BEFORE THE

DEPARTMENT OF COMMERCE

BUREAU OF THE CENSUS

WASHINGTON, D.C.

FOREIGN TRADE REGULATIONS

15 CFR PART 30

Docket No. 031009254-4355-02
RIN 0607-AA38

COMMENTS OF

THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

By publication in the February 17, 2005 edition of the *Federal Register* (70 Fed. Reg. 8200 *et seq.*), the Bureau of the Census ("Census") issued proposed rules relating to the mandatory electronic filing of export information. Consistent with the Proposed rules, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") submits its comments.

I. INTRODUCTION AND THRESHOLD ISSUES

As relevant here, the NCBFAA is the trade association representing the interests of the nation's freight forwarders who provide service to shippers engaged in international trade into or out of the United States. In that capacity, the freight forwarders are often involved in handling the export formalities required by the U.S. governmental regulation, including completing and submitting the data required by the Shipper's Export Declaration ("SED") regulations set forth in 15 C.F.R. § 30.4 *et seq*. The Association and its members are accordingly familiar with the SED regulations as well as the Automated Export System ("AES") developed by Census.

From an overview perspective, NCBFAA has been very active for a number of years in various discussions involving U.S. government agencies and the international trade community regarding new security measures that effect international trade. The NCBFAA's members have been, for example, key members of the Advisory Committee on the Commercial Operations of Customs and Border Protection ("COAC"), which has used their knowledge and expertise in the transportation industry to submit recommendations to various government agencies concerning ways to improve export controls and border security.

And, as Census is well aware, the NCBFAA has been a major proponent of the agency's desire to completely automate the SED process. The Association has supported mandatory AES filing in Congress and has helped educate the forwarding industry as to the benefits and importance of participation in AES. It will come as no surprise that the NCBFAA shares Census' concerns regarding the need to enhance export security and generally welcomes the proposed rules as a positive step. The NCBFAA does have a number of questions and concerns about the proposed rules, however, as well as some recommendations regarding how to modify

them in a way that would not only result in enhanced export security but also promote more fairness and efficiency in the international trade.

II. THE NEED FOR CONSISTENT IMPLEMENTATION

The NCBFAA agrees with the general approach taken by the proposed rules, *i.e.*, the proposal to require the electronic filing of export information -- either by means of the AES or through the online AES*Direct* system -- and to discontinue accepting export information submitted on a paper SED. The Association believes that Census is correct when concluding that "electronic filing strengthens the U.S. government's ability to prevent the export of certain items by unauthorized parties to unauthorized destinations and end users". AES does assist the targeting and identification of suspicious or questionable export shipments, as well as improve the government's ability to maintain export statistics in an accurate and timely fashion (70 Fed. Reg. 8200).

To accomplish this goal efficiently and permit governmental review without unduly burdening the export process, it is necessary that procedures be standardized so that all parties -- both trade and government -- are working from a single set of rules. Unfortunately, that has not been the Association's experience with respect to previous efforts to completely automate the SED process.

For example, notwithstanding the fact that Census required the mandatory use of AES for all shipments on the Commerce Control List ("CCL") and the United States Munitions List ("USML") in 2003, some Customs Port Directors have continued to require that export information be submitted on paper SEDs. By requiring -- only at certain ports -- that both AES and paper SEDs be submitted, the government has engendered considerable confusion as to the necessary export procedures on the part of the trade community. Since all relevant data required

for a determination of export status is included in the AES record, it is not clear that the continued requirement of paper SEDs at certain ports is anything other than an anachronism. Accordingly, the NCBFAA urges that Census work with Customs and Border Protection ("CBP") to establish a single, acceptable procedure for the trade community to provide the required information at all ports.

III. PENALTY GUIDELINES ARE ESSENTIAL

Census proposes to revise Subpart H (15 CFR § 30.70 *et seq.*,) to set out new penalty provisions for Foreign Trade Regulations ("FTR") violations. These provisions contain vastly increased maximum penalties. While former 15 CFR § 30.95 provided for only civil penalties with a maximum fine of $1,000 per violation, the new provisions increase this maximum to $10,000 per violation. *Additionally, the new regulation authorizes* the imposition of criminal penalties of up to five years imprisonment plus a $10,000 fine.

