

Making a better AES

Census grapples with balancing export data demands, commercial realities.

By Chris Gillis

When the U.S. Census Bureau earlier this year proposed significant changes to how export data is filed through the Automated Export System, the agency realized it would invoke numerous comments and questions from exporters and freight forwarders who use the system.

Census is analyzing those comments and has expressed a general willingness to work with the industry to find the best way to align the nation's export trade data and enforcement requirements with commercial realities.

"The comment period for the notice of proposed rulemaking was a very valuable resource to hear back from the trade community on concerns and possible challenges," said Omari S. Wooden, Census' trade ombudsman. "Based on the comments received, we scheduled meetings with members of the trade community to clarify and better understand their concerns."

Census' Foreign Trade Division received more than 60 comments from the trade between publishing the *Federal Register* notice on Jan. 21 and the closeout of the comment period on March 22. Agency officials have also addressed the changes at different trade association gatherings and government forums, including the American Association of Exporters and Importers conference, Customs Electronic System Action Committee meetings, and the Bureau of Industry and Security's annual Update Conference.

The agency also regularly meets with Customs and Border Protection and Bureau of Industry and Security on the proposed changes that are directly connected to their areas, such as enforcement for CBP and dual-use items (technologies with both commercial and military applications) and end-user information for BIS.



"During these meetings and brainstorming sessions we want to ensure our requirements are clear for the export trade community," Wooden said. "Furthermore, the new requirements need to be clear to be enforced consistently around the country."

Census has decided to revisit some of the proposed changes listed in the notice of proposed rulemaking, and thus publication of the final changes is not expected until next spring at the earliest. "Initially, we were hopeful for something towards the end of the year, early next year, but at this point, based on feedback from the trade community, it's difficult to target a date," Wooden said.

Wooden

Work In Progress. AES has long been a work in progress, although the system has been mandatory for filing shipper's export declarations with the government since Sept. 30, 2008. Census developed AES with Customs as a successor to the Automated Export Reporting Program (AERP) in mid-1995. The agency switched off the 30-year-old AERP at midnight on Dec. 31, 1999.

AES was initially set up with the export industry as a voluntary system. Migration from paper export declarations to the system was slow in the late 1990s, but its use by exporters and freight forwarders took off after 2000.

In 1999, Congress passed the Consolidated Appropriations Act, requiring Census to develop regulations for mandatory AES reporting of all shipments regulated under the U.S. Munitions List and Commerce Control List. This regulation was published in July 2003.

After the Sept. 11, 2001 terrorist attacks in the United States, Congress and the Bush administration began to press for the processing of all export declarations through AES and its Internet-based counterpart AESDirect. In 2002, Congress passed the Security Assistance Act, which mandated this activity. The 2002 Trade Act also authorized Customs to request electronic submission of export declarations pre-departure. Census responded to this legislation by turning its attention toward full mandatory AES filing in the summer of 2003. By 2010, Census registered about 44,200 AES filers, who submitted nearly 22 million electronic records valued at more than \$1 trillion.

Despite the success of mandating AES, agency officials knew that further policy changes and certain export data filing challenges still needed addressing.

For example, the mandatory AES rules maintained a moratorium on post-departure filing of export declarations, known as Option 4. CBP sought to eliminate Option 4 over concerns it could be used as a loophole for illegal exports. The freeze meant that about 1,800 companies already eligible for Option 4 filing could continue to submit export information up to 10 days after departure, but the program would not be expanded to include new companies. Agricultural and other bulk shippers like the post-departure option because the value and weight of shipments aren't fully calculated or available until they're loaded on a vessel.

Compliance questions have lingered in the current mandatory AES filing regulations about how to properly handle "routed" export transactions.

Routed transactions, also known commercially as "ex-works" shipments, occur when the overseas buyer (foreign principal part in interest, or FPPI) authorizes a U.S. agent to facilitate the export of items from the United States on its behalf and prepare and file the electronic export information (EEI) in AES. The practice is quite common, and experienced routinely between exporters (U.S. principal party in interest, or USPPPI) and their overseas customers.

Exporters and forwarders must ask themselves: Who is required to file in AES? What is the USPPPI required to provide to the forwarder to file the AES submission? Who is the USPPPI? Who is responsible if a penalty is issued?

