

ARTICLE

Are Attorneys 'Brokers' Under Traffic in Arms Regs?

Law360

March 4, 2016

The D.C. District Court has dismissed a challenge to the U.S. Department of State's application of the International Traffic Arms Regulations' (ITAR) brokering provisions to attorneys.[1] Notably, the challenge was filed by international trade law firm Matthew A. Goldstein PLLC on its own behalf, regarding the application of the brokering provisions to legal services provided to its clients. Specifically, Goldstein sought a judgment declaring that any application of these ITAR provisions to its legal services would be *ultra vires*, unconstitutional and run afoul of the Administrative Procedure Act (APA) and requested that the court permanently enjoin the State Department from applying the provisions to the firm.

The Arms Export Control Act (AECA) authorizes the president to control the import and export of defense articles and services[2] and it provides the statutory authority for the promulgation of the ITAR. Pursuant to a 1996 amendment, the AECA states that every person (other than a U.S. government officer/employee) "who engages in the business of brokering activities with respect to the manufacture, export, import or transfer" of a defense article or service must both register with the government and obtain a license.[3] The ITAR implement these requirements in Part 129 of the regulations — the brokering provisions.[4] Part 129 requires, among other things, that persons engaged in brokering activities register with the State Department's Directorate of Defense Trade Controls (DDTC), obtain DDTC approval before engaging in certain brokering activities, provide an annual report detailing the registrant's brokering activities and maintain records regarding the activities.

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In 2013, the State Department amended the brokering regulations, in part to clarify that the regulations definition of "brokering activities" does not include "activities by an attorney that do not extend beyond the provision of legal advice to clients." [5] However, guidance from the State Department makes clear that, under certain circumstances, an attorney could still act as a "broker," within the meaning of the ITAR. Specifically, if attorneys "engage in activities that go beyond providing consulting or legal advice, including being a third party to the transaction, or are engaged in soliciting, locating a buyer or seller, introducing or recommending specific parties, structuring the transaction, marketing, promoting and/or negotiating ITAR-controlled defense articles and services on behalf of their clients beyond contract terms of already identified foreign parties by your client, then such activities may constitute brokering activities" under the ITAR. [6]

In his suit, Goldstein alleged that the brokering provision's application to certain broadly defined activities rendered unclear the scope of attorney activities that State considers subject to the provisions. In 2013, Goldstein filed an advisory opinion request with the State Department seeking further guidance and, in particular, advice regarding whether six specific legal services would be considered "brokering activities" (including advising on the structure of transactions for the sale of defense articles/services and preparing contracts for such sales).

Finding the response to his request insufficient, Goldstein filed suit in the United States District Court for the District of Columbia. Goldstein alleged in part that the State Department's position that the ITAR brokering provisions apply to certain legal services offered by attorneys, coupled with the agency's alleged failure to confirm whether the provisions apply to a list of specific activities by attorneys, caused Goldstein great and irreparable harm. Part of this alleged harm resulted from the conflict between the brokering provisions' reporting requirements and ethical rules requiring the protection of attorney-client confidentiality.

On Jan. 26, finding that Goldstein lacked standing and that the case was not yet ripe, Judge Rudolph Contreras granted a motion to dismiss the case. The court found that Goldstein failed to demonstrate an injury in fact, as it did not show that it has, or will, engage in any activities that would be considered "brokering activities" by the State Department and that the threat of enforcement was merely speculative. Even if it was required to comply with the brokering provisions, the court found, Goldstein did not show that it would be injured, as it did not specifically identify what type of information it would be required to provide to DDTC in violation of attorney ethics rules. The court suggested that Goldstein may have been able to simply "advise its client about the requirements of [the brokering provisions], and seek informed consent before obtaining from its clients or providing to the State Department any confidential information that might be necessary to comply with those requirements." For similar reasons, the court also concluded that plaintiff's claims were not ripe for judicial review, and the case was dismissed.

Under the court's reasoning, it appears unlikely that any similar challenge to the ITAR's brokering provisions would proceed to the merits of the case, without a showing that the State Department has affirmatively required an attorney to abide by the requirements in the provisions.

With the dismissal of Goldstein's case, attorneys are left with only the agency's pre-existing guidance regarding the scope of the application of the ITAR's brokering provisions. Attorneys who believe that their

activities may fall within the scope of the ITAR's brokering provisions should also bear in mind the guidance provided to Goldstein by the D.C. Bar Legal Ethics Committee. According to the court's opinion, Goldstein was advised that, where an attorney would be aware prior to taking on a client engagement that he or she would be required to disclose certain confidences and secrets (e.g., through the provision of an annual brokering report to DDTC), the attorney must advise the client of these risks at the outset of the representation and obtain the client's informed consent prior to receiving any information subject to disclosure. Taking such steps will help to ensure that attorneys providing ITAR compliance advice abide by both any applicable requirements of the ITAR brokering provisions and the rules of professional conduct for their jurisdiction.

Goldstein's case is not the only example of a law firm bringing suit on its own behalf against the State Department, seeking declaratory and injunctive relief related to the agency's export controls regulations. *Stagg PC v. U.S. Department of State*, currently pending in the United States District Court for the Southern District of New York, involves another export controls law firm's challenge to the agency's application of the ITAR. Stagg contends that the ITAR's exercise of control over domestic speech and publications, because they may be heard or read by foreign persons, acts as an unconstitutional prior restraint on the freedom of speech, among other claims. With a motion to dismiss pending, it remains to be seen whether the court will consider the plaintiff's claims or, as in *Goldstein*, dismiss the case as inappropriate for judicial review.[7]

[1] The case is *Matthew A. Goldstein PLLC v. U.S. Department of State*, civil action number 2015-0311, in the United States District Court for the District of Columbia.

[2] 22 U.S.C. § 2778(a)(1).

[3] See *Act of July 21, 1996*, Pub. L. No. 104-164, § 151, 110 Stat. 1421, 1437-38; 22 U.S.C. § 2778(b)(1)(A)(ii)(I)-(III).

[4] 22 C.F.R. Part 129.

[5] See *Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions*, 78 Fed. Reg. 52,680 (Aug. 26, 2013); 22 C.F.R. § 129.2(b)(2)(iv).

[6] *Frequently Asked Questions (FAQs) – Registration*, U.S. Department of State, Directorate of Defense Trade Controls (July 2, 2015).

[7] This case is *Stagg PC v. U.S. Department of State*, civil action number 2015-8468, in the United States District Court for the Southern District of New York.