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The "Big 3" of Chinese International Arbitration

Economic activity inevitably generates disputes, and economic activity between parties in China and the United States is no exception. But where should those disputes be resolved? Resolution in the national courts of China or the United States often is not a viable option. There is no treaty compelling a Chinese court to enforce the judgment of a court in the United States, or requiring a court in the United States to enforce the judgment of a Chinese court. Hence such disputes are increasingly resolved through binding arbitration under an international treaty known as the New York Convention of 1958, to which China, the United States, and over 140 other countries are parties. The resulting arbitration awards—unlike court judgments—are enforceable as a matter of right around the world.

So what are the options for arbitrating with Chinese parties? Theoretically, one can arbitrate a dispute just about anywhere in the world. As a practical matter, however, most international arbitrations involving Chinese parties tend to take place in Asia, and tend to be administered by the "Big 3" of Chinese international arbitration:

1. **The China International Economic and Trade Arbitration Commission (CIETAC)**
2. **The Hong Kong International Arbitration Centre (HKIAC)**
3. **The Singapore International Arbitration Centre (SIAC)**

New case filings in the Big 3 have more than doubled in the last ten years, with CIETAC handling the bulk of disputes. Many users of arbitration view CIETAC negatively, however. There are a number of reasons for this. For example, Chinese law provides that arbitration proceedings that take place in China must be administered by a state-approved institution, with CIETAC being the leading arbitral center headquartered in China. Perhaps not surprisingly, therefore, the 2010 "Choices in International Arbitration" survey conducted by Queen Mary University of London and White & Case reported that, among the various arbitration centers, survey respondents had the most negative perception of CIETAC and two arbitration centers headquartered in the Middle East.

As might be expected, it is not unusual for non-Chinese parties to prefer a more "neutral" arbitration center and location. As a result, parties often compromise and agree to other Asian arbitration centers, with the HKIC and SIAC being the most popular alternatives.

The 2010 "Choices in International Arbitration" survey listed the SIAC as the most preferred arbitral association in Asia. Perhaps one factor influencing this preference in favor of the SIAC over the HKIAC is that many non-Chinese parties presume that, because Hong Kong is a Chinese territory, it may not be sufficiently neutral. (**Singapore v Hong Kong: The arbitration battle intensifies, Asian Legal Business**)

Our own view is that there is little evidence to support this presumption. Hong Kong maintains its own legal system and has an independent judiciary. One example of this independence can be found as recently as 2011, when the Hong Kong courts enforced a multimillion dollar award against a state-owned enterprise located in mainland China. *Shandong Hongri Acron Chemical Joint Stock Co., Ltd. v PetroChina International (Hong Kong) Corp. Ltd.,* CACV 31/2011, July 25, 2011.

Nevertheless, analysis of new case filings suggests there is in fact a growing preference in favor of the SIAC over HKIAC. In the past four years HKIAC has experienced a

17% decline in new case filings, whereas the SIAC's caseload has increased 90%.

This trend in favor of the SIAC is not entirely surprising. Our own experience representing companies in the SIAC has been positive. The SIAC appears to administer international arbitrations in a manner that is consistent with the leading Western arbitration centers where we have defended and prosecuted claims.

How do parties provide for arbitration by one of the Big 3? The starting point is using the model dispute resolution clause of the three institutions. The arbitration rules of each of the Big 3 specify default rules for how the proceedings will be conducted, but there are two important points to understand about institutional rules. First, all are designed to provide the parties with maximum flexibility to tailor the process to fit their own needs. Second, precisely because the rules are flexible, it is up to each party to proactively consider and aggressively negotiate for whatever procedures are in its best interest.

What are those procedures? Much depends on the type of deal and which side of the table the client is on. Besides the arbitration center and location, some key provisions are:

» confidentiality of the arbitration

» discovery rights

» language of the arbitration and

» number and qualifications of the arbitrators

Unfortunately, it is common for lawyers drafting deals to treat the dispute resolution clause as an afterthought, which frequently has unintended and unpleasant consequences for the client.