Civil penalties for non-compliance with the mandatory AES filing regulations can be stiff, ranging from \$1,000 to \$10,000 per violation for late filings, failure to file and reporting incorrect information. For criminal violations, the penalties could reach a maximum of \$10,000 per violation and/or up to five years in prison.

Other more minor technical glitches have been fixed in the past several years by Census, including ending the use of social security numbers as identification for individual filers when registering to use AES or AESDirect. The employer identification number (EIN) is now sufficient, since it covers both businesses and individuals, the agency said. Census also resolved a data entry problem in which some AES filers would inadvertently misidentify export destinations for Ireland and Iraq as Iran because the abbreviation for Iran in the system was "IR."

Charged Debate. The most recently proposed AES filing changes generate sharp debate at gatherings between regulators and export industry representatives.

Some large exporters oppose abolishing Option 4 filing, causing Census to revise its stance. "Are we going to keep post-departure? I cannot confirm or deny," Wooden told attendees at the BIS Update conference in Washington on July 19. He added that if Option 4 stays, "it will be different."

Census and BIS are considering a "nots" list for retaining an Option 4 variant, meaning certain export commodities will not be granted post-departure filing privileges, such as missile technology, potential bioterrorism and chemical weapons agents and other items of national security concern, said Gerard Horner, senior trade and industry analyst for BIS's Office of Technology Evaluation, at the Update conference.

"BIS is evaluating and working in support of developing this regulation," Horner said, referring to an Option 4 inter-agency evaluation. He noted 16 companies with licensed commodities file post-departure in AES. "Most likely that privilege will go away for them."

Wooden added if post-departure filing is retained in AES, all filers will need to reapply to participate, so the agencies and industry can "start off fresh."

Albert Saphir, president of Weston, Fla.-based ABS Consulting, believes exporters should make every effort to operate in an AES filing environment without Option 4. "I know some shippers are upset, but we live in a different world today where post-departure information is no longer acceptable," he said. "Just look at the 24-hour advance manifest rule or ISF (Importer Security Filing). The world has changed and will continue to in the future, so U.S. exporters need to jump on board this; no sense in delaying any further."

For forwarders, who often manage AES filings on behalf of exporters, one of the biggest areas of concern with the proposed rules is the end-user requirement. This would amend the electronic export information submission requirements to indicate, when known, the end users in an export transaction. "Both Census and BIS regularly get questions regarding who should be listed in the ultimate consignee field when both the ultimate consignee and end users are known," Horner said.

According to San Francisco trade attorney George Tuttle III, forwarders will need to devise new ways to obtain this information from customers (usually the USPPPI), which they would otherwise not have access to from the export invoice or shipper's letter of instructions.

Proposed AES filing changes takeaways

Exporters: Ensure the compliance officer in the company works closely with forwarder counterparts to create awareness and plan to establish procedures to accurately and comprehensively capture export data. Also, exporters should plan to notify their overseas resellers of the potential changes so that there is proper collaboration.

Forwarders: Educate sales personnel about the proposed AES filing changes so they can start communicating them to existing and new export customers. Use Web sites, newsletters and other media; consider holding workshops; and educate overseas agents.

Also, pay attention to the Census Bureau Foreign Trade Division's Web site (www.census.gov/foreign-trade) for updates and to the *Federal Register* (www.gpoaccess.gov/fr/index.html) for publication of the final rule.



Shapiro

“While exporters will certainly understand the importance of the end-user requirement, obtaining the true destination/ultimate consignee information from the people to whom they are selling is oftentimes easier said than done,” said Marjorie Shapiro, president and chief executive officer of Samuel Shapiro & Co., based in Baltimore.

“Clearly there are situations where the U.S. exporter will be required to know who the ultimate end user is, but these are typically commodities that will require a validated export license and the exporter will be advised by Commerce if this information is required in order to approve the license application,” Tuttle explained. “But we are talking about a completely different animal here. The proposed regulation applies to all transactions, not just those that require an export license, and the vast majority of these transactions are for commodities that do not require an export license.”

“The information of the AES end user and consignee type is based on the knowledge the exporter has at the time of export,” Shapiro said. “But from what we understand, if that information is not known, the filer is not required to report it. Obtaining clear guidance and communication on this from Census will go a long way towards making this easier on exporters and forwarders.”

