

## Guidelines for the Imposition and Mitigation of Civil Penalties for Failure to Comply with the Foreign Trade

### Regulations in 15 CFR Part 30

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** General notice.

**SUMMARY:** This document provides mitigation guidelines for violations of the Foreign Trade Regulations (FTR) issued by the Census Bureau, Department of Commerce (DOC) in Title 15 of the Code of Federal Regulations part 30. On June 2, 2008, the Census Bureau published a final rule in the **Federal Register** amending the provisions of the FTR to require mandatory filing of export information through the Automated Export System (AES) or through AESDirect for all shipments where the export information is required by the FTR. The final rule included provisions for the issuance of civil penalties for violations of the FTR and the collection of the penalties. These penalty provisions are administered by U.S. Customs and Border Protection (CBP). Pursuant to the FTR, civil penalties not to exceed \$10,000 per violation may be imposed for the failure to file or the delayed filing of export information in AES, the filing of false or misleading information in AES, and other violations of the FTR.

**EFFECTIVE DATES:** These guidelines are effective on February 1, 2009 for violations occurring on or after February 1, 2009.

4 CUSTOMS BULLETIN AND DECISIONS, VOL. 43, NO. 2, JANUARY 2, 2009

**FOR FURTHER INFORMATION CONTACT:** Susan Terranova, Penalties Branch, Regulations and Rulings, Office of International Trade, (202) 325–0009, or Chris Pappas, Penalties Branch, Regulations and Rulings, Office of International Trade, (202) 325–0109.

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

On July 1, 2005, the Secretary of the Department of Commerce (DOC), pursuant to his authority under 13 U.S.C. 306, delegated to the Secretary of the Department of Homeland Security (DHS) the authority to enforce the provisions of 13 U.S.C. 304, 305 and specific regulations in 15 CFR part 30 (the “Foreign Trade Regulations” (FTR)). The enforcement of the FTR was to be effected through the issuance of civil penalties in the amounts set forth in the FTR, and by the forfeiture of merchandise as provided for by 15 CFR 30.71(b)(3).

The authority to issue civil penalties to enforce the FTR was delegated by the Secretary of Homeland Security to the Commissioner of CBP. See DHS Delegation Number 7010.3, issued on May 11, 2006. However, DHS, CBP and DOC agreed that the enforcement of the FTR through the assessment of penalties would be postponed until the proposed amendments of the Census Bureau (DOC) to the FTR, published in the **Federal Register** on February 17, 2005 (see 70 FR 8200), were finalized. On June 2, 2008, the Census Bureau published a final rule in the **Federal Register** (73 FR 31548) amending the provisions of the FTR to require mandatory filing of export information through the Automated Export System (AES) or through AESDirect for all shipments where the export information is required by the FTR. The final rule stated that the implementation of the provisions of the FTR would be delayed until September 30, 2008, to allow all affected parties’ sufficient time in which to come into compliance with the final rule. However, in order to provide the public with advance notice of these guidelines, CBP will not commence the issuance of penalties for FTR violations until thirty days after the date of publication of this document.

The statutory basis for the penalty assessments for violation of the FTR resides in 13 U.S.C. 304. The penalty provisions that will be administered by CBP are set forth in sections 30.71 and 30.72 of the FTR (15 CFR 30.71 and 30.72). Pursuant to section 30.71(b)(1) and (b)(2), civil penalties not to exceed \$10,000 per violation may be imposed for the failure to file or the delayed filing of export information in AES, the filing of false or misleading information in AES, and other violations of the FTR. Section 30.72 sets forth the procedures for the collection of the penalties and provides for the mitigation of the penalties incurred under section 30.71(b) (1) and (b) (2). Inasmuch as the authority to assess and mitigate these penalties has been delegated ultimately to the Commissioner of CBP, the administration of these penalties shall be under the customs laws. See 15 CFR 30.72(b).

CBP coordinated with other offices in DHS and with DOC in drafting guidelines for the mitigation of the civil penalties set forth in the FTR. These guidelines provide for separate mitigation schemes for penalties assessed for the following: (1) the failure to file the export information in AES, (2) the late filing of the export information in AES, (3) the failure to file all the necessary information in AES, the filing of incorrect information in AES, or the failure to comply with some other requirement of the FTR, and (4) the failure of the exporting carrier to provide certain documents or certain information to CBP. The penalties may be assessed against any culpable party with respect to the export transaction. These parties include the U.S. Principal Party in Interest (USPPI), the Foreign Principal Party in Interest (FPPI), freight forwarders, authorized agents (which may include brokers and other parties to the export transaction), and carriers.

Penalties may be assessed against more than one culpable party. For example, if the USPPI or its agent fails to provide the carrier with the AES proof of filing citation or exemption legend and the carrier then fails to include the filing citation or exemption legend on the manifest (when the manifest is required), CBP may issue a penalty against both the USPPI and the carrier. The penalty should be assessed against the culpable party or parties per each AES transmission that is found to be in violation of the FTR, rather than per each violation of the FTR with respect to the AES transmission. For instance, when a USPPI transmits incorrect foreign consignee information in AES and also transmits a false value for the merchandise, which is then exported without correction of the AES record, only one penalty will be issued to the USPPI.

