

Regulatory Impact Statement

Customs and Excise Act Review: Establish competency as a requirement for maintaining Joint Border Management System user registration

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by Customs.

It provides an analysis of options related to establishing competency as a requirement for maintaining Joint Border Management System (JBMS) user registration and as grounds for suspension or cancellation where there is evidence that competency has not been maintained, compared to retaining the status quo.

The proposal discussed in this regulatory impact assessment was not part of the public discussion document on the Customs and Excise Act Review. However, two submissions were made as part of feedback on administrative penalties that supported the use of suspension or cancellation of a JBMS user's ability to enter data as a means of improving quality of data entered into JBMS.

It is difficult to anticipate how many users would face suspension or cancellation, but based on the data available, the number is likely to be low. There is no data available on the impacts to revenue, risk management and statistics due to ongoing competency issues.

Further work will be required to develop the performance measures and standards for maintaining competency, monitoring processes and the operational procedures for how the suspension or cancellation sanction for not meeting the required performance standard would be initiated within the wider sanctions framework.

Signed by Michael Papesch on 8 March 2016

Michael Papesch
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8 March 2016

Executive summary

1. This Regulatory Impact Statement provides an analysis of options to establish competency as a requirement for maintaining JBMS user registration to address persistent poor performance by some users. Accurate compliance with legislated data requirements for goods is essential to collect due revenue in a timely manner, identifying and managing risk, and maintaining accurate statistics for subsequent users of Customs' data.
2. While competency must be demonstrated as part of the initial application process, the current JBMS user registration process does not require users to maintain ongoing competency in the use of JBMS. There is not a clear mandate under the existing framework to suspend or cancel a user's registration or specific privileges in JBMS where there is evidence of a lack of ongoing competency in the data entered into JBMS.
3. There are only a small percentage of all users where there is evidence of persistent poor performance, but these create significant additional work for Customs to address the issue. Customs is constrained in its ability to address ongoing competency where there has been no improvement in accuracy despite letters, meetings, warnings and administrative penalties.
4. The overarching objective is to have competency in the use of JBMS as an ongoing, non-negotiable requirement for JBMS registered users to increase the accuracy and timeliness of data for other Customs functions, to reduce the number of JBMS users with persistent performance issues and to encourage JBMS users to keep updated with the required knowledge to maintain competency and proactively address gaps.
5. The options considered are:
 - Impose conditions as part of the application approval process and on existing users under the existing legislative framework
 - Require periodic competency assessments of all JBMS registered users
 - Establish competency as a specific requirement in legislation for all JBMS users
6. The recommended option is Option 3, as this provides a single, transparent requirement for competency on all new and existing JBMS registered users, with a clear mandate for suspension and cancellation where there is evidence that competency has not been maintained. Option 1 would result in a condition in three separate areas which is less transparent, requires amendment (to the Act and regulations), and provides some users with an additional right of appeal to the Customs Appeal Authority. Option 2 is a blunt instrument as it imposes costs on JBMS users who are competent.
7. Performance measures and standards will be required and these will be developed in consultation with industry representatives, along with operational procedures and guidance. Under Option 3, JBMS users would have the right to appeal a suspension or cancellation of the registration or privilege, but not the requirement for competency.

8. Customs' existing audit and assurance processes, which identify high risk users, will support the monitoring and evaluation processes.

Background: overview of role of competency and JBMS

9. Accurate compliance with legislated data requirements for goods is essential for gathering due revenue in a timely manner, identifying and managing risk, and maintaining accurate statistics for subsequent users of Customs' data (e.g. trade data). Customs' compliance and customer service framework relies on JBMS users' voluntary compliance with data requirements and to take reasonable care in the entry of that data.
10. There are two categories of JBMS users (referred to as declarants and non-declarants¹). Declarants require competence in the valuation processes, identifying the correct tariff classification, understanding processes that impact on revenue, etc. Non-declarants do not require this same level of knowledge and understanding but must still understand and comply with Customs requirements in respect of the data they do enter. Declarants are issued with a Unique User Identification (UUI, i.e. their user PIN) for JBMS. The privileges² a user has in JBMS is linked to their UUI. The analysis and proposals relate to all JBMS users.
11. All JBMS registered users are expected to take reasonable care to ensure the information they enter into JBMS is accurate. Evidence of competence is required of declarants when applying to be JBMS registered users, but this is currently not required from non-declarants.³
12. Competency in relation to JBMS means the user has and maintains the required knowledge and skills to determine the correct information relating to an entry or action in JBMS and to enter that information with reasonable care to minimise errors and omissions.

