
Customs Publishes New Penalty Guidelines for Export Filing Errors

by Thomas M. deButts and Ada L. Loo

On January 2, 2009, U.S. Customs and Border Protection (CBP) published penalty guidelines for violations of the Foreign Trade Regulations (FTR) issued by the U.S. Census Bureau (Census), which were amended on June 2, 2008, and became effective as of September 30, 2008. The amended FTR adopted new measures, such as a voluntary disclosure program, to mitigate violations of the FTR, which are subject to a civil penalty not to exceed \$10,000 per violation. Violations can include the failure to file or the delayed filing of export information in the Automated Export System (AES) and the filing of false or misleading information in AES.

Authority to issue civil penalties to enforce the FTR has been delegated to CBP, which has published guidelines on how it will assess penalties for certain violations based on four mitigation schemes outlined as follows:

- Penalties for the Failure to File Electronic Export Information (EEI) in AES
- Penalties for the Late Filing of Electronic Export Information (EEI) in AES
- Penalties for Various Other FTR Violations
- Penalties for Carrier Filing Failures

Each penalty scheme follows a sequence of recorded offenses, typified by the following one for failure to file EEI:

- First Recorded Offense - \$750 to \$2,500
- Second Recorded Offense - \$1000 to \$3500
- Third Recorded Offense - \$1500 to \$5000
- Fourth and Subsequent Recorded Offense - \$2000 to \$10,000

In addition to a voluntary disclosure, a number of other mitigating factors can reduce the penalty. Additional mitigating factors may include: a first-time offense; documented remedial measures to prevent future violations; exceptional cooperation; isolated occurrence; providing substantial assistance during investigation; and demonstration of systematic export compliance efforts.

If one or more mitigating factors are present, it may result in a reduced penalty amount from the prescribed amount with a minimum penalty of \$250 or \$500, depending on the mitigation scheme. The reduced amounts are based on the type of violation and which of the four mitigation schemes covers that violation. In situations of a first-time offense, CBP may take an alternative action to the assessment of penalties, such as a warning letter. Note that multiple violations can occur in a single export transaction and penalties can be assessed on a per-shipment basis where violations are repeated. Therefore, the total amount of fines can be significant for companies that export regularly.

Alternatively, if one or more aggravating factors exist, then the mitigated penalty amount may increase beyond the prescribed amount but no higher than \$10,000 per violation. The guidelines provide a list of examples of aggravating factors. The examples include: several violations in the same export transaction; circumstances suggesting an intentional violation; a high number of violations in the preceding three-year period; evidence of criminal conviction for related violation; pattern of disregard for U.S. export laws and regulations; and evidence of lack of systematic export compliance effort.

Penalties may be assessed against any culpable party with respect to the export transaction. This includes 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.

The notice states that CBP will commence the issuance of civil penalties for FTR violations on February 1. Although enforcement actions for violations of these regulations have previously been relatively rare, the publication of these guidelines suggests that CBP is planning a more robust civil penalty program. All companies involved in international business should ensure that they maintain full compliance with the FTR to avoid the increased penalties and the new cop on the beat.

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