



Businessman Sentenced to One Year Imprisonment for ITAR Brokering Violations

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A U.S. business executive was recently sentenced to a one-year-and-a-day prison sentence for violations of the International Traffic In Arms Regulations (ITAR) brokering regulations under ITAR Part 129 (the "Brokering Regulations"). According to the Department of Justice press releases (available [here](#) and [here](#)), Tuqiang Xie, also known as "Tony Xie," of Irvine California served as a broker for the shipment of defense articles listed on the U.S. Munitions List (USML) and the U.S. Munitions Import List (USMIL) involving China through his company, Bio-Medical Optics LLC. According to DOJ, Xie never registered as a broker with the State Department or obtained a license under the ITAR brokering regulations for these transactions. Under ITAR, parties engaged in "brokering activities" are required to register, obtain advanced authorizations and comply with other requirements unless exemptions apply.

Xie was sentenced on March 30, 2022 by U.S. District Court Judge Charles R. Norgle in the Northern District of Illinois. Xie also pleaded guilty to filing a false tax return for Bio-Medical Optics.

The ITAR brokering requirements are an expansive set of regulations that impose restrictions on parties that provide assistance to other persons in the export and import of items on the USML and the USMIL. [1] It is not necessary for a party to purchase and resell a product to be regulated as a broker. Just providing assistance to another party who is buying or selling defense articles can give rise to requirements under these regulations. The requirements apply to transactions for controlled physical products, technical data, software and defense services.

Under ITAR § 129.2(c), engaging in the business of brokering activities requires only one occasion of brokering as described in the Brokering Regulations.

ITAR brokers are subject to a number of legal requirements. Parties that engage in "brokering activities" are required to register as brokers with the Directorate of Defense Trade Controls (DDTC) within the State Department (subject to certain exemptions set forth in ITAR § 129.3 and elsewhere). Also, parties that are required to register as brokers are subject to additional obligations including the requirement to: (i) obtain advance "approval" from DDTC (similar to a license) prior to engaging in

certain transactions, subject to exemptions in ITAR § 129.5; (ii) file brokering reports under ITAR § 129.10; (iii) comply with recordkeeping requirements; and (iv) file reports with DDTC regarding the payment of certain fees, commissions and political contributions in connection with ITAR-controlled transactions (including brokering transactions) as set forth in ITAR Part 130.

In addition, there are specific restrictions on engaging in brokering involving countries subject to U.S. embargoes and parties subject to debarment. Specifically, parties are prohibited from engaging in or making proposals to engage in brokering activities: (i) that involve any country or person referred to in ITAR § 126.1 (the §126.1 "proscribed countries?"), or (ii) that involve countries or persons identified by the Department of State through notice in the Federal Register that impose limitations on defense articles or defense services for reasons of U.S. national security, foreign policy or law enforcement interests (e.g., an individual subject to debarment pursuant to ITAR § 127.7), without first obtaining DDTC approval. Any person who knows or has reason to know of brokering activities involving such countries or persons described above is required to immediately inform DDTC under ITAR § 129.7(d). These requirements apply to brokering activities defined in ITAR § 129.2, regardless of whether the person involved in such activities has registered or is exempt from registration under ITAR § 129.3. In addition, the exemptions from the requirement to obtain advanced approval for certain brokering transactions in ITAR § 129.5 do not apply to brokering activities related to the § 126.1 "proscribed countries? or debarred parties as discussed in ITAR § 129.7.

With the Russian invasion of Ukraine, many companies are contemplating becoming involved in commercial sales transactions to provide support to the Ukrainian armed forces ? this includes providing defense articles and/or services directly and/or facilitating other parties in providing the same. Such activities may be subject to restrictions under the Brokering Regulations, along with other requirements under ITAR, the EAR and the U.S. sanctions laws. Companies are advised to review their transactions carefully to assess the role of the parties, export classifications of the products and services, countries involved and other factors to properly analyze the regulatory requirements that will apply.

While many types of firearms and ammunition were transferred from the USML to the Commerce Control List (CCL) under the Export Administration Regulations (EAR) in recent amendments, the *brokering* of firearms and ammunition is still regulated under the ITAR Brokering Regulations.