Fortunately, the unintended consequences can be avoided with minimal effort and cost by having an experienced international dispute resolution expert involved early on in the negotiations. And for clients who routinely enter into international transactions, we can help develop a dispute resolution policy to guide future negotiations in these unfamiliar and sometimes treacherous waters.

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China's Merger Control Regime

China's Anti-Monopoly Law (AML) took effect on August 1, 2008. Since then, the Chinese regulatory authorities have issued a number of implementing regulations and guidelines and developed enforcement mechanisms under the AML merger control regime.

WHAT'S NEW?

On August 29, 2011, China's Ministry of Commerce (MOFCOM) issued the Interim Provisions on Assessing the Impact of Concentration of Business Operators on Competition which became effective on September 5, 2011. The provisions set forth key considerations for merger reviews, including the market shares and market control power of the involved parties, substitutability of the relevant products or services, competition in the relevant market, degree and effect of the proposed concentration and other factors.

The Interim Provisions on Investigating and Disposing of Failure to Declare the Concentration of Business Operators became effective on February 1, 2012. The provisions provide that MOFCOM has the right to impose a fine of up to RMB 500,000 (about USD $80,000) on the involved parties for failing to make the required MOFCOM filing.

In addition, MOFCOM also adopted a new merger filing form (effective July 7, 2012) providing important clarifications regarding merger filing requirements and mandates and, for the first time, information related to the past AML compliance by the parties.

EFFECTS OF THE NEW REGULATIONS

MOFCOM is expected to take a more proactive and stringent approach in investigating and penalizing companies that fail to comply with their merger review notification requirements.

Prior notification is generally required under the AML for any "concentration of undertakings" transaction which meets one of two turnover thresholds:

1. the combined worldwide turnovers of all involved parties in the last fiscal year exceed RMB 10 billion (approximately USD $1.58 billion) and the PRC turnover of at least two of the parties each exceeds RMB 400 million (approximately USD $63.34 million) or
2. the combined PRC turnovers of all involved parties in the last fiscal year exceed RMB 2 billion (approximately USD $316 million) and the PRC turnover of at least two of the parties each exceeds RMB 400 million (approximately USD $63.34 million)

Under the AML, a concentration of undertakings includes a merger and acquisition transaction, the formation of a joint venture and other acquisition of control of a business through contract or other means. If either of the turnover thresholds is met by a concentration of undertakings, the party acquiring control must notify MOFCOM of the transaction and submit the required information and documentation for review.

The AML then provides that the transaction may not be completed until either the transaction is cleared by MOFCOM or the review period expires without a decision by MOFCOM. The review period can total up to 180 days.

- Initial Review Period: The initial review period under the AML is 30 days after MOFCOM accepts the notification filing. However, in practice, there are often delays between submission and acceptance which may significantly lengthen the initial review period.
- Additional Review Period: MOFCOM can extend the initial period for an additional 90 days and can extend the period further for up to 150 days (an additional 60 days) under certain circumstances.

There is no "size of the transaction" threshold under the AML, so even small transactions or those that have little or no nexus with the PRC market can trigger the notification requirements if the concentration and turnover thresholds are met. Further, MOFCOM has the authority to investigate any concentration that it determines may result in the elimination or restriction of competition in the PRC whether or not the turnover thresholds are met.

Over the past four years, MOFCOM has developed its experience in reviewing M&A transactions which raise competitive concerns and has developed its own analytical methods. In some cases, MOFCOM has imposed conditions or remedies substantially different than those imposed by other jurisdictions.

A recent example in 2012 is MOFCOM's imposition of conditions to its approval of Google's $12.5 billion acquisition of Motorola Mobility Holdings, Inc. (Motorola), when the transaction was cleared by the U.S. Department of Justice (DOJ) and the European Commission (EC) without conditions respectively.

