establishment, acquisition or divestment of a U.S. or foreign subsidiary or other affiliate who is engaged in brokering activities or otherwise required to be listed registrant's Statement of Registration.

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

(f) A U.S. or foreign registrant must provide written notification to the Directorate of Defense Trade Controls at least sixty (60) days in advance of any intended sale or transfer to a foreign person of ownership or control of the registrant or any parent, subsidiary, joint venture, or other affiliate listed and covered in their Statement of Registration. This requirement applies to a foreign person required to register pursuant to this part who intends to sell or transfer ownership or control to a foreign person from the same country or to a foreign person from another country. Such notice does not relieve the registrant from obtaining any prior approval required under this subchapter.

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

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

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

(3) The numbers of all approvals for brokering activities under the surviving registration number, since any approval not the subject of notification will be considered invalid.

(h) A registrant whose registration lapses because of failure to renew and, after an intervening period, seeks to register again must pay registration fees

for any part of such intervening period during which the registrant engaged in the business of brokering activities.

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

§ 129.5 Policy on embargoes and other proscriptions.

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

(b) No person may engage in or make a proposal to engage in brokering activities that involve any country, area, or other person referred to in § 126.1 of this subchapter without first obtaining the approval of the Directorate of Defense Trade Controls.

(c) No person may engage in or make a proposal to engage in brokering activities without the prior approval of the Directorate of Defense Trade Controls if such activities involve other countries or persons identified from time to time by the Department of State through notice in the **Federal Register**, with respect to which certain limitations on defense articles or defense services are imposed for reasons of U.S. national security, foreign policy, or law enforcement interests (e.g., an individual subject to debarment pursuant to § 127.7 of this subchapter). (See § 127.1(c) of this subchapter for additional disclosure and approval requirements applicable to brokering activities.)

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

24. Section 129.6 is amended by revising the section heading, removing paragraphing, and revising the text to read as follows:

§ 129.6 Requirement for prior approval.

Except as provided in § 129.7 of this subchapter, no person who is required to register as a broker pursuant to § 129.3 of this subchapter may engage in the business of brokering activities

without the prior approval of the Directorate of Defense Trade Controls.

25. Section 129.7 is amended by revising the section heading and paragraphs (a), (a)(1), (a)(2), (b), (b)(1), (b)(2), (c), and (d), removing paragraphs (a)(1)(i) through (a)(1)(vii), (a)(2)(i) through (a)(2)(iv), and adding paragraphs (a)(3), (b)(2)(i), (b)(2)(ii), (c)(1), (c)(2), (d)(1), (d)(2), (e), (e)(1) through (e)(14), and (f), to read as follows:

§ 129.7 Exemptions from prior approval.

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

(1) The broker is not registered as required by § 129.3 of this subchapter;

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

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

(b) Brokering activities are exempt from the requirement for prior approval if undertaken for an agency of the U.S. Government pursuant to a contract between the broker and that agency provided that:

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

(2) The brokering activities are undertaken for carrying out a foreign assistance or sales program authorized by law and subject to control by the President by other means, as demonstrated by one of the following conditions being met:

(i) The U.S. Government agency contract with the broker contains an explicit provision stating 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 International Traffic in Arms Regulations; or

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

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

(1) The brokering activities are undertaken wholly within and involve defense articles or defense services located within and destined exclusively for the North Atlantic Treaty

Organization (NATO), any member country of that organization, Australia, Japan, New Zealand, or the Republic of South Korea; and

(2) The brokering activities do not pertain to the defense articles or defense services that are excluded from this exemption by paragraph (e) of this section.

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

(1) Defense articles or defense services excluded from this exemption by paragraph (e) of this section; or

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

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

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

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

(3) Nuclear weapons strategic delivery systems and all components, parts, accessories, or attachments specifically designed for such weapons and associated equipment;

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

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

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

(7) Spacecraft of a nature described by Category XV of part 121 of this

subchapter that is significant military equipment;

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

(9) Directed energy weapons of a nature described by Category XVIII of part 121 of this subchapter;

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

(11) Miscellaneous articles of a nature described by Category XXI of part 121 of this subchapter;

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

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

(14) 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.

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

26. Section 129.8 is amended by revising the section heading and paragraphs (a) and (b), and adding paragraphs (a)(1), (a)(2), (a)(2)(i) through (a)(2)(iii), (b)(1) through (b)(5)(iii), (c), (d), and (e), to read as follows:

§ 129.8 Procedures for obtaining prior approval.