Penalties for ITAR violations include fines of up to \$1 million and up to 20 years imprisonment per violation.

There are additional requirements and exemptions under the Brokering Regulations ? this article is not intended to address all of these, and parties are advised to review the regulations in detail for specific transactions in which they are involved.

The Brokering Regulations are tucked away at the end of the ITAR regulations in Part 129 ? often overlooked by many companies. Despite their physical location in the regulations, however, they are an important part of the ITAR compliance puzzle and should be approached with the proper level of care.

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[1] A number of the key ITAR provisions regarding parties that are subject to the Brokering Regulations are as follows.

ITAR §129.2(b) provides as follows: (b) *Brokering activities* means any action on behalf of another to facilitate the manufacture, export, permanent import, transfer, reexport, or retransfer of a U.S. or foreign defense article or defense service, regardless of its origin.

(1) Such action includes, but is not limited to:

(i) Financing, insuring, transporting, or freight forwarding defense articles and defense services; or

(ii) Soliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service.

(2) Such action does not include:

(i) 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);

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

(iii) Activities by regular employees (see § 120.39 of this subchapter) acting on behalf of their employer, including those regular employees who are dual nationals or third-country nationals that satisfy the requirements of § 126.18 of this subchapter;

Note to paragraph (b)(2)(iii): The exclusion does not apply to persons subject to U.S. jurisdiction with respect to activities involving a defense article or defense service originating in or destined for any proscribed country, area, or person identified in § 126.1 of this subchapter.

(iv) 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, collecting product and pricing information to prepare a response to Request for Proposal, generally promoting company goodwill at trade shows, or activities by an attorney that do not extend beyond the provision of legal advice to clients;

(v) Activities performed by an affiliate, as defined in § 120.40 of this subchapter, on behalf of another affiliate;

(vi) Activities by persons, including their regular employees (see § 120.39 of this subchapter), that do not extend beyond acting as an end-user of a defense article or defense service exported pursuant to a license or other 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 other approval, or under an approval pursuant to § 123.9 of this subchapter;

(vii) Activities by persons to facilitate the manufacture in the United States or export of an item subject to the EAR; or

(viii) Activities by persons to facilitate the reexport or transfer of an item subject to the EAR that has been approved pursuant to a license, license exception, or no license required authorization under the EAR or a license or other approval under this subchapter.?

ITAR § 129.2(a) provides as follows: (a) *Broker* means any person (see § 120.14 of this subchapter) described below who engages in the business of brokering activities:

(1) Any U.S. person (see § 120.15 of this subchapter) wherever located;

(2) Any foreign person (see § 120.16 of this subchapter) located in the United States; or

(3) Any foreign person located outside the United States where the foreign person is owned or controlled by a U.S. person.

Note to paragraph (a)(3): For purposes of this paragraph, ?owned by a U.S. person? means more than 50 percent of the outstanding voting securities of the firm are owned by a U.S. person, and ?controlled by a U.S. person? means one or more U.S. persons have the authority or ability to establish or direct the general policies or

day-to-day operations of the firm. U.S. person control is rebuttably presumed to exist where U.S. persons own 25 percent or more of the outstanding voting securities unless one foreign person controls an equal or larger percentage.?

ITAR §129.3(b) and (c) provide as follows: (b) *Exemptions.*

Registration, approval, recordkeeping, and reporting under this section are not required for:

(1) Foreign governments or international organizations, including their employees, acting in an official capacity; or

(2) Persons exclusively in the business of financing, insuring, transporting, customs brokering, or freight forwarding, whose activities do not extend beyond financing, insuring, transporting, customs brokering, or freight forwarding. Examples include air carriers or freight forwarders that merely transport or arrange transportation for licensed defense articles, 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. 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. In such circumstances, the banks, firms, or other persons providing financing for defense articles or defense services are not exempt.

(c) Persons exempt from registration, approval, recordkeeping, and reporting as provided in § 129.3(b) are subject to the policy on embargoes and other proscriptions as outlined in § 129.7.?

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