

Mandatory AES debuts

Census, DHS patch up differences to finalize changes to export regulations.

BY ERIC KULISCH

The U.S. Census Bureau on June 2 published a final rule for mandatory electronic filing of shipper's export declarations. The rule applies to all shipments with a value of \$2,500 or more, except those to Canada.

Three years after first being proposed, the rules will eliminate paper documentation and require exporters to instead use the agency's Automated Export System or AES Direct Web portal. Census will maintain its moratorium on

post-departure filing of export documents, according to the document. The rule also clarifies a host of disparate federal trade regulations.

The Census Bureau uses the export data to compile the nation's trade statistics, while the Bureau of Industry and Security, Customs and Border Protection and other agencies use it to stop illicit exports to unauthorized users or determine violations of export control laws.

Electronic filing, ordered by Congress in September 2002, allows for advance screening of data for potential violations prior to export as well as more timely and accurate trade statistics. Errors are



- Two hours prior to arrival at the border for rail cargo.

The new foreign trade regulations also have much tougher penalty provisions for failure to file or false export information. Civil penalties are increased from \$1,000 to \$10,000 per violation and criminal penalties are also increased to a maximum of \$10,000 per violation and/or five years in prison. For the first time, CBP will be able to enforce export documentation requirements at departure ports.

The rulemaking was held up by an inter-agency dispute between Census and the Department of Homeland Security over sharing confidential export data and allowing companies to file their export documents up to 10 days after a shipment has left the country rather than before departure.

DHS and its CBP branch wanted Census to eliminate post-departure filing in AES altogether because it is perceived as a security loophole in stopping illegal exports. Census placed a moratorium on expanding Option 4 filing, as it is known, in September 2003 because it felt tighter requirements were needed for accepting new companies into the program, but CBP and DHS do not want existing companies grandfathered into the regulations.

There are about 1,800 companies with Option 4 privileges, which agricultural and other bulk shippers in particular say are necessary because the value, weight or quantity of a shipment isn't fully calculated or available until it is loaded on a vessel. Post-departure filing is essential for a member of the Agriculture Transportation Coalition that receives orders in the morning and can get product to a nearby port in time to make a vessel departure the same day, according to Kathy Beubien, regulatory affairs director for the trade group.

"If they can't ship they'll lose the sale," she said, adding that some exporters will not be able to meet the 24-hour deadline.

In other cases exporters don't have all their data together because it resides in multiple systems. A large global manufacturer, for example, may have pricing information on one system, country of origin data on another and track shipments through a freight forwarder on yet a third system. After departure, the company may generate

a report to collect all the data and file it. "There was a huge sigh of relief when Option 4 was maintained," said Beth Peterson, president of global trade consultant BPE Inc., because big companies would face a "whole re-engineering of their systems if they have to switch to pre-departure."

Not everyone favors Option 4. "We're a strong proponent of pre-departure filing, getting all your information up front," Michael Ford, vice president of regulatory compliance and quality at Philadelphia-based logistics provider BDP International. Pre-departure filing allows BDP to collect the information it needs to conduct other functions in its role as a freight forwarder, such as delivering the bill of lading to the ocean carrier, he said during a break at the American Association of Exporters and Importers conference in New York on June 3. Having the shippers' electronic export information prepared in advance allows BDP to fill out the bill of lading on time with accurate information about the cargo the carrier is handling.

The regulations also allow shippers to update their AES records without penalty when more correct information becomes available, making post-departure allowances unnecessary, Ford argued.

As more countries request advance import information for screening purposes, BDP can simply apply its pre-departure data collection to meet those demands, he added.

It's natural for a freight forwarder to want to streamline its operations and have one process instead of two, Peterson countered. While the forwarder will want its information up front before it will sign off on the shipment to the carrier, exporters that are filing post-departure are filing on their own instead of having their transportation intermediary do it for them, she said.

Option 4 "is an advantage to the exporter because they can self-file and eliminate that forwarder from this service. As a self-filer they can control the accuracy," Peterson said. Self-filing export documents isn't as challenging and controversial as self-filing customs entries for imports, which are typically farmed out to customs brokers, she added.