MOFCOM's approval included the following:

- Google is required to continue licensing Android on a free and open basis (subject to certain exemptions)

» Google is required to treat all OEMs in a nondiscriminatory manner with respect to the Android platform (subject to certain exemptions)

» Google is required to comply with Motorola's existing obligations with respect to Motorola's patents and

» Google is required to appoint an independent trustee to supervise its compliance with the conditions, and is required to submit reports to the trustee and MOFCOM every six months for five years

With the rapidly increasing volume of notifications filed under the AML, it is expected that MOFCOM will develop a fast-track review mechanism for transactions considered to have no or only minor effects on competition in the PRC.

However, MOFCOM's current review processes still appear lengthier and broader than the DOJ's and the EC's. Therefore, early analysis of the merger notifications requirements of the AML and planning for competition reviews by companies and their legal counsel is recommended for any M&A transaction that may implicate China's AML merger control regime.

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China Allows Compulsory Licensing

On May 1, 2012, China's newly released "Measures for Compulsory Licensing of Patent Implementation" (the New Measures) came into effect. By allowing China's State Intellectual Property Office (SIPO) to grant compulsory licenses for producing generic versions of branded drugs, the New Measures have the multinational big pharmas worried, especially as India just granted its first compulsory license for Bayer's anti-cancer drug Nexavar shortly before these New Measures took effect.

ARE THE NEW MEASURES REALLY NEW?

No compulsory license has ever been granted in China, but ideas and rules of compulsory licensing are not new in China. China's Patent Law of 2001 and its Implementing Rules already included provisions allowing compulsory licenses under certain circumstances, and such provisions were further clarified in China's Patent Law as amended in 2008. The New Measures integrate and replace two sets of older regulations: "Measures for Compulsory Licensing of Patent Implementation" (Order No. 31) promulgated in 2003, and "Measures for Compulsory Licensing of Patent Implementation Regarding Public Health" (Order No. 37) promulgated in 2005. Further, the New Measures provide more detailed and better defined procedures for examining and terminating compulsory licenses under applicable patent laws.

Under the New Measures, China's SIPO may issue and terminate compulsory licenses for invention patents and utility patents (not design patents) to a qualified entity or individual, considering three factors:

1. non-use of the patented invention or misuse of patent in violation of anti-monopoly law;
2. public welfare, including "national emergency or extraordinary situation," "public interest," and "public interest;" and
3. cross-license for exploitation of an improvement invention

If a compulsory license is granted, the parties may negotiate the royalties or ask the SIPO for adjudication on such fees. If a party is unsatisfied with the SIPO's decision on compulsory licensing, it can apply for an administrative review or initiate an administrative litigation.

WILL CHINA BE THE NEXT INDIA?

The broad and undefined descriptions of "national emergence or extraordinary situation" and "public interest" make multinational big pharma worried if and where China's SIPO will draw a line. Before the New Measures, China was similar to Japan which also had rules allowing compulsory licensing but never used them. Now, the New Measures raise the question whether such a situation will be changed. If China decides to follow the steps of India to actually grant a compulsory license (as did smaller countries such as Thailand, Indonesia, and Malaysia) to make expensive drugs less costly by granting compulsory licenses, many products may be affected. This raises special concerns for multinational pharmaceutical companies that have already contracted Chinese companies to make the key ingredients in their drugs as those Chinese companies may now be technically capable of making the products.

However, there are also strong reasons for China not to do so or do so lightly.

First, from a business perspective, granting a compulsory license by the SIPO will ring alarm bells for all foreign investors in China, including companies in other industries that compete based on innovation and technologies. This is contrary to China's long established policy to attract foreign investment, particularly high-tech investment.

