

GUIDELINES FOR THE IMPOSITION AND MITIGATION OF CIVIL PENALTIES FOR FAILURE TO COMPLY WITH THE FOREIGN TRADE REGULATIONS IN 15 CFR PART 30 - 15 CFR PART 30 (CBP Dec. 08-50)

Pursuant to sections 304 and 305 of Title 13, United States Code (13 U.S.C. 304 and 305), the Department of Commerce's Census Bureau (Census Bureau) published in the Federal Register (73 FR 31548) a Final Rule on June 2, 2008, amending the regulations in Part 30 of Title 15, Code of Federal Regulations (15 CFR part 30) (the "Foreign Trade Regulations" (FTR)) requiring mandatory filing of electronic export information (EEI) through the Automated Export System (AES) or through AESDirect for certain exports. The Census Bureau subsequently published other Final Rules amending the FTR, including publication of a Final Rule in the Federal Register (82 FR 18383) on April 19, 2017. On January 8, 2018, the Department of Commerce also published in the Federal Register (83 FR 706) a Final Rule adjusting several Department of Commerce penalty amounts, including the penalty amounts for FTR violations, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. The Department of Commerce published the current (increased) penalty amounts for FTR penalties in 15 CFR 6.3(c).

On January 2, 2009, U.S. Customs and Border Protection (CBP) published "**Guidelines for the Imposition and Mitigation of Civil Penalties for Failure to Comply with the Foreign Trade Regulations in 15 CFR Part 30**" in the CBP Bulletin and Decisions as CBP Dec. 08-50. The guidelines below are based on that publication, with modifications made to reflect changes made to the FTR since the publication of CBP Dec. 08-50, including the Census and Department of Commerce Final Rules referenced above.

I. Background

On July 1, 2005, the Secretary of the Department of Commerce, pursuant to his authority under 13 U.S.C. 306, delegated to the Secretary of the Department of Homeland Security the authority to enforce the provisions of 13 U.S.C. 304 and 305 and the 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. See 15 CFR 30.71(b).

The statutory basis for the penalty assessments for violation of the FTR resides in 13 U.S.C. 304 and 305. The penalty provisions that CBP administers are set forth in sections 30.71 and 30.72 of the FTR (15 CFR 30.71 and 30.72). Pursuant to 15 CFR 30.71(b)(1) and 15 CFR 6.3(c)¹, civil penalties not to exceed \$13,605 per

¹ The Department of Commerce adjusted the FTR civil penalty amounts for inflation pursuant to Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. The new maximum penalty amounts for FTR penalties are published in 15 CFR 6.3(c). Where CBP Dec. 08-50 referenced the maximum penalty and mitigation amounts prior to the inflation adjustment (\$1,100 per day and \$10,000 maximum), those

violation may be imposed for the failure to file. Pursuant to section 30.71(b)(2), for delayed filings, civil penalties not to exceed \$1,360 per day may be imposed up to a maximum of \$13,605. Pursuant to section 30.71(b)(3), civil penalties not to exceed \$13,605 per violation may be imposed for the filing of false or misleading information, furtherance of illegal activities and any violation of the FTR not encompassed in paragraphs (b)(1) or (b)(2).

Pursuant to section 30.72, the CBP laws relating to penalty assessment, remission or mitigation of penalties, collection of penalties, and limitations of action and compromise of claims apply to penalties that CBP assesses pursuant to the FTR.

II. Overview of Enforcement and the Mitigation Guidelines

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.²

amounts have been increased in this document to reflect the new amounts in 15 CFR 6.3(c) (\$1,360 per day and \$13,605 maximum).

² The decision of whether to take alternative action to the assessment of penalties is solely within the discretion of CBP.

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.

III. Penalties for the Failure to File Electronic Export Information (EEI) in the Automated Export System (AES)

A. 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.

B. 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 \$13,605.

C. 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 \$13,605

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.

D. 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.

E. 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.

IV. Penalties for the Late Filing of EEI in AES

A. 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 III. 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 III. above.

B. 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 \$1,360 per each day late, up to a maximum of \$13,605.

C. 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—\$1,360 per day up to a maximum of \$13,605.

NOTE: If one or more mitigating factors as enumerated in Paragraph III.D. 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 III.E. above exist, the mitigated penalty amount may be increased beyond the prescribed amount, but no higher than \$13,605.

V. 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 \$13,605.

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 \$13,605
- NOTE: Mitigating factors as enumerated in paragraph III.D. 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 III.E. 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.

VI. Carrier Penalties

- A. Penalties may be issued against exporting carriers or other persons as appropriate for the following violations:
1. Failure of carriers to adhere to requirements set forth in section 30.45 (15 CFR 30.45).
 2. Failure to provide the USPPI or authorized agent with changes to the date of export or the port of export.
 3. Failure to report the proof of filing citation or exemption legend on the required manifest.
 4. When filing an incomplete manifest under bond, the failure to file the manifest information within the prescribed time period after export (“late filing”).
 5. 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.
 6. For carriers exempted from filing a manifest, the failure to file, upon request, the proof of filing citations or exemption legends.

B. Penalty Issuance

The Notice of Penalty will be issued at the maximum amount of \$13,605, except for late filing of the manifest information. For late filing of the manifest information, the penalty will be issued at \$1,360 per each day late, up to a maximum of \$13,605 per violation.

C. 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 \$13,605
- NOTE: Mitigating factors as enumerated in Paragraph III.D. 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 III.E. 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.