The moratorium means that only companies already accepted in the program



Harvey Monk
assistant director
for economic
programs,
U.S. Census Bureau

***"Everything's
on the table."***

may file post-departure shipper's export declarations.

It supersedes language retained in the rule that lays out the application procedures for Option 4 privileges.

"Everything's on the table," said Harvey Monk, assistant director for economic programs at Census, of ongoing negotiations with DHS on how to resolve the post-departure filing controversy.

DHS also wanted the ability to share export data with foreign governments for antiterrorism purposes and to receive blanket, rather than case-by-case, permission to share the export information with other agencies. Census has fought hard to protect the integrity of the information exporters divulge, and opposes

sharing with foreign governments because of fears the information could be accessed by unauthorized parties and place U.S. exporters at a commercial disadvantage.

Monk said the biggest sticking point is the desire to share export data with foreign governments. The Commerce secretary frequently issues national interest determinations that allow sharing of data with other U.S. agencies.

"From our perspective, data sharing with other agencies is not really an issue. I think where the issue has been more difficult has been the desire to share data with foreign governments. We're on the record that we oppose unfettered, wholesale sharing of information with foreign governments," Monk said in a phone interview.

Many exporters believe DHS finally capitulated to Census, but an industry source and close reading of administration statements suggest that DHS has not given up its quest to end Option 4 and share data with other agencies and governments.

DHS agreed to an interim compromise to get the security benefit of reviewing shipping data early in the process, thereby giving Customs a better chance of halting an illegal export before it leaves the country and the ability to enforce AES compliance.

Rather than stand in the way of the regulation, Homeland Security officials now appear prepared to seek a legislative solution that would end Option 4 and give them authority to share export data with other governmental entities.

Todd Owen, executive director for cargo and conveyance security at CBP, hinted at the administration's intent when he testified May 20 before the House Foreign Affairs subcommittee on terrorism, non-proliferation and trade, that risk management depends on the ability to receive electronic information before the cargo departs the country.

"To adequately assess and identify potentially high-risk shipments intended for export, it is essential to our enforcement efforts that advanced electronic information is provided through the AES for all shipments that require an SED. This will allow CBP sufficient time to screen high-risk cargo, while not impeding the movement of legitimate shipments leaving the United States," he said.



Beth Peterson
president,
BPE Inc.

"There was a huge sigh of relief when Option 4 was maintained."

His testimony was part of a hearing on a bill by Rep. Bill Manzullo, R-Ill., and Adam Smith, D-Wash., that also would mandate use of AES, establish a mandatory licensing program for AES filers and attempt to reduce inadvertent illegal exports by providing an automated warning about restricted parties and embargoed countries.

Beubien questioned the need to treat all shipments the same for security purposes without taking risk or economic impact into account.

Bulk agriculture exporters, for example, tend to ship the same product to the same places and could be identified as legitimate shippers, she said.

"We're not shipping weapons of mass destruction out of this country. I think there would be some value for a C-TPAT

program for exporters that would recognize that there are certain exporters that are low-risk," and there are laws on the books to monitor foreign sales of high-tech components and weapons, Beubien said.

The Customs-Trade Partnership Against Terrorism is a voluntary program designed to provide customs facilitation benefits to trusted shippers that have implemented approved supply chain security plans for their import cargo.

The bill also attempts to give more authority to the Commerce secretary in the tug-of-war over the export data controlled by Census. The Securing Exports



Owen

Through Coordination and Technology Act clarifies that under current law the Commerce secretary

is the person who determines on a case-by-case basis whether SED information can be shared with other government agencies and foreign governments for national security purposes.

An industry observer believes the bill gives DHS an opportunity to present its case for having final say over the data because Commerce is not in a position to understand the broader security picture.

Last year, former DHS Deputy Secretary Michael Jackson stated that the department might have to go to Congress to break the impasse with Census over the blanket sharing of export data for antiterrorism purposes. The AES rulemaking also attempts to make export compliance easier by including sections on definitions, voluntary self-disclosure, proof-of-filing citations, appendices cross referencing the pre-existing and new requirements. Monk said the rules would also be available on a CD and be searchable to make them more user friendly.