Second, the current Five-Year Plan (2010-2015) released by the Chinese government emphasizes its goal to establish an innovation-oriented economy and to promote IP protections. It is difficult to imagine that without major policy and rule changes, the SIPO will suddenly act against China's national IP strategy and start to grant a compulsory license which is generally looked upon as discouraging innovation.

Third, granting a compulsory license almost certainly will attract objections from the governments of developed countries and spark international trade tensions. Therefore, it is very unlikely that China will take this step now or in the near future.

WHAT MIGHT HAPPEN?

Despite the foregoing, one thing is sure. The New Measures are becoming a useful negotiating tool for the Chinese government. The clearest evidence is the current negotiation between the Chinese government and U.S.-based Gilead Science Inc. over Tenofovir – a drug for HIV treatment. China has been excluded from the Patent Pool for providing generic versions of Tenofovir to 111 countries. It seems that, after the New Measures took effect, Gilead offered certain concessions, e.g., by giving China a substantial donation of Tenofovir if China continues to buy an equivalent amount. Now, all eyes are on China to see how it will react with the New Measures, especially since China will lose its funding from the Global Fund to Fight AIDS, Tuberculosis and Malaria in 2013.

In addition, in spite of the low possibility for the SIPO to issue a compulsory license, the New Measures may still encourage more Chinese entities to file antitrust cases in courts, and look for evidence of patent non-use and raise public welfare arguments before the SIPO to support their case for a compulsory license. Thus, the multinational pharmaceutical companies would be better off to start preparing to fend off those applications.

Further, since a main argument for compulsory licensing is the high price of essential drugs, multinational pharmaceutical companies may need to consider local production of expensive imported drugs as a means to reduce the cost and the probabilities of SIPO to grant a compulsory license.

In summary, we believe that even with the New Measures, China is unlikely to change its patent practice or grant its first compulsory license right away. But the final result of the negotiation between the Chinese government and Gilead will shed some light on China's current attitude toward the uses of compulsory licensing.

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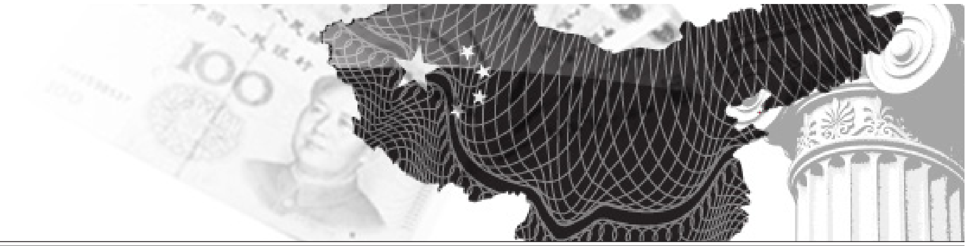

Export Control Violations: Man on Trial for Taking His Laptop to China

Back in September 2011, Sixing Liu, a Chinese national-U.S. permanent resident, was charged by the U.S. Government for U.S. export control law violations. Liu allegedly took export-controlled technical data on military technology (Controlled Data) from his U.S. employer in New Jersey back to his home country of China on his laptop without a U.S. export control license. The Controlled Data was comprised of military technology, covered by Category XII of the ITAR U.S. Munitions List. The Controlled Data is used for target locators and navigation systems. Opening arguments for this case recently began on September 12, 2012.

The indictment made no allegations that the Controlled Data was actually disclosed by Liu to anyone in China, but rather simply the fact that Liu took the Controlled Data to China without a U.S. export control license constituted an export that was a violation of ITAR, whether disclosed or not.

In pursuing criminal liability, prosecution for the U.S. Government will attempt to prove that Liu had the requisite criminal intent, that is, he knew that taking his laptop to China with the Controlled Data on it was a violation of law.

According to the indictment, a U.S. customs agent at Newark Liberty International Airport noticed a VIP badge in Liu's luggage from a Shanghai conference when Liu returned to the U.S. from China in November 2010. A secondary inspection revealed that his laptop had various documents on it comprising Controlled Data that belonged to the company where Liu worked as an engineer.

