

INTERNATIONAL TRADE ALERT

IMPORTER SECURITY AND CARRIER FILINGS UPDATE: CBP ISSUES BROAD MITIGATION GUIDELINES FOR LIQUIDATED DAMAGES CLAIMS

On July 17, 2009, U.S. Customs and Border Protection (CBP) published mitigation guidelines for liquidated damages claims associated with the Interim Final Rule establishing the Importer Security Filing (ISF) and Additional Carrier Requirements for cargo arriving in U.S. ports by vessel—the so-called “10+2 Rule.”¹ CBP published the Interim Final Rule (“Rule”) in the Federal Register on November 25, 2008, in order to implement Section 203 of the Security and Accountability for Every (SAFE) Port Act of 2006. The Rule went into effect on January 26, 2009, with a 12-month flexible enforcement period through January 26, 2010. The general focus of this alert is the mitigation guidelines for liquidated damages claims with respect to the ISF requirement for importers as set forth in 19 C.F.R. Part 149.²

General ISF Requirements: The Rule generally requires importers of cargo aboard oceangoing vessels to transmit an ISF to CBP no later than 24 hours before cargo is laden aboard a vessel destined for the United States.³ In addition to other import entry requirements, the ISF consists of 10 data elements for shipments of goods intended to be entered into the U.S. or delivered to a Foreign Trade Zone (FTZ) and five data elements for shipments transiting the U.S. for foreign ports (e.g., foreign cargo remaining on board a vessel and goods intended to be transported as immediate exportation (IE) or transportation and exportation (T&E) in-bond shipments). The ISF must be updated if, after filing and before arrival within the limits of a U.S. port, there are changes to the information or more accurate information becomes available. The ISF must be withdrawn if the goods associated with the ISF are no longer intended to be imported into the United States.

¹ CBP Dec. 09-26 (43 Cust. B. & Dec. No. 28) (“Guidelines for the Assessment and Cancellation of Claims for Liquidated Damages for Failure to Comply with the Vessel Stow Plan, Container Status Message, and Importer Security Filing Requirements”).

² The guidelines also cover the assessment and cancellation of claims for liquidated damages for failure to comply with the vessel stow plan and container status message requirements set forth in the Rule, which generally apply to carriers. Those guidelines are not addressed in this alert.

³ CBP allows for flexibility in the timing of submission for some of the ISF data elements. The ISF for foreign cargo remaining on board (FROB) is required any time prior to lading.

Scope of Guidelines: The July 17 guidelines are for the assessment and cancellation of liquidated damages claims against the bonds of carriers and ISF Importers for failing to provide the required advance electronic information to CBP within the time period and manner prescribed by the regulations or for providing inaccurate or invalid information. The guidelines are effective July 17, 2009

Potentially Significant Cargo Delays for ISF Violations: The guidelines state that, in addition to liquidated damages claims that CBP may assess, the failure of an arriving carrier or ISF Importer to provide the required advance electronic cargo information in the required time period and manner may result in other adverse consequences such as the issuance of a do not load (DNL) hold, the delay or denial of a vessel carrier's preliminary entry-permit/special license to unlade and/or the assessment of any other applicable statutory penalty. CBP may also withhold the release or transfer of the cargo until it receives the required information and has the opportunity to review the documentation and conduct any necessary examination. Given the significant shipment delays that can occur for failure to file complete and accurate ISFs, the guidelines confirm that it is imperative for importers to immediately establish and implement internal procedures to ensure compliance with the Rule and avoid increased costs resulting from DNLs and other cargo release impediments.

No Strict Liability for Information Received from Third Party: Notably, the guidelines also recognize that ISF Importers may receive information required for the ISF filing from a third party and provide some relief from "strict liability" penalties for the inaccuracy of such information. Specifically, where an ISF importer receives any of the ISF information from another party, CBP will consider how, in accordance with ordinary commercial practices, the presenting party acquired the information and whether and how the party is able to verify the information. If the party is not reasonably able to verify the information, CBP will permit the party to electronically present such information on the basis of what the party reasonably believes to be true.

General ISF Violations: With respect to ISF filings, the guidelines note that it is a violation to fail to submit a required ISF, to submit a late or inaccurate ISF or to submit an inaccurate update to an ISF pursuant to 19 C.F.R. § 149.2(d). It is also a violation to fail to withdraw an ISF pursuant to 19 C.F.R. § 149.2(e).

Failure to File ISF: Liquidated damages cannot be assessed for the failure to file an ISF if no bond is in place. Therefore, if goods for which an ISF has not been filed arrive in the United States, CBP will withhold the release or transfer of the cargo until it receives the required information and has had the opportunity to review the documentation and conduct any necessary examination. If an ISF has not been filed, CBP may also limit the permit to unlade for the merchandise; if the merchandise is unladen, it may be subject to seizure if approved by CBP Headquarters.

