

ECONOMIC CENSUS PENALTY PROVISIONS: ANOTHER CASE OF FEDERAL ENFORCEMENT OVERKILL?

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We have informed Solari subscribers in the past about the decennial census, fines for failing to mail in decennial census forms and the economic census generally (see links below). Given the confusing state of the law we found surrounding penalties for failing to respond to the decennial census, we were not surprised to find another case of "it's more complicated than what they tell you on the Census Bureau website" when we researched the economic census.

Authority for the Economic Census

The Census Bureau's position is that 13 USC §131 [<http://www.law.cornell.edu/uscode/text/13/131>] provides the authority for the US Government to conduct a business census:

"The Secretary shall take, compile, and publish censuses of manufactures, of mineral industries, and of other businesses, including the distributive trades, service establishments, and transportation (exclusive of means of transportation for which statistics are required by law to be filed with, and are compiled and published by, a designated regulatory body), in the year 1964, then in the year 1968, and every fifth year thereafter, and each such census shall relate to the year immediately preceding the taking thereof."

We might wish for a more up-to-date and precise enumeration of the businesses subject to the census requirement and greater detail as to what constitutes the compiling and publishing of censuses that is authorized. Nevertheless, it does appear that, broadly interpreted, this provision authorizes the government to collect and use at least some information from "businesses" other than a narrow subset of regulated transportation businesses (for which information is gathered separately). Probably, it would be an exercise in futility to challenge the authority of the Census Bureau to require an accurate response to a request for "census" information in the typical business situation.

Without too much trouble, we can envision situations in which the authority is not so clear. For example, what about not-for-profit organizations, particularly those that do not manufacture goods or provide services? Governmental units are not covered by this provision, but 13 USC §161 [<http://www.law.cornell.edu/uscode/text/13/161>] authorizes a census of federal, state and local governments and government agencies. For more information on governmental unit censuses, visit <http://www.census.gov/govs/>. What about religious institutions, which, as we shall see below, are mentioned in the penalty provisions of the census statute? What about farms, which, at least under the penalty provisions of the census statute, appear to be treated the same as families and not organizations?

How much information is the government authorized to collect based upon this authority? A review of Title 13 of the US Code

[<http://uscode.house.gov/pdf/2011/2011usc13.pdf>]<http://uscode.house.gov/pdf/2011/2011usc13.pdf>] generally is instructive. Here are some provisions of the census statute that may be of interest to those with hesitations about providing "private" business information to the government for census-related purposes:

- (a) Section 6 seems to allow the Census Bureau (through the Secretary of Commerce) to collect information collected for other purposes by other federal agencies as well as state and local governments and "any source" and incorporate that information into "census" statistics. Presumably, tax information is excluded by overriding provisions of the Internal Revenue Code, but we have not researched that issue. From this we conclude that information provided on

- census forms is not the only information that may be kept by the Census Bureau with respect to a given census respondent.
- (b) Section 7(c) provides that no information collected can be used to the detriment of a respondent or anyone to whom the information relates except in connection with violations of the census statute.
 - (c) Section 9 prohibits the Census Bureau, its officers and employees, any “agency thereof” and any local governmental liaison to the Census Bureau from using information collected in the census for purposes other than the statistical purposes for which it was provided, with certain limited exceptions (e.g., exchange of information with the Bureau of Economic Analysis and other designated statistical agencies). Section 23 allows the Census Bureau to use employees of other agencies and private organizations as temporary employees of the Census Bureau to assist the Bureau in matters covered by the census statute as long as they have sworn to observe the limitations of Section 9 that apply to permanent Census Bureau employees.
 - (d) Section 13 authorizes the Census Bureau to contract with educational institutions and “other research organizations” for the preparation of monographs and other reports. Thus, in some form, whether individual or collective, census information can be made available to universities and any type of organization that qualifies as a “research organization.” Query whether, e.g., the R&D division of IBM, JP MorganChase or Monsanto is a “research organization.”
 - (e) Section 22 provides that all *permanent* officers and employees of the Census Bureau must be citizens of the US.
 - (f) Section 221 (c) provides that no one shall be required to provide information about his or her religious beliefs or membership.
 - (g) Section 303 allows the Secretary of Treasury to assist the Census Bureau in collecting census information from “persons engaged in foreign commerce or trade” and from owners or operators of carriers.

Penalties for Failing to Respond to Economic Census and for Providing False Information to the Census Bureau

The FAQ on the economic census on the Census Bureau site [<http://www.census.gov/econ/census/faqs.html#q7>] says:

"The census law (Title 13, United States Code, Section 224), coupled with the Sentencing Reform Act of 1984 (Title 18, Sections 3551, 3559, and 3571), provides for penalties of up to \$5,000 for failure to report, and \$10,000 for intentionally providing false information."