(a) All requests for prior approval of brokering activities must be made to the Directorate of Defense Trade Controls, be signed by an empowered official, and include the following information:

(1) The applicant's name, address and registration code;

(2) A certification on whether:

(i) The applicant, chief executive officer, president, vice president, secretary, partner, member, other senior officers or officials (*e.g.*, comptroller, treasurer, general counsel), or any member of the board of directors of the registrant or of its parent, subsidiary, joint venture, or other affiliate required to be listed in the Statement of Registration is the subject of an indictment or has been otherwise charged (*e.g.*, by information) for, or has been convicted of, violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or is the subject of an indictment or has otherwise been charged (*e.g.*, by information) for or has been convicted

of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27 of this subchapter;

(ii) The applicant, chief executive officer, president, vice president, secretary, partner, member, other senior officers or officials (*e.g.*, comptroller, treasurer, general counsel), or any member of the board of directors of the registrant or of its parent, subsidiary, joint venture, or other affiliate required to be listed in the Statement of Registration is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government, or is ineligible to contract with any foreign government agency, or to receive an export license or other form of authorization or otherwise participate in export or brokering activities under the laws of a foreign country; and

(iii) To the best of the applicant's knowledge, any other person involved in the brokering activities that are the subject of the request for prior approval as defined in § 129.2 of this subchapter is the subject of an indictment or has been otherwise charged (*e.g.*, by information) for or has been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or is the subject of an indictment or has otherwise been charged (*e.g.*, by information) for or has been convicted of violating any foreign criminal statutes dealing with subject matter similar to that in the U.S. criminal statutes enumerated in § 120.27 of this subchapter, or is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from any agency of the U.S. Government, or is ineligible to contract with any foreign government agency, or to receive an export license or other form of authorization or otherwise participate in defense trade under the laws of a foreign country.

(b) The request for prior approval shall describe fully the brokering activities that will be undertaken, including:

(1) The action to be taken by the applicant to facilitate the manufacture, export, import, or transfer of a defense article or defense service (which may be referred to as a "defense article or defense service transaction");

(2) The name, nationality and country where located of all persons who may participate in the brokering activities;

(3) A description of each defense article or defense service that may be involved, including:

- (i) The U.S. Munitions List category and sub-category;
- (ii) Name or military nomenclature of the defense article;
- (iii) Whether the article or service is significant military equipment;
- (iv) Estimated quantity of defense articles;
- (v) Estimated U.S. dollar value of defense articles and defense services;
- (vi) Security classification; and
- (vii) End-user and end-use;

(4) A statement whether the brokering activities are related to a sale through commercial channels or under the U.S. Foreign Military Sales Program or other activity in support of the U.S. Government; and

(5) The type of consideration received or expected to be received, directly or indirectly (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):

- (i) by the applicant;
- (ii) by other persons who may participate in such brokering activities from or at the direction of the applicant, and the identity of such other persons; and
- (iii) the U.S. dollar value amount and source thereof.

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

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

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

27. Section 129.9 is amended by revising the section heading and text, to include new paragraphs (a), (b), and (c), to read as follows:

§ 129.9 Guidance.

(a) Any person desiring guidance on whether an activity constitutes a brokering activity within the scope of part 129 of this subchapter may request in writing guidance from the Directorate of Defense Trade Controls. The request for guidance shall identify the applicant and registrant code (if applicable) and describe fully the activities that will be undertaken, including:

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

(2) The name, nationality, and country where located of all U.S. and foreign persons who may participate in the activities;

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

(4) End-user and end-use;

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

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

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

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

28. Section 129.10 is amended by revising the section heading and text, to include new paragraphs (a), (b), and (c), to read as follows:

§ 129.10 Reports.

(a) Any person required to register under this part (including those registered in accordance with § 129.3(d) of this subchapter) shall provide to the Directorate of Defense Trade Controls on an annual basis a report of its brokering activities in the previous calendar year. Such report shall be submitted along with the registrant's annual renewal submission or, if not renewing, within 30 days after expiration of registration.

(b) The report shall include brokering activities that received or were exempt from prior approval as follows:

(1) The report shall identify the broker's name, address, and registration code and be signed by an empowered official who shall certify that the report is complete and accurate. The report shall describe each of the brokering activities, including the number of the prior approval or the exemption claimed; and

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

(c) If there were no brokering activities, the report shall certify that there were no such activities.

29. Section 129.11 is added to read as follows:

§ 129.11 Maintenance of Brokering Records by Registrants.

A person who is required to register pursuant to this part (including those registered in accordance with § 129.3(d) of this subchapter) must maintain records concerning brokering activities in accordance with § 122.5 of this subchapter.

Dated: December 12, 2011.

Ellen O. Tauscher,

Under Secretary, Arms Control and International Security, Department of State.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-124627-11]

RIN 1545-BK43

Corporate Reorganizations; Guidance on the Measurement of Continuity of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations concerning the continuity of interest requirement for corporate reorganizations. The guidance is necessary to clarify the manner in which the continuity of interest