Status quo and problem definition

13. Under the current application process for JBMS user registration the chief executive may require evidence of competency at the time of application. The approval process can set conditions on new JBMS users and/or impose conditions on existing users. Conditions imposed on existing users would be time bound and could be appealed.
14. The current suspension and cancellation framework for JBMS user registration in the Act covers non-compliance with imposed conditions or following a conviction for a relevant offence. The current conditions are administrative and do not include an explicit requirement for ongoing competency by all JBMS registered users. The Act (section 135(1)(d)) provides for a regulation to be established that would prescribe grounds for cancellation, but this does not enable the suspension of a registration. The current

¹ Declarants lodge import and export entries, inward cargo reports and cargo report for export when requesting write-offs. Non-declarants enter registrations for client, broker and supplier codes and inward cargo report and cargo report for export (where no write-off is requested). Note: excise clients do not enter their excise returns into JBMS at present.

² Privileges refer to what activities can be undertaken in JBMS by the user.

³ A range of assessment courses are available to determine evidence of competency for declarants.

framework does not allow the suspension or cancellation of specific privileges that a user has in JBMS to provide a targeted response to a persistent performance issue.

15. Customs is not able to suspend or cancel a user's registration for JBMS or of specific privileges in JBMS where an audit or other Customs' interaction with users has identified numerous ongoing errors and there has been no improvement in accuracy despite letters, meetings, warnings and administrative penalties.
16. Persistent poor performance arises with a small percentage of all users where there are ongoing errors due to lack of competency, but it creates significant additional work for Customs to address the issue. An example of this situation is where two audits have been completed and \$3,500 of administrative penalties (16 in total) over two years issued to a JBMS user and the employing company has opted not to implement its written commitment to provide formal training and independent testing for the user concerned.
17. The errors related to incorrect classification, use of concessions, valuation for duty; overstated or no freight. These errors resulted in additional duty of nearly \$3,000. In the first follow-up audit there was an error rate of 85 percent. A second follow-up audit has been scheduled due to the ongoing high error rate. The two completed audits took 225 hours of Customs resources. Such cases are rare but they undermine the integrity of the system.
18. On average, 75 – 90 declarants (2.5% - 3.1% of the 2900 declarants) appear in at least one high risk category in each of Customs' regular assurance monitoring reports of JBMS data entries. Of these, 10-15 declarants are referred for further investigation due to the high error rate or appearing in multiple categories. There is not a consistent trend in the number of JBMS users identified as high priority for further investigation. In 2014/15, 17 declarant performance audits were conducted, with two declarants requiring follow-up audits. Only two declarants have had their registration cancelled as a result of a conviction. Currently, there are approximately 175 JBMS users (6 percent of all JBMS users) who have accuracy and data quality issues when entering client registrations. Customs advises users where there is an ongoing issue that the data input is not of an acceptable standard or within the guidelines set by Customs.
19. Competency issues (eg, understanding of valuation processes or entry errors) can affect when due revenue is paid to Customs. These errors result in additional revenue payments either through voluntary disclosure by declarant JBMS users or identified through Customs' alerts and audit processes.⁴
20. Numerous and ongoing errors are evidence of a lack of competency by JBMS users in accurately entering the correct information into JBMS. Ongoing competency in making entries and updating JBMS underpins Customs' assurance model. It also avoids a more intrusive system of checking data that would delay clearance of goods. Erroneous or defective entries are easy to do and difficult to detect.
21. There is a risk that numerous administrative penalties of \$200 are regarded as a cost of doing business and are not achieving the required improvement. There is a gap between

⁴ The available data does not identify the amount of additional revenue paid due to ongoing competency issues.

existing penalties, particularly where multiple errors occur that do not affect revenue collected, and the next step of prosecution. Undertaking a prosecution is costly and time-consuming for all parties and not proportionate to all instances of ongoing data quality issues.