While NCBFAA recognizes the security concerns underlying the new penalty structure, in promulgating final rules Census should take steps to explain and assure the trade community that any penalties will be reasonably and predictably imposed against those parties responsible for violations.

A. Determination of Responsibility.

One obvious concern is whether the Proposed rules would allocate an improper amount of responsibility for the accurate submission of electronic export information ("EEI") to filing agents, such as freight forwarders, who simply transmit export information supplied to them.

In this regard, new section 30.3(c)(2)(i) would hold Filing Agents responsible for "accurately preparing and filing the EEI based on information received from the USPPI and other parties involved in the transaction." And, proposed sections 30.3(d)(3) and 30.9 hold filing

agents responsible for the submission of accurate information and for responding to "fatal error", "warning", "verify" and "reminder" messages. As such, the rules would now, for the first time, formally subject filing agents to the same penalties as actual exporters on USPPIs, whether or not they have access to the relevant data.

To the extent these proposed regulations are stated such in axiomatic terms, they manifest a fundamental misunderstanding of the role played by freight forwarders. In many if not most instances, forwarders do not have control of cargo, and often never see the cargo; instead, shipments move directly from the premises of the exporter or some warehouse/distribution consolidation center for export. A freight forwarder or other filing agent must necessarily rely on information submitted to it by exporters when preparing SEDs or AES transmissions. And, the information often comes from multiple sources and may be somewhat conflicting.

For example, on routed export shipments, the USPPI and FPPI may present the forwarder with different information on a variety of topics, such as the value or quantity. It is not clear how or why the forwarder can be responsible for ensuring that the information it receives is correct. Similarly, if vessel operators fail to adhere to booking commitments and load vessels *earlier* than scheduled without notice to other parties, AES filers may unwittingly end up transmitting the SED data less than 24-hours prior to departure. It would be inequitable and unreasonable for forwarders or other filing agents to be held *per se* liable for filing inaccurate or untimely information if they act in good faith and accurately transmit the data supplied to them. While the NCBFAA is not suggesting that forwarders or other Filing Agents be given *carte blanche* with respect to their export information obligations, it does suggest that any penalties that are necessary be directed to the party actually responsible for violations.

Since these regulations will likely be enforced by CPB, this is not an academic concern.

When CBP issued the so-called "24-hour advance manifest rules" that are codified, it permitted either the steamship lines or Automated Manifest System ("AMS") certified NVOCCs to transmit the required manifest data set forth in the rules. Although CBP has stated that it would only impose penalties upon the party responsible for violating the rules, that has not proven to be the case. To the contrary, despite the fact that NVOCCs have no physical or contractual control over the actual movement of the containers, CBP has consistently imposed penalties against them for transgressions over which they have no control. Instead of looking to issue sanctions against the party that caused the particular violation, CBP has apparently been content to let the status of the filer determine responsibility.

For example, NVOCCs have been penalized under the 24-Hour Rules for failing to correctly provide the name of the vessel carrying the goods in situations where the steamship line transshipped the goods to a different vessel without notice to the NVOCC. Similarly, NVOCCs have been penalized when containers scheduled for examination were released by the port or steamship line, even though the line had notice of the "Hold" message and was the only party that actually had the ability to hold or release the container. In all of these cases, the touchstone used by CBP for assessment of penalties has been that the NVOCC, as the AMS filer, became absolutely responsible for any infringement of the regulations even if it could not have taken any steps to prevent the violation. And, despite the submission of petitions seeking mitigation or remission of such penalties, CBP has simply let the initial penalty determinations of the local port officials stand.

Now that Census is implementing the Foreign Relations Authorization Act, which substantially increased the type and amount of penalties that could be imposed, the issue of responsibility becomes all the more important. It is one thing to assess a fine of $250 to a

forwarder or other filing agent, which is the typical penalty meted out today for AES violations. But if the penalties are really to increase ten-fold or more, it is essential that the enforcement agency not impose these penalties automatically on the filing party without looking first to determine who was in fact responsible for the violation.