For first violations of the FTR, CBP may take alternative action to the assessment of penalties, including, but not limited to, educating and informing the parties involved in the export transaction of the applicable U.S. export laws and regulations, or issuing a warning letter to the party. However, CBP may issue penalties when the party has previously received a warning letter or the party has been educated by an enforcement agency through an outreach program or by other means.

The issuance by CBP of a penalty for a violation of the FTR does not preclude CBP from issuing penalties for other violations that may exist with respect to the export transaction. For example, CBP may issue a penalty under the FTR against a USPPI who filed incorrect export information in AES for an exportation of counterfeit trademarked goods that had been illegally entered into the U.S., as well as a separate penalty under CBP laws for the trademark violation.

The mitigation guidelines for penalties issued for violations of the FTR are set forth below. **These guidelines are effective on February 1, 2009.**

The text of the guidelines is set forth below.

Date: December 12, 2008

W. RALPH BASHAM,

*Commissioner, Customs and Border Protection*

Attachment

## **Guidelines for the Imposition and Mitigation of Civil Penalties for Failure to Comply with the Foreign Trade Regulations in 15 CFR Part 30**

The guidelines set forth below will pertain to penalties incurred for violations of the Foreign Trade Regulations (FTR) (15 CFR part 30). Penalties under the FTR may be issued to U.S. Principal Parties in Interest (USPPIs), Foreign Principal Parties in Interest (FPPIs), freight forwarders, authorized agents (including brokers and other parties to the export transaction, as appropriate) and carriers. Under 15 CFR Subpart H, the penalty may be issued in an amount up to \$10,000 per violation. Penalties may be assessed against more than one person for a violation stemming from the same export transaction.

**NOTE:** For purposes of the penalty guidelines below, only violations occurring or resolved within the 3-year period preceding the subject violation will be considered as prior violations.

**Informed Compliance:** For first offenses, enforcement agencies may take alternative action to the assessment of penalties, including the alternative to educate and inform the persons involved in the transaction of the applicable U.S. export laws, issuance of warning letters, or company outreach.

**I. PENALTIES FOR THE FAILURE TO FILE ELECTRONIC EXPORT INFORMATION (EEI) IN THE AUTOMATED EXPORT SYSTEM (AES)**—A failure to file occurs if the government discovers that there is no record in the AES for an export transaction by the date that the record is required and that discovery is made and communicated to the USPPI, authorized agent, or other party before the violation is corrected (See 15 CFR 30.4 for the time periods for filing of the

EEI). However, any AES record filed later than 10 days after the due date will be considered a failure to file, regardless of whether the violation was or was not discovered by the government.

A. PENALTY ISSUANCE—These penalties will be assessed against USPPIs, authorized agents or other parties to the export transaction, or the FPPI, its authorized agent, or other appropriate party to the transaction if a routed export transaction as defined in 15 CFR 30.1(c). The Notice of Penalty will be issued at the maximum amount of \$10,000.

B. PENALTY MITIGATION:

1. First Recorded Offense—\$750 to \$2,500
2. Second Recorded Offense—\$1000 to \$3,500
3. Third Recorded Offense—\$1,500 to \$5,000
4. Fourth and Subsequent Recorded Offenses—\$2,000 to \$10,000

NOTE: The existence of one or more mitigating factors to the violation may result in mitigation at the low end of the mitigation range. If one or more aggravating factors exist, the penalty may be mitigated at the high end of the mitigation range. Mitigating and aggravating factors may be used to offset each other.

C. MITIGATING FACTORS (Not an exhaustive list):

1. First—time USPPI or authorized agent, FPPI, carrier, etc.
2. Voluntary self-disclosure of the violation, in accordance with 15 CFR 30.74 (Extraordinary Mitigating Factor).
3. Clear documentary evidence of remedial measures undertaken to prevent future violations.
4. Exceptional cooperation with CBP, Census or the Bureau of Industry and Security (BIS).
5. The violation was an isolated occurrence.
6. The party has provided substantial assistance in the investigation of another person.
7. The party demonstrates that it has a systematic export compliance effort.

D. AGGRAVATING FACTORS (Not an exhaustive list):

1. Several violations in the same export transaction (e.g., wrong port code; incorrect value; missing required data; violations of the regulations of other agencies, such as the Department of State or the Drug Enforcement Administration, in addition to the Census violation).
2. Circumstances suggest the intentional nature of the violation (e.g., wrong value where invoices or other documents covering goods show correct value; claiming post-departure to avoid pre-departure filing when filer is not an approved post-departure filer).
3. High number of violations in preceding 3-year period.
4. Evidence of criminal conviction for a related violation, such as a BIS violation.
5. The party exhibits a pattern of disregard for its responsibilities under U.S. export laws and regulations.
6. The party exports as a regular part of its business, but lacked a systematic export compliance effort.