The self-disclosure procedures apply to serious situations in which shippers fail to file export documents or have faulty export software that systematically causes them

to make errors. The proof-of-filing is a document that must be presented to the freight carrier that includes an Internal Transaction Number generated by AES. Other documents the carrier may need to proceed with loading an export are vouchers when AES is out of service and an ITN number is not avail-

able, as well as exclusions (shipping to U.S. territories, for example) and exemptions (such as for low value cargo).

The rule eliminates the use of the External Transaction Number generated by the exporter as a form of confirmation that the shipment information has been accepted in AES.

Requirements differ for goods on the U.S. Munitions List. The rule also incorporates in one document many foreign trade statis-

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Michael Ford
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tical interpretations issued during the past several years and modifications made to the proposed rule based on public comments.

Monk said the export industry appears ready to make the transition to e-filing, especially considering there are only about 25,000 paper documents out of 1.2 million SEDs filed each month.

“So we’re pretty close to being fully electronic anyway,” he said.

Most exporters “are looking forward to the regulation. They feel like it will put all the players on a level playing field,” said Dale Kelly, branch chief of the Foreign Trade Division, at a Regulations and Procedures Technical Advisory Committee meeting in March.

Ford cautioned that many companies invested years ago in programming changes in anticipation of the new foreign trade

regulations, but the long waiting period for the final rule may have frozen resources needed to update the systems.

The final rule will go into effect on July 2 and be fully enforced on Sept. 30. CBP will not penalize exporters during the 90-day informed compliance period.

Outreach. The Foreign Trade Division has planned an extensive array of educa-

Forwarders back licensing AES filers

By CHRIS GILLIS

A long-time spokesman for the U.S. freight forwarding industry told House lawmakers on May 20 that proposed legislation to license filers who use the federal government’s Automated Export System is a positive step toward enhancing export data integrity and regulatory compliance.

The 2008 Securing Exports Through Coordination and Technology Act (H.R. 5828) legislation “provides assurance to the government that the filers of AES data have the requisite skills, knowledge and professionalism to merit this trust, by requiring filers to be licensed,” testified Peter H. Powell Sr., senior counselor to the National Customs Brokers and Forwarders Association of America, before the House Foreign Affairs’ subcommittee on terrorism, nonproliferation and trade.

“Candidly, it may seem unusual for a professional association to embrace licensure for its members,” Powell said. “This position becomes more plausible in light of our years of experience working with the Bureau of Census.”

Census uses data in AES to compile U.S. trade statistics, while Customs and Border Protection employs the information to stop illicit exports before they leave the country. Other agencies, such as the Bureau of Industry and Security, Directorate of Defense Trade Controls, Office of Foreign Asset Controls, Energy Department and Nuclear Regulatory Commission, use AES for various export control purposes.

It’s estimated that forwarders facilitated 78 percent of the \$1.62 trillion in U.S. exports in 2007.

In April, Reps. Don Manzullo, R-Ill., and Adam Smith, D-Wash., introduced the bill to help “clarify” aspects of AES for legitimate exports, and crack down on those exporters and forwarders who try to evade the system’s controls to facilitate illegal shipments.

In addition to licensing AES filers, the legislation calls for strengthened criminal and administrative prosecution of exporters who attempt to circumvent the electronic export controls.

Licensing AES filers is nothing new. The Census Bureau’s Foreign Trade Division proposed a similar procedure in early 2003. While the concept was generally well received by forwarders then, the Commerce Department found limitations in the program and Census subsequently shelved it.

Powell said H.R. 5828’s licensure provisions are “not unduly burdensome,” noting in the proposed legislation that:

- Each company must have a licensed individual responsible for oversight and control of those employees who file shipper’s export declaration information with AES.
- Loss of a license is protected by reasonable due process of procedures.
- Acquisition of a license by a U.S. citizen or permanent resident is “within the reach of those who meet qualification requirements reasonably expected of a responsible filer.”

Other industry members testifying before the House subcommittee approved of the call to license AES filers.