Consequently, prior to promulgating final rules in this area, Census should set forth the criteria that will be followed in determining whether a party should be subject to any sanctions.

B. Penalty Guidelines.

In view of the severity of the new penalties the NCBFAA also recommends that Census adopt clear and predictable rules for the imposition of these penalties. As noted above, the proposed rules set out a range of penalties for FTR infractions. For civil violations, Census may assess fines of up to $1,000 per day or $10,000 per violation and/or order the forfeiture of the property to be exported. (Proposed 15 CFR § 30.71(b).) The proposed regulation does not state, however, under which circumstances, or for which specific violations, Census would assess the maximum penalty or a more nominal one. It also does not indicate what penalties would be assessed for any specific infractions or what circumstances would result in forfeiture of cargo.

Additionally, for "knowing" violations, the proposed rules empower Census to subject violators to an even wider range of criminal penalties -- namely, a fine of up to $10,000 or up to five years in prison. (Proposed 15 CFR § 30.71(a).) Based on the language of the regulations, therefore, a "knowing" FTR violation may carry a penalty of anywhere from a nominal fine to five years in prison plus a $10,000 fine.

Nor do the proposed penalties take into consideration that many forwarders and other filing agents are small businesses. The imposition of penalties of the magnitude that are now possible would likely be tantamount to a death sentence to many intermediaries whose only error

may have been to commit typographical errors in transmitting information through AES. Simply stated, the proposal lacks any sense of proportion with respect to how sanctions are to be imposed.

That shortcoming is magnified when considering the fact that not all transgressions should be treated equally. Everyone can agree that the failure to properly reflect the true identity of a consignee who would otherwise be on the U.S. Munitions List is a serious error. Similarly, failing to reflect that goods on the USML are being exported without appropriate licenses, or that shipments are actually going to Cuba when the AES transmission lists the destination as Columbia are significant problems that should be dealt with in an appropriate serious manner. But placing an incorrect address or inadvertently typing in the wrong license exception should not normally be cause for the government to impose penalties at the $5,000 or $10,000 level just because the statutory authority to do so exists.

The NCBFAA believes that establishing a list of monetary sanctions without at the same time providing clear guidelines as to how those sanctions should be imposed is likely to result in the unreasonable assessment of penalties by local CBP officials that do not have the time nor perspective necessary implement these laws properly. This would unnecessarily wreak havoc with the forwarding industry and substantially hinder commerce.

NCBFAA urges Census to adopt and publish detailed guidelines, for the assessment of both criminal and civil penalties for FTR violations, that clearly state the penalties to be assessed for specific violations and/or under specific circumstances, set out mitigating and exacerbating factors and provide a clear definition of "knowing" for the purposes of the criminal penalties. These guidelines would both introduce a measure of predictability to FTR penalty assessment and ensure that Census would assess comparable penalties for comparable violations.

In addition, NCBFAA further recommends that Census establish a "voluntary disclosure" program under which the trade could report violations as soon as they are discovered. Under this program, Census would treat a disclosure of an FTR violation as a substantial mitigating factor in determining whether to assess a penalty and, if so, how much. A mechanism of this nature -- which has already been adopted by many other agencies -- would not only encourage disclosure of FTR violations but also relieve Census or CPB of the need to investigate many inadvertent violations.

IV. COMPLIANCE SHOULD BE ON A PHASED-IN SCHEDULE

The NBCFAA is concerned that the Proposed Rules do not establish a phased-in compliance schedule, as the trade community will need some time to adapt to and conform to the demanding requirements that will become effective when final rules are promulgated. It is similarly likely that responsible government agencies will need a period of time to train their staff and make the programming changes required to implement the Proposed Rules. The NCBFAA therefore recommends that Census implement a phased-in compliance schedule. In this way, the trade would have a thirty (30) day informed compliance period, where violations of the new rules (other than egregious violations of existing export control requirements) are brought to the attention of filing parties, rather than becoming subject to the automatic issuance of penalties.