Problem statement

22. The lack of an explicit requirement for ongoing competency by all JBMS registered users creates a gap in the suspension and cancellation process and in the wider sanctions framework. There are limited options to encourage JBMS users to take the required actions to improve data quality if administrative penalties are not having the intended effect. There is a need for an intermediate sanction between administrative penalties and prosecution.

Objectives

23. The overarching objective is to establish competency as an ongoing, non-negotiable requirement for JBMS registered users to achieve the following supporting objectives:
- increased accuracy and timeliness in revenue collection; risk assessment and improved quality of data provided to other agencies
 - sustained improvement in data quality by all JBMS registered users
 - fewer users identified as repeat risk users in Customs' assurance processes, resulting in fewer audits
 - JBMS users keep updated with the required knowledge to maintain competency and proactively address gaps to reduce errors.

Criteria for assessing the options

24. Options for establishing a competency condition for JBMS users determining and entering information into JBMS were assessed against the following criteria:
- Provides a clear requirement for ongoing competence by all JBMS users
 - Provides an effective sanction if there is evidence of ongoing lack of competence⁵
 - Compliance costs are borne by users demonstrating ongoing data quality issues
 - Procedurally simple and cost effective to administer by Customs.

Options and impact analysis

⁵ This RIS does not assess the impact of the wider suspension and cancellation framework as it is already provided for in legislation.

25. The following options were considered and compared to the status quo:
- Option 1: impose a competency condition as part of the application approval process (under s132A), on existing users or classes of users (under s134A) and for use of the UUI (under s133)
 - Option 2: require periodic competency assessments of all JBMS registered users
 - Option 3: establish competency as an overall specific requirement in legislation for maintaining JBMS user registration by new and existing JBMS registered users (preferred).

Option 1: impose conditions as part of the application approval process (under s132A), on existing users or classes of users (under s134A) and for use of UUI (under s133)

26. A condition for ongoing competency could be set as part of the registration process for new JBMS registered users under s132A, under s134A for existing users or classes of user and under s133(4) for use and security of the UUI. A user's registration could be suspended or cancelled if a condition was breached under any of these sections.
27. The current conditions set under s132A and s133(4) are administrative and cover the residential and physical location when lodging entries, security requirements for the UUI, changes to employment details, renewing the UUI every two years.
28. A condition imposed under s134A must be complied with within a time frame and the condition can be appealed to the Customs Appeal Authority. This right of appeal is separate to the right of appeal if action was taken to suspend or cancel the registration where there was evidence of an ongoing lack of competency.
29. Amendments to the existing Act and regulations would be necessary to prescribe grounds for suspension or cancellation of the registration and specific privileges in JBMS where there is evidence on an ongoing lack of competency. Currently, this provision only applies to cancellation of a user's registration.⁶

Option 2: require periodic competency assessments of all JBMS registered users

30. This option would set a requirement for periodic competency assessments of all registered users done on either a sampling basis or by rotation. Such assessments would have to be targeted to the functions undertaken by the user and would therefore be more extensive for declarant JBMS users than for non-declarant JBMS users.
31. The requirement would be set as a condition under s132A or s134A, which would provide the mandate for suspension or cancellation if the condition was not met. The actual condition would not be set in legislation.
32. As with Option 1, a condition imposed under s134A must be complied with within a time frame and the condition can be appealed to the Customs Appeal Authority. This

⁶ Under s135(1)(d).

right of appeal is separate to the right of appeal if action was taken to suspend or cancel the registration where there was evidence of an ongoing lack of competency.

33. As with Option 1, amendments to the existing Act and regulations would be necessary to prescribe grounds for suspension or cancellation of the registration and specific privileges in JBMS where there is evidence on an ongoing lack of competency. Currently, this provision only applies to cancellation of a user's registration.

Option 3: establish competency as a requirement in legislation for maintaining JBMS user registration (preferred)

34. Under this option, ongoing competency in determining the required information and entering that information into JBMS would be an explicit requirement in legislation for maintaining registration for all new and existing registered JBMS users. The requirement for competency is of a similar nature to the fit and proper criteria for JBMS registered users, which is in legislation.
35. The requirement would be grounds for suspension and cancellation of the user registration or specific privileges in JBMS where there was evidence that the requirement was not being maintained.
36. JBMS users would have the right of appeal if action was taken to suspend or cancel the user registration or a specific privilege where there was evidence of ongoing lack of competency. Under this option, JBMS users would not have the ability to appeal the requirement to maintain competency.