“Currently law enforcement officers can review large numbers of transactions by

using a search engine in the AES database,” said Mark Menefee, counsel to law firm Baker & McKenzie and former director of the BIS Office of Export Enforcement. “This can be a very effective enforcement technique.

“But these efforts are undercut by the high percentage of inaccurate AES records being filed,” he said. “It is the old database problem of ‘garbage in, garbage out.’ By establishing a licensing requirement for AES filers, as well as a ‘pay as you go’ training fund, the bill would greatly improve the accuracy of data input into AES, thereby enabling law enforcement to do its job better.”

Arthur Shulman, general counsel to the Wisconsin Project on Nuclear Arms Control, added that the proposal should include an option for the federal regulators to suspend licenses and block access to the system to those filers who violate the export control or AES rules.

Powell said the NCBFAA’s Education Foundation would develop the curriculum to educate its forwarder members to qualify for a license and then to meet Census’ continuing education requirements. For those who are not members of the NCBFAA, he said Census has the authority under the proposed legislation to conduct similar training for those seeking a license.

However, a CBP official told the House subcommittee that licensing AES filers would be an unnecessary process once the rules mandating the use of AES take effect.

“The proposed creation of a new licensing regime would place an unneeded burden on the exporting community, since currently anyone can register to use AES, or AESDirect, an Internet-based module of AES,” said Todd Owen, CBP’s executive director of cargo and conveyance security. “Further, it could slow the flow of commerce and potentially strain CBP resources, if CBP were required to validate whether an exporter was licensed or not prior to clearing export cargo.”



Powell



Menefee



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tional programs and tools to help exporters comply with the new regulations.

It will host five town hall meetings in Miami, Dallas, St. Louis, San Diego and Laredo, Texas. The meetings are focused on the southern border because that is where Census has the highest level of paper export documents being filed and associated errors, said William G. Bostic Jr., chief of the Foreign Trade Division, in an interview.

In conjunction with the meetings, Census will conduct free workshops during which paper filers can register and get certified for using AES. There will be two workshops in Laredo and one in each of the other locations.

Census also updated its compact export compliance flip guide with details of the new regulations and created a Spanish language version, as well as posting it on the Foreign Trade Division Web site.

The Web site also includes a short video that discusses the implementation dates and the importance of getting training to comply with new regulations. A Spanish language video will also be available. Bostic will star in his own video 30 days before the implementation date to reinforce the deadline, penalties and other key rules.

Existing electronic filers have received messages because they are impacted by the

new filing time frames and penalty provisions. And the Foreign Trade Division's quarterly newsletter sent to all AES filers will also highlight the new regulations.

The division is educating CBP officers at ports of entry who will enforce the regulations in the field through a combination of hands-on training and eight short video modules they can view to acclimate themselves to the new regulations, Bostic said.

Census staff plans to visit the largest paper filing ports — Laredo, New York, Miami, Chicago, Santa Theresa, N.M., and others — during the week of July 7 along with Customs agents to hand out bilingual fliers to people who drop off paper SEDs or ask for an ITN number to help shippers understand the new regulations.

Census personnel will return during the week of Oct. 1 to ports of entry that are still receiving a lot of paper documents to spread the word again about the changes.

Other outreach efforts include sending AES best practices handbooks to local chambers of commerce, Webinars conducted in conjunction with the International Trade Administration, and a series of Webinars for AAIE members during the run-up to implementation.