**II. PENALTIES FOR THE LATE FILING OF ELECTRONIC EXPORT INFORMATION (EEI) in AES**—Late filing occurs when the AES record is filed beyond the due date for such filing (See 15 CFR 30.4 for the time periods for filing in AES). However, any AES record filed later than 10 days after the due date will be considered a non-filing of the AES record and will be subject to the penalties under Paragraph I. above.

Further, any AES record filed after the government discovers the violation and communicates the violation to the USPPI or authorized agent will be considered a failure to file in the AES, also subject to the penalty scheme in Paragraph I. above.

A. PENALTY ISSUANCE—These penalties will be issued to USPPIs, authorized agents, or other person as appropriate; or the FPPI, its authorized agent or other person as appropriate if a routed transaction. The Notice of Penalty will be issued in an amount that reflects \$1,100 per each day late, up to a maximum of \$10,000.

B. PENALTY MITIGATION:

1. First Recorded Offense—\$250 per day to \$1,500
2. Second Recorded Offense—\$500 per day to \$2,500
3. Third Recorded Offense—\$750 per day to \$3,500
4. Fourth and Subsequent Recorded Offenses—\$1,100 per day up to a maximum of \$10,000

NOTE: If one or more mitigating factors as enumerated in Paragraph I.C. above exist, the mitigated penalty amount may be reduced from the prescribed amount, but no lower than \$250. If one or more aggravating factors as enumerated in Paragraph I.D. above exist, the mitigated penalty amount may be increased beyond the prescribed amount, but no higher than \$10,000.

**III. PENALTIES FOR OTHER FTR VIOLATIONS, INCLUDING THE FOLLOWING (Not an Exhaustive List):**

- Incorrect value for shipment
- Other incorrect information in the AES record, such as an incorrect USPPI, consignee, end-user, commodity description, or port of export
- Failure to cite license code or license number
- Failure to obtain Power of Attorney for AES transmission
- Failure to identify transaction as a routed transaction
- Failure to correct information in AES as the changes become known to the filer
- Failure to provide carrier with appropriate proof of filing citation or exemption legend by the time periods set forth in the FTR
- Failure to retain all records relating to the export shipment for a 5-yr. period from the date of export

A. PENALTY ISSUANCE—These penalties may be issued against USPPIs, authorized agents, freight forwarders, and any other person as appropriate, or the FPPI or its authorized agent if a routed transaction, or other persons as appropriate. The Notice of Penalty will be issued at the maximum amount of \$10,000.

**B. PENALTY MITIGATION:**

1. First Recorded Offense—\$500 to \$2,500
2. Second Recorded Offense—\$750 to \$3,500
3. Third Recorded Offense—\$1,000 to \$5,000
4. Fourth and Subsequent Recorded Offenses—\$2,000 to \$10,000

NOTE: Mitigating factors as enumerated in paragraph I.C. above may result in a mitigated penalty at the low end of the mitigation range or a penalty below the minimum penalty amount, but no lower than \$500. Aggravating factors as enumerated in paragraph I.D. above may result in a mitigated amount at the high end of the mitigation range. Mitigating and aggravating factors may serve to offset each other.

**IV. CARRIER PENALTIES**—Penalties may be issued against exporting carriers or other persons as appropriate for the following violations:

- Failure of carriers to adhere to requirements set forth in section 30.45 (15 CFR 30.45)
- Failure to provide the USPPI or authorized agent with changes to the date of export or the port of export
- Failure to report the proof of filing citation or exemption legend on the required manifest
- When filing an incomplete manifest under bond, the failure to file the manifest information within the prescribed time period after export (“late filing”)
- When filing incomplete under bond, the failure to provide the list of proof of filing citations or exemption legends prior to departure from the port of exit
- For carriers exempted from filing a manifest, the failure to file, upon request, the proof of filing citations or exemption legends

A. PENALTY ISSUANCE—The Notice of Penalty will be issued at the maximum amount of \$10,000, except for late filing of the manifest information.

For late filing of the manifest information, the penalty will be issued at \$1,100 per each day late, up to a maximum of \$10,000 per violation, in accord with section 30.47(b) of the FTR (15 CFR 30.47(b)).

**B. PENALTY MITIGATION:**

1. First Recorded Offense—\$500 to \$2,500
2. Second Recorded Offense—\$750 to \$3,500
3. Third Recorded Offense—\$1,000 to \$5,000
4. Fourth and Subsequent Recorded Offenses—\$2,000 to \$10,000

NOTE: Mitigating factors as enumerated in Paragraph I.C. above may result in a mitigated penalty amount at the low end of the mitigation range or lower, but not less than \$500. Aggravating factors as enumerated in Paragraph I.D. above may result in a mitigated amount at the high end of the mitigation range. Mitigating and aggravating factors may be used to offset each other.