CONECT

Coalition Of New England Companies For Trade

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April 27, 2005

Director, U.S. Census Bureau
Room 2049, Federal Building 3
Washington, DC 20233

Re: Docket Number 031009254–4355–02

Dear Director:

I am writing on behalf of the Coalition of New England Companies for Trade (CONECT), an organization of exporters, importers, freight forwarders, customs brokers and others engaged in international trade in New England. We respectfully submit the following comments relating to the new penalty provisions for the Automated Export System (AES), as set forth in the Proposed Rule.

Proposed Penalty Provisions

Subpart H of the proposed regulations sets out penalty provisions for the failure to file through AES, for late filing through AES, and erroneous filings through AES. The regulations set out both criminal and civil penalties, but these comments address only the civil penalty section of the proposed regulations. The regulations propose a penalty of $1,000.00 for each day that an AES transaction is delinquent. Presumably an AES transaction will be considered as late filed if filed after the timeframes as set out in 15 C.F.R. §30.4. In addition to the penalty set forth for late filing, the regulations provide for a penalty of up to $10,000.00 for violations of the provisions of the regulations not related to delinquency. The regulations provide for a hearing before an administrative law judge should a principal party of interest, agent, carrier, or other party subject to these civil penalties challenge the penalty assessment. With regard to mitigation or remission, the proposed regulations provide for mitigation or remission indicating that a penalty may be mitigated or remitted if the penalty was incurred without willful negligence or fraud. The proposed regulations further provide that mitigation may take place if "Other circumstances exist that justify a remission or mitigation."

As set out in the proposed regulations, it would appear possible that a party may be subject to the assessment of three separate penalties. If an AES transaction is

submitted, but the data is not accurate, is it considered at that time to be filed? If not, the party would be subject to penalties for a delinquent filing in addition to the potential $10,000.00 penalty for the erroneous information. Further, since the regulation sets out that these penalties are in addition to any other penalties which may be assessed under statute, the goods may be seized and subject to forfeiture under 19 U.S.C. § 1595a(c). Assuming that Customs and Border Protection will provide for the release of the goods for export after the payment of a penalty, a party, under the proposed regulations, would be subject to potentially three penalties in addition to the seizure of its goods and the cost of challenging the assessment. Further, a party finding itself in such a position would have to pursue two separate remedies, one with an administrative law judge for remission of the penalties under Subpart H and the petitioning process set out in 19 C.F.R. Part 171.

The proposed regulations do not provide any meaningful standards of mitigation with regard to the penalty assessment. Penalties, apparently, can be assessed even if the erroneous data was not a material omission or material error, or was caused by clerical error or inadvertence. The regulations certainly provide for mitigation if the erroneous filing was not due to willful negligence or fraud. The operative word in the regulation is "may." The government is under no obligation to mitigate or remit and has established no guidelines which would apply for mitigation or remission. This is contrasted with mitigation for imports found in violation. 19 C.F.R. Part 171, in the appendix, sets out specific guidelines including mitigating and aggravating factors.

We believe that the proposed regulations, as written, represent a blank check to the government. Issues which must be considered include materiality, cause of the alleged violation, the nature of the violation, and the record of the party to whom the penalty is directed. By way of comparison, attention is directed to 19 U.S.C. § 1592 which deals with penalties for fraud, gross negligence, and negligence in importing. The statute specifically provides that clerical errors or mistakes of fact are not violations unless they are part of a pattern of negligent conduct. The mere non-intentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct. However, in the proposed AES regulations, there is no provision for clerical errors. This would seem to imply that clerical errors only occur on importation in the preparation of documentation but not on exportation.

Materiality should also be addressed in the regulations. There is a significant difference between an exporter who fails to obtain or report a Commerce Department license and erroneously provides a wrong export commodity control number for goods which may be restricted and a party who, through non-negligent conduct, reports a Harmonized Tariff System (HTS) number of ten digits in which the ninth and tenth digits are reported incorrectly or for which those numbers Customs or Commerce do not agree. Yet, the regulations on their face make no provision for any issue of materiality in the assessment of penalties.

There is no question that a company's prior record should be considered in the assessment of any penalties. An exporter with a flawless record who commits one error, perhaps not even a material error, in an AES filing is subject to the same penalties as a party who continuously supplies erroneous data to the Commerce Department. While an argument can be made that the government will take these factors into account in determining mitigation, without specific written guidelines, it is left to the discretion of the

deciding official (the agency deciding has not been made clear in the regulations, it may be Commerce, the Bureau of Industry and Security, or Customs and Border Protection). The importer is at the mercy of arbitrary and capricious decisions by the government. Without these safeguards and some process for petitioning the government prior to resorting to an administrative law judge, an alleged violator will be forced to weigh financial factors as to whether or not it is less expensive to pay a penalty and thereby admit to a violation than to pursue mitigation, remission or cancellation before an administrative law judge. If the alleged erroneous filing results in the seizure of the goods, the alleged violator will be in a position to pursue a remedy with Customs through its Fines, Penalties and Forfeitures officer and seek redress for the Commerce penalty assessment through a challenge before an administrative law judge. This would appear to add layers of bureaucracy and significant risk to exporters.

Conclusion

While it is recognized that the report of export data through AES is vital to the government's mission to ensure security, it should be recognized that, as written, the regulations pose a significant threat to the financial well-being of companies, who through no fault of their own or through non-negligent errors, find themselves subject to significant penalties. These issues should be addressed in the regulations.

Thank you for consideration of our concerns. If you have questions please feel free to contact our Washington, D.C. counsel, Peter Friedmann, at 202-783-3333.

Sincerely,

Joan M. Padduck
President