

## Inconsistent Filing Penalties Can Leave Exporters Scratching Their Heads

By: Joan Koenig and Nicolas Guzman

United States Customs and Border Protection (CBP) has begun enforcing the heightened civil penalties outlined in its January 2009 enforcement guidelines against parties who violate the export filing requirements of the Foreign Trade Regulations (FTR) of the Department of Commerce, Bureau of the Census (Census). As enforcement has ramped up, an apparent conflict has arisen between the final rule on the mandatory use of the Automated Export System (AES), published in June of 2008 by Census, and the Guidelines published in the Customs Bulletin for enforcement. Specifically, CBP has begun imposing fines of up to \$10,000 on shipments at the Southern Border when the required notification for those shipments is not given within the one-hour window required by the Census regulations, but the filing occurs same day. These heightened fines have been imposed on exporters because of a conflicting definition of "failure to file" between the Census regulations and the CBP Enforcement Guidelines.

### Background

In June 2008 the Census Bureau published its final rule on the mandatory use of AES for the transmission of statistical and compliance data related to exports from the United States. The regulations specify the rules for implementing the Foreign Relations Authorization Act of 2002. These rules mandate the use of AES for filing cargo information for shipments departing the United States and describe the timing requirements for those filings depending on the exporting mode of transport. The rules also make it clear that Census delegates authority for enforcement of the FTR to CBP and the Bureau of Industry and Security.

In January 2009, CBP published Guidelines dated December 8, 2008, regarding the imposition and mitigation of civil penalties for violations of the FTR (C.D. 08-50). The Guidelines describe civil penalties that are not only more specific, but also appear to be inconsistent with those contained in the Census' Final Rule.

## Conflicting Civil Penalty Language and Exporters Affected

Under the FTR (15 C.F.R. §30.71(b)(1)), a “failure to file or a delayed filing” of information in connection with the exportation of cargo incurs a civil penalty “not to exceed” \$1,100 for each day of delinquency beyond the applicable period, but not more than \$10,000 per violation. While Census’ rules mention both the “failure to file” and “delayed filing,” they are not distinguished, and both are subject to the same penalties described under the rule, *i.e.*, not to exceed \$1,100 per day.

The Guidelines set forth by CBP, however, bifurcate the filing penalties into two categories: “failure to file” and “late filing.” According to the Guidelines, a “failure to file” occurs when the government discovers there is no AES record for a particular export transaction by the date that record is required and that discovery is communicated to the U.S. Principal Party in Interest (USPPI) before the violation is corrected. A failure to file incurs a Notice of Penalty of the maximum amount of \$10,000. Conversely, a “late filing” occurs when the AES record is filed beyond the date and time proscribed for such filing, but the error is corrected by the USPPI before it is discovered by CBP. A late filing incurs a Notice of Penalty of \$1,100 per each day late, up to a maximum of \$10,000.

In conflict with the FTR, the CBP Guidelines state that any AES record filed after the government discovers the violation and communicates it to the USPPI is considered a failure to file. Under the Guidelines, a failure to file can be penalized up to \$10,000 for a single day of delay, when previously this violation would at most be penalized \$1,100 per day.

Recently, exporters who have been transporting shipments that require AES filings and have filed 30 minutes after arrival at the border (*i.e.*, 90 minutes late) have been issued the flat \$10,000 fine under CBP’s Guidelines, regardless of the explicit language in the FTR that would cap the penalty at \$1,100. In practice, CBP is ignoring the conflicting language and enforcing the FTR according to CBP’s published Guidelines. The conflicting language is particularly important for exporters who transport goods via truck across the southern border of the United States. Unlike shipments to Canada, most shipments to Mexico require AES filing. And, unlike vessels and air cargo, the truck shipment notification window is relatively short (one hour), making exporters more susceptible to CBP notification of failure to file, as opposed to self reporting.

## Resolving the Conflict

Census and CBP are currently in discussions regarding the inconsistent language in the regulations and CBP Guidelines. Despite the fact that the FTR underwent a comment and answer period, and that the regulations are legally binding, CBP continues to enforce its own Guidelines even though they exceed the scope of the penalties defined under the FTR. Until this discrepancy is resolved, exporters may be subject to the \$10,000 CBP penalty under the “failure to file” framework and should take extra care to ensure that their filings are timely and that any penalty issued by CBP inconsistent with the FTR be aggressively challenged through CBP’s petition process.

If you have any questions regarding compliance with AES timing requirements, please contact Joan Koenig (312.569.1163, Joan.Koenig@dbr.com) or any other member of Drinker Biddle's Customs and Trade Group.

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