

ALERT

# Challenge to Application of the ITAR Brokering Regulations Dismissed by DC Court

February 16, 2016

The U.S. District Court for the District of Columbia has dismissed a challenge to the United States Department of State's application of the International Traffic Arms Regulations' (ITAR) brokering provisions to practicing attorneys. The challenge was filed by international trade law firm Matthew A. Goldstein, PLLC (Goldstein) on its own behalf, seeking injunctive and declaratory relief regarding the application of the ITAR's brokering provisions to legal services provided to its clients. Specifically, Goldstein sought a judgment declaring that any application of the brokering provisions to its legal services would be unconstitutional, and requested that the court equitably estop the State Department from applying the provisions to the firm.

The Arms Export Control Act (AECA) provides the statutory authority for the promulgation of the ITAR. A 1996 amendment to AECA states that every person (other than an U.S. government officer or 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 register with the government and seek a license before engaging in such activities.<sup>1</sup> In 2013, the State Department, by regulation, clarified the ITAR<sup>2</sup> to exclude "activities by an attorney that do not extend beyond the provision of legal advice to clients" from the definition of "brokering activities."<sup>3</sup>

However, Goldstein alleged that the ITAR's brokering provisions did apply to certain other broadly defined activities by attorneys (*e.g.*, introducing or recommending specific parties and structuring transactions), rendering unclear the scope of attorney activities that Defendants considered to be subject to the provisions. In 2013, Goldstein filed an advisory opinion request with the State Department seeking further guidance as to the issue. Finding the response thereto

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insufficient, Goldstein filed suit, alleging 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 harm resulted from the conflict between the brokering provisions' reporting requirements and ethical rules requiring the protection of attorney-client confidentiality.

On January 26, 2016, finding that Goldstein lacked standing and that the case was not yet ripe, the court granted a motion to dismiss the case filed by Defendants.<sup>4</sup> The court found that Goldstein failed to demonstrate an injury in fact, as it did not concretely 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, even were it to engage in such activities, was merely speculative. Even if it was required to comply with the brokering provisions, the court found, Goldstein had not shown that it would be injured by having to adhere to the requirements, as it did not identify with specificity what type of information it would be required to but could not provide without violating ethical rules. The court suggested that the plaintiff 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 State 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 Goldstein's case was dismissed.

For more information regarding the case, or for further guidance regarding the ITAR's brokering provisions, contact Wiley Rein attorney Laura El-Sabaawi.

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[1] 22 U.S.C. § 2778(b)(1)(A)(ii)(I)-(III).

[2] See generally *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).

[3] 22 C.F.R. § 129.2(b)(2)(iv).

[4] *Matthew A. Goldstein, PLLC v. U.S. Department of State*, DDC, Civil Action No. 2015-0311 (Jan. 26, 2016).