Analysis of options

37. An assessment of the extent that each option ranks against the criteria is provided in the table below. Each option is ranked from 0 (not at all); 1 (low) 2 (moderate) 3 (high) against each of the criteria listed in paragraph 14.
38. Option 3 (establish an explicit condition of competency in legislation) ranks more highly than other options. It provides a single condition that provides clarity for business and for Customs to administer.

Analysis of options

Criteria	Status quo	Option 1: Condition under s132A, s134A & s133	Option 2: Periodic assessment	Option 3: Establish competency as a single requirement (Preferred)
Provides a clear requirement for ongoing competence by all JBMS users	0 There is not an explicit requirement	2 A condition in three separate sections creates duplication and lacks transparency; a condition under s134A for existing JBMS users can be appealed, unless this was amended	2 A condition in three separate sections creates duplication and lacks transparency; a condition under s134A for existing JBMS users can be appealed, unless this was amended	3 A single requirement in legislation for all users linked to suspension and cancellation of registration and privileges would be clear, remove duplication, provides a single ground for appeal
Provides an effective sanction if there is evidence of ongoing lack of competence	0 Does not provide an effective sanction	2 Clearly linked to suspension and cancellation framework, but additional appeal right to imposition of condition by some users reduces efficacy;	2 Clearly linked to suspension and cancellation framework, but additional appeal right to imposition of condition by some users reduces efficacy	3 Clearly linked to suspension and cancellation framework
Compliance costs are borne by users demonstrating ongoing data quality issues	1 Identified user(s) receives administrative penalties	3 Cost of a suspension or cancellation would be incurred by identified user(s)	1 Competent users (the majority) would also incur compliance costs of verifying competency	3 Cost of a suspension or cancellation would be incurred by identified user(s)

Criteria	Status quo	Option 1: Condition under s132A, s134A & s133	Option 2: Periodic assessment	Option 3: Establish competency as a single requirement (Preferred)
Procedurally simple and cost effective to administer	3 Continues existing practice	2 All existing users would be notified of new condition and right of appeal; only some users would have a right of appeal; Customs would have to record which section applied to which user	1 Customs would require a process of recording periodic assessments process & outcomes for approximately 3,000 JBMS users	3 Identification of user(s) is part of existing audit and assurance processes
Total	4	9	6	12

Costs and risks of establishing competency as a requirement for maintaining JBMS registration

39. All options require some changes to legislation to achieve the wider objectives and provide consistency and transparency for JBMS users. As an interim solution, competency issues with specific users could be addressed with a condition imposed under s134A. For example, the identified user provides evidence of further training that demonstrates a specific level of competency within a specified timeframe, to improve the identified performance issues. If this was not complied with, then suspension or cancellation of the registration could follow.
40. The costs of maintaining competency to use JBMS are incurred by the brokering industry. These are normal business costs as the sanctions regime in the Customs and Excise Act already requires a reasonable degree of accuracy and competency in entries.
41. The additional costs arising from suspension of a user's registration or privileges, or cancellation of a user's registration, are incurred by the user where the ongoing competency issue has been identified. Maintaining competency and remediation where a lack of competency is evident is within the control of the user.
42. Customs is incurring additional costs when a user continues to demonstrate a lack of competency in entering information into JBMS through repeated interactions with the user.
43. Customs considers that the risk of suspension or cancellation would encourage the user to maintain competency and address issues early. The extent of the impact on the business can be mitigated by suspending the specific privileges related to the errors, rather than all privileges. Imposing higher financial penalties for lack of reasonable care or gross carelessness can be treated as a cost of doing business and not achieve the desired outcome of improving accuracy.
44. There is a risk that suspension or cancellation following numerous administrative penalties will be seen as a double penalty. The condition of competency would become the basis for suspension or cancellation where other actions and penalties had not changed the behaviour. It reflects the graduated sanction approach across Customs' sanctions framework, which would inform how the indicators and thresholds are set.
45. The new ground for suspension or cancellation due to evidence of an ongoing lack of competency would be subject to a right of appeal to the Customs Appeal Authority, which is consistent with the current grounds for suspension or cancellation.