Liquidated Damages Claims for Certain Violations: If an ISF Importer submits a late ISF, CBP may assess a liquidated damages claim of \$5,000 per late ISF. If the ISF is inaccurate, CBP may assess a liquidated damages claim of \$5,000 per inaccurate ISF. For inaccurate ISFs, CBP will consider the transmission closest in time to, but prior to, 24 hours prior to lading, prior to lading, or 24 hours prior to arrival, whichever is applicable. If an ISF Importer submits an inaccurate ISF update, CBP may assess a liquidated damages claim for the first inaccurate ISF update of \$5,000. If an ISF Importer fails to withdraw an ISF as required, CBP may assess a liquidated damages claim of \$5,000.

Cancellation of Liquidated Damages Claims: The guidelines also address the circumstances in which a liquidated damages claim for ISF violations may be cancelled. For first violations resulting in a liquidated damages claim for filing a late or inaccurate ISF or an inaccurate ISF update, the claim may be cancelled upon payment of \$1,000 to \$2,000, depending on the presence of mitigating or aggravating factors, as described below. For subsequent violations resulting in a liquidated damages claim for filing a late or inaccurate ISF or an inaccurate ISF update, the claim may be cancelled upon payment of at least \$2,500. For first and subsequent violations, CBP will not cancel a claim if it determines that law enforcement goals were compromised by the violation. Notably, the stated purpose of the Rule, i.e., imposition of the ISF requirement, is to help prevent terrorist weapons from being transported to the United States by enabling CBP to target high-risk shipments. It is, therefore, difficult to ascertain a situation where CBP might determine that such ISF violations do not compromise a law enforcement goal, as CBP would not have the necessary information to make an accurate assessment of the cargo's security risk. It is possible that CBP could consider the C-TPAT status of the importer in determining whether a law enforcement goal was compromised, especially since C-TPAT membership is a significant mitigating factor as described below.

Additional Penalties for Serious or Repetitive Violations: CBP also may assess penalties under 19 U.S.C. § 1595a(b) (penalties for aiding unlawful importation) or other applicable statutory authority for serious or repetitive violations. CBP Headquarters must approve of the issuance of such penalties. Section 1595a(b) penalties will be mitigated consistent with current applicable guidelines set forth in CBP's "Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages" Informed Compliance publication.

Mitigating or Aggravating Factors: The guidelines also list mitigating and aggravating factors that CBP will consider in determining the final assessed liquidated damages claim or penalties. Mitigating factors include evidence of progress of implementation of the ISF requirement during the flexible enforcement period, a small number of violations compared to total shipments for which an ISF was required and demonstrated remedial action. If the ISF Importer is a Tier 2 or 3 C-TPAT (Customs-Trade Partnership Against Terrorism) member, it may receive additional mitigation of up to 50 percent of the normal mitigation amount depending on the tier. Accordingly, the guidelines provide additional incentive for importers to join C-TPAT and achieve Tier 2 or 3 status, especially in light of the potentially costly cargo delays or seizures that can result from ISF violations. In an ISF is inaccurate, CBP may cancel the liquidated damages claim without payment if the party acquired the information from another party in accordance with ordinary commercial practices, can demonstrate that it reasonably believed the information to be true and was not reasonably able to verify the information. Given the "reasonability" standard built into this factor, CBP will have broad discretion in determining whether the party meets the requirements and, thus, whether cancellation of the claim in full is warranted.

Aggravating factors include lack of cooperation with CBP, multiple ISF errors, a rising error rate indicative of deteriorating performance in the transmission of ISF information and evidence of smuggling.

Broad and Undefined Exception for Compromise of Law Enforcement Goals: Despite the detail in the guidelines, they nonetheless leave considerable room for CBP to exercise enforcement discretion and not apply the mitigation guidelines at all. In this respect, the guidelines lack clarity. For example, if CBP concludes that a violation constitutes a "compromise" of law enforcement goals, CBP will generally not grant relief in accordance

with the guidelines. CBP does not elaborate in any way on what might constitute a “compromise” of law enforcement goals. Given past practice, local CBP field offices might have the opportunity to invoke this exception and to apply it to violations that do not raise cargo security concerns. Given this possibility, it would seem appropriate for CBP to clarify what it means by this exception and to ensure that it only relates to cargo security. In addition, CBP would no doubt ease the importing community’s concerns if it ensured that field offices interpret this exception uniformly.

Conclusion

The July 17 guidelines attempt to strike a balance between cargo security goals and commercial realities that will affect the timing and accuracy of ISFs. While significant mitigation or cancellation of liquidated damages claims resulting from ISF violations is contemplated, importers are strongly advised to establish and implement internal ISF procedures well in advance of January 26, 2010. This is especially important given that, in order to ensure the accuracy and timeliness of the information, compliance with ISF requirements may require importers to revise business operations and logistics with respect to the timing of receipt of information required for ISFs and/or the party from whom such information is received.

In addition, although in issuing the Rule, CBP declined to exempt C-TPAT members from the ISF filing generally, the guidelines reinforce CBP’s commitment to providing commercially valuable benefits—through significantly mitigated liquidated damages claims—to C-TPAT members, especially Tier 2 and 3 members.

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