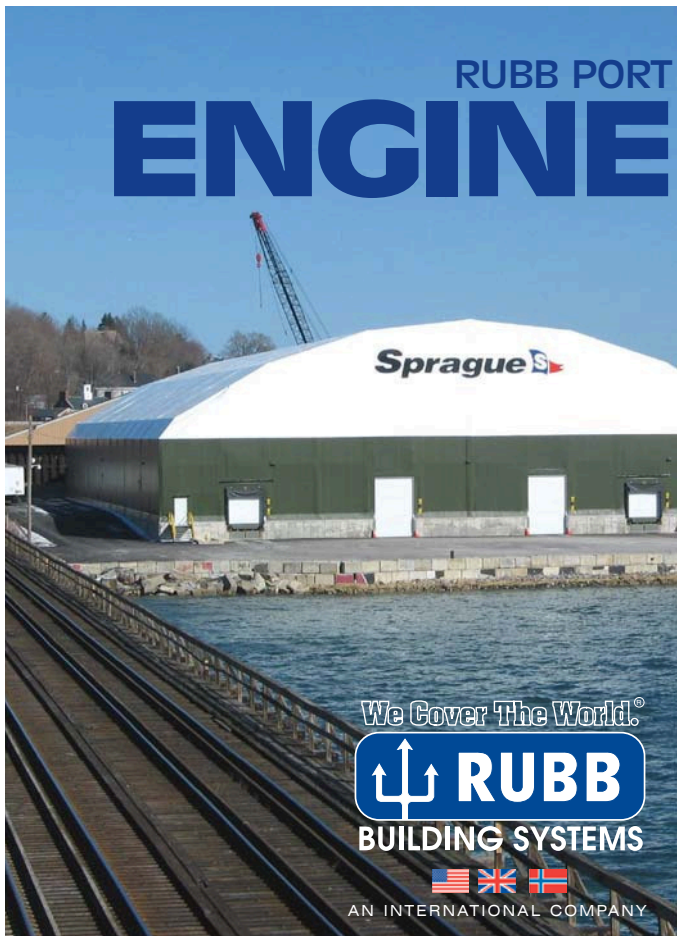
The new regulations will also be covered at the agency's traveling workshops on

export compliance, sponsored this year by local affiliates of the National Customs Brokers and Forwarders Association of America.

The agency is freezing until late 2009 or early 2010 its compliance review program started last year to help guide shippers with compliance rates below 80 percent on how to properly file electronic export information, Bostic said. Under the program, several dozen companies were audited for repeated late or inaccurate export filings to help implement good compliance practices. Census warned that it would notify other enforcement agencies of bad corporate citizens who they might have reason to review for violations under their jurisdiction.

Until now Census has not had the authority to enforce its own regulations, and referral is considered a way to put pressure on companies to properly enter data in AES.

Bostic said the freeze, which doesn't apply to foreign trade zones or diamonds subject to the Kimberley process, would allow companies to fully implement the new regulations. Census will still take an informed compliance approach after Oct. 1 to identify companies and remind them of the new filing requirements, but will not



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report violators to enforcement agencies during the following year or more, Bostic said.

The difference is that Census won't follow a formal process for targeting non-compliant companies, but will help companies with large volumes or high-value transactions with poor compliance rates that are easy to notice.

"Before we refer, we're going to try and turn that company around and bring their compliance rate up to 95 percent. If they've taken corrective action, and are making progress, I can grant extensions. We won't make a referral because the bottom line is we want quality data," he said.

Companies that ignore Census and are involved with licensed commodities may be referred to the Commerce Department's Office of Export Enforcement once the freeze is lifted.

CBP, however, operates under different guidelines and can issue penalties for violations in the field it discovers on its own.

"The biggest issue with the regulations is

AES — It's your move ...

- *Consult with systems providers to ensure they're ready for all aspects of the mandatory filing rules.*
- *Re-evaluate production, transportation and invoicing processes to make sure cargo information is available in advance of international shipping to meet AES filing deadlines for different modes.*
- *Make sure employees take compliance training offered by Census, private firms or trade associations on export regulations.*

the enforcement aspect. For the most part, when shippers filed incorrect information, they might have gotten a letter. That's going to change when CBP starts enforcing it, and

they are very adept at imposing fines and penalties. As importers know, CBP can be sticklers for accurate information," Beubien said.

She expressed concern that exporters could be caught unaware of the changed enforcement climate or inadvertently be dinged with penalties. Shippers, for example, may not receive clear communication from the ocean carrier that cargo has been switched to a different vessel than originally booked and could be liable if they don't amend the export declaration with the updated information. Carriers often don't notify customers when cargo is held over and switched to another vessel, so the change could be missed unless somebody matches the manifest information with the AES filing.

"If they don't have systems to amend the SED filings when they get new information they could be looking at penalties," she said.

Census provides the regulations, FAQs, videos, and additional information on AES at www.census.gov/foreign-trade/aes/mandatory/index.html. ■

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