

## What Constitutes a “Broker” under ITAR

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The International Traffic in Arms Regulations (ITAR) require that any U.S. person, wherever located, and any foreign person located in the U.S. or otherwise subject to the jurisdiction of the U.S., who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of any defense article or defense service register with the Directorate of Defense Trade Controls (DDTC) of the U.S. Department of State (DOS).

Questions often arise about whether a particular activity requires a person to register as an ITAR Broker. The existing regulation is challenging to interpret. On December 19, 2011, the DDTC attempted to make things a bit easier by publishing a proposed clarifying regulation (Proposed Rule).

The Proposed Rule would amend the definitions of broker and brokering activities to track the definitions in the Arms Export Control Act. Through these and other changes, the Proposed Regulation helps professionals involved in the defense and export control communities understand whether they are required to register with the DDTC as ITAR brokers.

The Proposed Rule revises the definitions of brokering and brokering activities.

**Broker** means any person who engages in brokering activities.

**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.

Engaging in the activities described in either (1) or (2) is enough to meet the definition of brokering activities.

The Proposed Rule **includes** brokering activities by any

- U.S. person wherever located
- foreign person located in the U.S.
- foreign person located outside the U.S. involving a U.S.-origin defense article or defense service
- foreign person located outside the U.S. involving the import into the U.S. of any defense article or defense service  
or
- foreign person located outside the U.S. acting on behalf of a U.S. person

The Proposed Rule **excludes**

- Activities by a U.S. person in the U.S. 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)

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- Activities by employees of the U.S. Government acting in an official capacity or
- 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

Further, the Proposed Rule specifically **exempts** the following persons from the broker registration requirements under ITAR

- Employees of foreign governments or international organizations acting in an official capacity are exempt from registration
- 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.... 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
- Persons registered [as manufacturers or exporters under ITAR], their U.S. person subsidiaries, joint ventures, and other affiliates listed and covered in their Statement of Registration, their bona fide and full-time regular employees, and their eligible... foreign person brokers listed and identified as their exclusive brokers in their Statements of Registration and
- 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 ITAR]

Under the Proposed Rule, if further guidance about the scope of the registration requirement is needed, a person could request guidance in writing from the DDTTC including

- The specific activities to be undertaken by the applicant and any other U.S. or foreign person
- The name, nationality, and country where located of all U.S. and foreign persons who may participate in the activities
- 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
- End-user and end-use
- 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
- 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

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Comments on the Proposed Rule were due February 17, 2012. The DDTC has not announced the status of any changes to the Proposed Rule in response to comments that it has received. The DDTC may release a final rule in the coming months incorporating language changes made in response to the comments on the Proposed Rule.