“The freight forwarder cannot complete the AES entry and move the freight if there are any discrepancies in the fields of information between what the FPPI and USPPPI provide the forwarder,” said Paul DiVecchio, president of Northboro, Mass.-based export compliance consulting firm DiVecchio & Associates. “Thus a level playing field is needed within the regulations to ensure freight is not given to a less conscientious forwarder to move. This would aid in minimizing the risk of transshipment diversion.”

Another piece of the proposed rulemaking that may impact forwarders is the requirement to provide the USPPPI with the ITN (internal transaction number) and date of export when the agent files the electronic export information in a routed transaction.

“We endorse this idea, and believe it should have been a requirement long ago,” Shapiro said. “We have been providing the 10 data elements to USPPPIs upon request for quite some time. It is logical to now include the ITN and date of export to complete the USPPPI’s export recordkeeping. What may be challenging for the USPPPI is ensuring that they have some kind of proof of export in a routed transaction.”

The proposed rulemaking also includes numerous other less contentious changes to tighten potential trade data loopholes and confusion among AES filers.

Household goods exports, for instance, have long been a concern for enforcement agencies. Since exports valued under \$2,500 do not need to be reported in AES, some exporters have used the household goods description to misdeclare and potentially smuggle commercial shipments.

“Based on feedback, we’re looking to redefine household goods and personal effects,” Wooden said. “Fifteen TVs and 10 sofas exported are not household effects, and companies will falsely use that status today.”

Census proposes to require all used self-propelled vehicle exports be reported in AES regardless of value and destination country, and proof of filing must be in hand at least 72 hours prior to export.

In addition, AES filing clarifications are under consideration for proof of export, reporting exports in U.S. dollar values only, split shipments and exports made in international waters.

“The proposed minor changes should not present any challenges for freight forwarders as long as they stay tuned to the process and read and implement the changed regulations once they come out,” Saphir said.

“The changes proposed in the data collection will ask forwarders to collect the new data elements and submit them within the prescribed time limits of the regulations,” said Michael Ford, vice president of regulatory compliance and quality at Philadelphia-based BDP International. “Today in the export process many of the proposed new data elements are collected — not a big change — however the timeliness of the data may be impacted.

“The forwarder and exporter need to continue to work on obtaining the best data that is available at the time of export,” he said.

Staying Engaged. One of the biggest challenges for forwarders will be staying on top of the major changes considered in the proposed rules, while Census and other agencies struggle to finalize them.

“To prepare, Panalpina has taken several steps,” said Paulette Kolba, area export and ocean compliance manager in the United States for the Swiss forwarder. “First and foremost, we have given a heads-up to our programmers. There is not enough information to be specific, but it is important to get these projects tentatively scheduled.

“We also stay close to what is happening with Census and CBP as they revisit many of the items in the proposed rule to understand how the rules are evolving so we can comment where necessary and, of course, to pay close attention to the timelines so we’re ready to move forward with systems and training at the earliest possible time,” she said.

BDP’s export compliance team has similarly met with its IT department to review the proposed AES filing changes. “We are waiting for the issuance of the final regulations so that we can plan changes to the system as well as operational planning so that we can meet the requirements,” Ford said.

DiVecchio believes many forwarders aren’t paying enough attention to the proposed AES filing changes and are putting themselves at serious risk of making violations. “I think the big players are engaged, but most forwarders do not have a dedicated compliance organization and therefore are oblivious to the proposed changes, and therefore their routed transactions are likely to not be in compliance with the changes,” he warned.

Census officials said there will be a grace period for the industry to become compliant with the final regulations once they're published. For the existing mandatory AES filing regulations, they were published in the *Federal Register* on June 2, 2008, became effective on July 2, 2008, and implemented on Sept. 30, 2008 — about 120 days after the publication date.

"Based on the existing changes in the NPR, we would plan to allow ample time for the export trade community to update their systems to adhere to the new requirements," Wooden said.

Census also plans to provide educational outreach programs to exporters and forwarders to help them understand and comply with the final rules. In the past, the agency scheduled public meetings around the country to discuss regulatory changes.

"Under current budget constraints, it may be difficult to provide similar type of outreach, but we are considering other media such as training videos, blogs, etc.," Wooden said. "It is Census' goal to educate the trade community on the changes to ensure accurate reporting in the Automated Export System."

"Census has always been very up front with trade on proposed and final regulations and has done a lot of outreach to ensure the trade understands the regulations," Ford said. "I expect Census will continue to be the leader in their outreach to trade."

Source: American Shipper

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