Further, according to the indictment:

> As part of his training at the Company, Liu received training concerning the safeguarding of sensitive proprietary and export-controlled information. In particular, on April 20, 2009, Liu attended a training program at the Company concerning provisions of the ITAR that prohibit the unlicensed export of items contained on the ITAR U.S. Munitions List and technical data relating to such items. Moreover, the Company regularly included prominent advisories on the pages of its work product warning that the contents may include technical data within the scope of ITAR. Due to the highly sensitive nature of the technology projects being developed where Liu worked, employees were forbidden from removing work product from the Company's corporate facility.

"It's not about taking work home," the prosecution stated. "This is not an environment where you can do that."

Mr. Liu's defense characterized him as a worker who was ill-informed about U.S. export control laws who merely downloaded the Controlled Data to work on outside the company office. It was noted that Mr. Liu's training in the U.S. export control compliance consisted of 15 minutes on his first day of work, between sessions on employee benefits and sexual harassment guidelines. This factual backdrop, though empathetic and of potential use for negating criminal intent, may not be sufficient to excuse Mr. Liu from civil liability and substantial fines under U.S. export control laws.

This factual backdrop about the seemingly insufficient amount of export control training may also serve as a basis for further investigation by export control enforcement authorities of the company itself.

This case illustrates the need to properly train employees on U.S. export control compliance when the employee initially commences employment and thereafter on an annual or semiannual basis. Emphasis should be given to the fact that export-controlled information cannot be downloaded on a laptop and then transferred outside the

U.S. or even accessed from outside the U.S. without a license or other U.S. export control authorization. Doing so will encourage employee compliance with U.S. export control laws and place your company in a defensible position when dealing with export control enforcement authorities.

We will keep you apprised as this case progresses.

For further information please contact Miller Canfield's Export Control Team. Visit our Export Controls webpage for prior articles and alerts, as well as subsequent updates on U.S. Export Control Reform and other export control articles.

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Your Chinese Trading Partners' SAFE Status May Impact Your Payment Terms

Chinese currency (renminbi or RMB) is not an internationally convertible currency. A Chinese company needs to convert its RMBs into internationally circulated currencies to pay for imported goods or convert foreign currencies it receives in payment for exports into RMBs. To do so, the company must apply to a bank to convert the currency. The payment, receipt, and conversion of foreign currency are subject to the regulations by the State Administration of Foreign Exchange of the People's Republic of China (SAFE).

SAFE recently issued new guidance and rules governing foreign exchange transactions in the export and import of goods. The Goods Trade Foreign Exchange Administration Guidance and Implement Rules (Regulations) became effective August 1, 2012. The Regulations apply to all companies organized under the laws of the People's Republic of China, including all foreign invested companies such as Sino-Foreign joint ventures and wholly-foreign owned enterprises (for the purpose of this article, Chinese companies). The Regulations govern all payments and receipts of foreign currencies in connection with the exportation and importation of goods by companies (Trade-related Forex Transactions).

DO YOUR CHINA TRADING PARTNERS HAVE THE NECESSARY FOREIGN TRADING RIGHTS?

To export and import goods, Chinese companies must first obtain foreign trading rights by registering with the MOFCOM corresponding commerce bureau after obtaining the proper business license and then registering with SAFE. SAFE sends its official list of Chinese companies registered for foreign trade activities to all banks via its Goods Trading Foreign Exchange Monitor System (Monitor System). If a Chinese company's name is not listed in the Monitor System, then a bank is not permitted to accept the company's request to receive or make payments relating to its trade activities. In that case, the Chinese company would need to engage a qualified import/export agent with proper business license and certificates for its foreign trade activities.

WHAT IS YOUR CHINESE TRADE PARTNERS' STATUS WITH SAFE?