The concept of phased-in compliance is familiar to government agencies even in this post-9/11 environment. For example, both Customs and Border Protection ("CBP") and the Food and Drug Administration ("FDA") worked with its trade partners on the various security initiatives that arose under the Trade and Bio-Terrorism Acts. While recognizing the importance that these Acts had to national security, the agencies nonetheless worked with the trade and

agreed to a phased implementation period, so that both the government and the members of the trade had sufficient time to have systems in place to comply with the new requirements. This minimized needless trade disruption and afforded all parties a fair opportunity to tighten the procedures required to truly enhance security and carry out the purpose of the statutes. The NCBFAA urges Census to proceed in a similar manner.

V. POWERS OF ATTORNEY

Census proposes, at *new section 30.3(f)*, to require agents performing electronic filing to obtain a new power of attorney (or another formal written authorization) from the USPPI with respect to the electronic filing of the SRD data through AES. As we understand it, the proposed rule would require that the authorizations now specifically mention that the filing agent is authorized to submit the export data via EEI.

The NCBFAA believes that this requirement would add an unnecessary administrative burden to forwarders and exporters. In most cases, exporters have already granted authority for forwarders and other filing agents to act on their behalf in export transactions. And, in most instances the NCBFAA suspects that the SED data is already being transmitted via AES. While the NCBFAA understands the need to make certain that filing agents have authority to file on an exporter's behalf, the Association is not aware of anything so fundamentally special about electronic transmissions of this data as to require a special form of authorization. The existing regulations have long required filing agents to have either a power or attorney or other authorization as a prerequisite to filing export information on the SED or AES record (*see, e.g.*, section 30.4(e)). Thus, as the proposed rule only requires that all submissions must be made electronically, the only change that need be made in the rule relating to obtaining appropriate authority is to eliminate the reference to filing the data on paper SEDs.

Requiring the specific form of powers of attorney or authorizations that now specifically refers to "EEI" filing, as proposed in section 30.3(f), would create an unnecessary burden on both filing agents and exporters. Most forwarders have literally thousands of customers; the cost of sending out, tracking and ensuring the receipt of new forms of authorization would be substantial under the best of circumstances. Moreover, over the years, it is likely that many exporters will have relocated their corporate offices or the person who executed the original authorization on behalf of the exporter may have been replaced. The burden of obtaining new authorizations will clearly be costly and time intensive on the part of the forwarders, many of whom - - as noted above - - are small businesses, thus belying the conclusion (at 32 Fed. Reg. at 8202) that requiring new forms of authorizations would not have a significant impact on a substantial number of small entities.[1]

The NCBFAA accordingly requests Census to clarify this issue in the discussion of the final rules and state directly that any form of authorization or power of attorney that clearly empowers the filing agent to submit export data to the government on behalf of the principal would suffice for the purpose of complying with proposed section 30.3(f). Alternatively, Census should "grandfather" all powers of attorney or other authorizations under which filing agents have previously made AES or SED submissions in the past.

[1] Parenthetically, the NCBFAA notes that Census' conclusion on the small business impact issue dealt only with the issue of whether mandatory automation would have an adverse financial affect on small forwarders. While the Association does not disagree that the automation portion of the proposed rule by itself would not be a significant issue for most forwarders, Census neglected to consider the substantial financial and administrative burden that a proposal to require a specific mention of EEI would have.

VI. CONCLUSION

The NCBFAA, as noted above, generally supports the proposed rules, and believes that they will both enhance the Government's ability to prevent exports harmful to national security and aid Census in maintaining more accurate foreign trade statistics. Nonetheless, Census needs to be mindful of the issues discussed herein relating to penalties, confidentiality and other matters. The NCBFAA accordingly urges Census to consider these comments very carefully and not embark on immediate implementation without making the suggested amendments and clarifications in order to ensure that the administration of the proposed rules properly, predictably and efficiently will not unreasonably burden the members of the forwarding industry.

Respectfully submitted,

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