Consultation

46. This proposal was not included in the Customs and Excise Act Review Discussion Document, but was referred to in two submissions on the administrative penalty matters. The Board of Airline Representatives of New Zealand (BARNZ) submitted that Customs should make more use of the power to 'suspend or temporarily suspend' an

individual's right to make entries. BARNZ considered that this action could have a stronger effect on accuracy than administrative penalties on the employer. The Customs Brokers and Freight Forwarders Federation of New Zealand (CBAFF) proposed a '3 strikes rule' for long-term holders of a JBMS UUI with few prior errors in material information. More recently, Customs consulted with the Stakeholder Reference Group and BARNZ and CBAFF have confirmed their support for the proposal.

47. The following government agencies were consulted on the proposed changes: Ministry for Primary Industries; Ministry for Business, Innovation and Employment; New Zealand Police; Inland Revenue; Ministry of Justice; the Treasury; Crown Law Office; Ministry of Transport; Department of Internal Affairs; Ministry of Foreign Affairs and Trade; Ministry for Primary Industries; Civil Aviation Authority; Maritime New Zealand; Ministry of Defence; New Zealand Defence Force; Ministry of Health; Parliamentary Counsel Office; the New Zealand Security Intelligence Service; and the Office of the Privacy Commissioner. The Department of Prime Minister and Cabinet was informed. The Ministry of Justice highlighted the need for certainty on the factors that constitute competency and the basis for suspension and cancellation. Performance measures and standards will be developed in consultation with representative industry organisations.

Conclusions and recommendations

48. Option 1 enables the objectives to be achieved, but with less transparency and certainty as the condition would be in three separate sections, could be appealed, and requires additional amendments to achieve all the objectives (eg, to allow grounds to be prescribed for suspension and to allow specific privileges to be suspended or cancelled). Customs considers that the ability to appeal against the imposition of the condition by existing users and the lack of transparency of Customs mandate to require ongoing competency, increases the potential of litigation.
49. Option 2 is a blunt approach as it incurs costs on all registered users, including those whose performance has not come to the attention of Customs through its regular monitoring processes.
50. Option 3 provides a transparent and explicit requirement in legislation for competency to be applied to all current and future JBMS registered users. It will provide clarity that suspension and cancellation, where there is evidence of a persistent performance issue, can apply to the user registration and to specific privileges in JBMS.
51. All the options require performance measures and standards to be developed prior to implementation to provide transparency.

Recommended option: Option 3: This option provides a clear mandate for requiring ongoing competency by JBMS registered users in their use of JBMS and provides a more transparent framework for suspension and cancellation where there is evidence of an ongoing lack of competency, for JBMS user registration and a user's specific privileges in JBMS.

Implementation

52. The proposals in this paper will be implemented in the Customs and Excise Bill, for which I am seeking either category two or category three priority on the 2016 Legislation programme.
53. Performance measures and standards will need to be developed to establish the required performance level in consultation with representative industry organisations. These would be required for any of the alternative options.
54. Operational procedures and guidance will be required that sets out how the performance standards will be monitored, required steps prior to suspension or cancellation, what actions are required for the registration or privileges to be re-instated, and how Customs will monitor performance following re-instatement.
55. Excise clients do not enter their excise returns into JBMS at present. When JBMS is applied to excise clients, further work will be required to determine the approach to assessing and monitoring competency once there is an evidence base from their use of the system.
56. As part of the wider sanctions framework, Customs will also need to establish:
 - operational guidelines (i.e. a compliance strategy and associated enforcement intervention guidelines) to help ensure that Customs officials know the circumstances under which they should apply the range of interventions available to them, including suspension and cancellation, use of warnings, administrative penalties and referral to prosecution
 - a training programme to ensure that Customs officers and other relevant staff are aware of the changes
 - a communication programme to explain the how the condition of competency will be implemented and applied.

Monitoring, evaluation and review

57. Customs' existing audit and assurance processes, which provide reports of the JBMS users with high levels of errors or omissions, will support the monitoring and evaluation process. Following the communication programme and availability of guidance to JBMS users, Customs will be able to monitor the reports to assess whether any changes are occurring (e.g. users who have previously had high levels of errors begin to show an improvement).

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