Previously, SAFE regulated all Trade-related Forex Transactions and applied the same rule to each transaction. However, effective August 1, 2012, SAFE switched from regulating "transactions" to regulating "subjects" (i.e., companies) that engage in the foreign trade of goods. SAFE regulates each Chinese company based on its registration status with the SAFE (SAFE Status). SAFE classifies Chinese companies with foreign trade rights into Class A, Class B or Class C, after completing a SAFE inspection and audit. The inspection can be conducted either on or off site and the frequency of the audits is at the discretion of SAFE. When conducting an off-site audit, the Chinese company is required to submit all foreign currency receipt, payment transactions documentation and custom documentation for the most recent 12-month period. For start-up Chinese companies, within 90 days from the date they engage in their first Trade-related Forex Transaction, SAFE will conduct training on the Regulations compliance and issue decisions on their SAFE Status.

Generally speaking, a company will fall into Class A status if it complies with the foreign exchange related regulations. If the company fails to provide information requested by SAFE within the prescribed period, the company will be classified as a Class B company. A company may be classified Class C if it is found to have seriously violated foreign exchange regulations during the 12-month audit period. When SAFE classifies a company as a Class B or Class C company, before such classification is sent to banks, SAFE must inform the company of its classification decision. Should the company disagree with SAFE's decision, it may file an opposition within 7 business days from the date it receives the SAFE decision on its SAFE Status. SAFE must review the opposition and may revise or confirm its decision. That decision is final unless adjusted by the SAFE. With respect to Class B and Class C companies, SAFE will impose a one-year term of supervision (Supervision Period) monitoring or regulating Trade-related Forex Transactions via the Monitoring System.

REGISTRATION OBLIGATIONS

Prior to adoption of the Regulations, a Chinese company exporting and importing goods was required to separately register each Trade-related Forex Transaction. Under the Regulations, Class A companies are exempted from these separate registration obligations. Class B and Class C companies' Trade-related Forex Transactions are more closely scrutinized; they are required to apply to SAFE and register the following transactions:

» A Class B company is required to register a Trade-related Forex Transaction when the amount of the foreign currencies involved exceeds the amount previously certified by the SAFE (Cap). The Cap is predetermined by SAFE for a Class B company based on the volume of foreign trade such company previously registered with SAFE;

» A Class C company is required to register each Trade-related Forex Transaction.

REPORTING OBLIGATIONS

A Chinese company (regardless of classification) is required to report Trade-related Forex Transactions to SAFE via the Monitoring System:

» if the term of the prepayment and term to receive the payment is more than 30 days;

» if the term of the deferred payment and deferred receipt of the payment is more than 90 days;

» if the term of a letter of credit through which payment is made is more than 90 days or the payment is made by an offshore entity on its behalf; or

» if all prepayment and receipt of advance payments is engaged by a Class B or Class C company during its Supervision Period.

If the counterparty of the Trade-related Forex Transaction is an affiliate of the Chinese company, the Chinese company is also required to provide specified information relating to the affiliate.

SAFE STATUS AND PAYMENT TERMS

The Regulations also impose restrictions on payment and related terms applicable to Class B and Class C companies. For example, payment terms may not exceed 90 days and the amount of any prepayment or advance payment is limited to a specified percentage, previously 10%-30% of the purchase price. The regulations do not specify the specific range, rather, SAFE will determine the ratio at its sole discretion. In determining the specific ratio applicable to a particular company, SAFE will consider the nature of the trade transaction involved and also consider the results from the off-site audit and inspection conducted by SAFE. Further, a Class B company must maintain a ratio between payment and receipt of the amount of foreign currencies pre-certified by the SAFE thereby potentially limiting its ability to import or export goods. If a Class C company makes an advance payment of more than $50,000, its foreign seller must provide a so-called "Letter of Advance Payment Bank Guarantee."

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What Constitutes a "Broker" under ITAR

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)

- 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 DDTC 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

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.

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