A review of the cited statutory provisions, however, leads us to conclude that in fact the maximum penalty for an *organization* (not including a farm, which appears to be treated under the individual, and not organization, provisions, at least under the census statute) is \$10,000 for both failure to report and false reporting. If the penalty is being levied upon an *individual* for failing to answer an economic census questionnaire, the maximum penalty may, in fact, be \$5,000. Query, based upon the list of individuals within an organization who may be liable under the census statute (as quoted in the next section) how many individuals within a business may be charged with the violation and what or who determines whether the maximum penalty is determined by the individual (\$5,000) or the organizational (\$10,000) provisions. Can there be multiple penalties for a single failed economic census questionnaire (e.g., \$5,000 for the owner,

\$5,000 for the record keeper, and \$10,000 for the organization itself)? Who makes this determination – the Justice Department (*i.e.*, local Assistant US Attorney) or the Census Bureau?

The following subsections explain how we reached this conclusion based upon the statute sections cited in the Census Bureau FAQ.

Census Statute Penalties

13 USC §224 sets a fine of \$500 for failing to answer a census form and \$10,000 for wilfully providing false information for an "organization" (*i.e.*, for the economic census, as opposed to the decennial census or America's Community Survey). Here's the language:

“Whoever, being the owner, official, agent, person in charge, or assistant to the person in charge, of any company, business, institution, establishment, religious body, or organization of any nature whatsoever, neglects or refuses, when requested by the Secretary or other authorized officer or employee of the Department of Commerce or bureau or agency thereof, to answer completely and correctly to the best of his knowledge all questions relating to his company, business, institution, establishment, religious body, or other organization, or to records or statistics in his official custody, contained on any census or other schedule or questionnaire prepared and submitted to him under the authority of this title, shall be fined not more than \$500; and if he willfully gives a false answer to any such question, he shall be fined not more than \$10,000.”

Note that it may be wise for a business owner to inform any employee involved in responding to the economic census of the foregoing provision. It appears to permit the government to fine any assistant to the person in charge who has official custody of records or statistics up to \$10,000 for failure to completely or correctly answer the economic census questionnaire to the best of his or her knowledge. Query what the poorly-paid office manager or other assistant who keeps business records for a tiny business is to do with knowledge that the boss has provided inaccurate information on an economic census form. Risk his or her job and report the infraction to the local AUSA?

Sentencing Guidelines Penalties that Override the Census Statute

At the outset, 18 USC §3551 of the federal sentencing guidelines expressly states that they cover census-related offenses:

“Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 [*i.e.*, the census statute] and 1153 of this title . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553 (a)(2) to the extent that they are applicable in light of all the circumstances of the case.”

Under 18 USC §3579, census violations are classified as infractions because they are not punishable by any prison term. Section 3571 says that the individual penalty for an "infraction" is \$5,000 (so this is what we wrote about in the decennial census article, cited below) and the organizational penalty is \$10,000. The authority for the \$5,000 penalty cited in the quoted language from the economic census FAQ is unclear unless it refers to the failure of an individual to answer – but we don't see how that is the correct section. The weird thing is that Section 3551 of the sentencing guidelines actually says that you can, in addition, as an individual or organization committing an "offense" (which includes any offense, the least of which is an infraction), get probation. Another section says that the maximum probation for an infraction is one year. The economic census FAQ says nothing about probation, even though the FAQ cites the section that provides for probation.

Statutory Summary Integrating Census Statute Provisions and Sentencing Guideline Provisions

13 USC §221 -- census statute -- individual census penalties, \$100/\$500 (failure to answer/false answer)

13 USC §224 -- census statute -- organizational census penalties, \$500/\$10,000 (failure to answer/false answer)

18 USC §3551 -- sentencing guidelines -- the sentencing guidelines cover census-related offenses and, in addition to fines, the court can add probation

18 USC §3561 -- sentencing guidelines -- the maximum probation for an infraction is one year

18 USC §3559 -- sentencing guidelines -- an offense for which there is no provision for imprisonment is an "infraction"

18 USC §3571 -- sentencing guidelines -- the maximum penalty for an individual's infraction is \$5,000; the maximum penalty for an organization's infraction is \$10,000

CONCLUSION

We are confused with the complexity of the various statutory sections as they relate to the economic census and do not believe it is at all clear either what the maximum penalties could be or against whom such penalties could be assessed. Given this state of the law and the fact that SWAT teams have been known to invade small family dairy operations for seemingly minor infractions related to the sale of fresh milk to their neighbors and coop members, who can predict the worst-case ramifications of failing to respond to the economic census questionnaire?

LINKS:

Economic Census 2012

<http://solari.com/blog/economic-census-2012/>

A Solari Report – Census Fines

<http://solari.com/blog/a-solari-report-census-fines/>

A Solari Report – The 2010 Census

<http://solari.com/blog/a-solari-report-the-2010-census/>