



The Current

July 24, 2009 / VOL. 2009, ISSUE 5

Importer Security Filing (ISF) Update: Penalty Mitigation Guidelines

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Dear Valued Customers:

U.S. Customs and Border Protection (CBP) published in the July 17, 2009, [*Customs Bulletin and Decisions*](#) a general notice setting forth guidelines on the assessment and cancellation of claims for liquidated damages incurred by importers and vessel carriers for failure to comply with the importer security filing (10+2) rule. Enforcement of the rule with penalties for violations begins on January 26, 2010.

During a presentation on this subject given on July 7, 2009, Richard DiNucci, Director of CBP's Secure Freight Initiative **warned importers who are "sitting on the fence" to begin participating in the 10+2 program now**. The reason given was that on average, it takes an importer about 3 months to set up Importer Security Filing processes with their end-to-end supply chain partners and ISF program vendors. For an importer to wait until the end of 2009 to begin their ISF filing will be too late to ensure compliance with the rule, resulting in exposure to penalties for violations beginning January 26, 2010. Furthermore, failure to participate during the Interim Rule period (January 26, 2009 through January 25, 2010) would result in stricter penalties with less consideration for mitigation.

James J. Boyle & Co. recommends that its clients consider participating in ISF filing immediately in order to be fully prepared for compliance by January 26, 2010. Moreover, importers who already participate in the program are also encouraged to work with its supply chain vendors to ensure timeliness and accuracy of the data being provided. Importers should take advantage of the Interim Rule Period to conduct a gap-analysis and implement improvements to achieve full compliance before January 26, 2010.

In addition, CBP has announced that an ISF Importer which is a ***certified Tier 2 or Tier 3 C-TPAT member may receive additional mitigation of up to 50%*** of the normal mitigation amount. This is additional incentive as a reason why you may wish to consider participation in the C-TPAT program.

The following is a summary of the main points concerning CBP's penalty and mitigation guidelines for ISF violations:



GENERAL ENFORCEMENT INFORMATION

Information received from another party: Where the Importer Security Filing (ISF) importer receives any of the ISF information from another party, CBP will take into consideration how, in accordance with ordinary commercial practices, the presenting party acquired such information, and whether and how the presenting party is able to verify this information. Where the presenting party is not reasonably able to verify such information, CBP will permit the party to electronically present such information on the basis of what the party reasonably believes to be true.

DNLs, unloading holds, etc: In addition to liquidated damages that may be assessed as provided for below, the failure of an arriving carrier or ISF Importer to provide the required advance electronic cargo information in the time period and manner prescribed by the regulations in 19 CFR, may result in 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 CBP receives the required information and has had the opportunity to review the documentation and conduct any necessary examination.

FAILURE TO FILE ISF

Withhold release or transfer: If goods for which an ISF has not been filed arrive in the U.S., CBP shall withhold the release or transfer of the cargo until CBP receives the required ISF information and has had the opportunity to review the documentation and conduct any necessary examination.

Limit permit to unlade, seizure: CBP also reserves the right to limit the permit to unlade so as to not permit unloading of merchandise for which no ISF has been filed, and, if such cargo is unladen without permission, it may be subject to seizure. All seizures will be approved by CBP Headquarters.

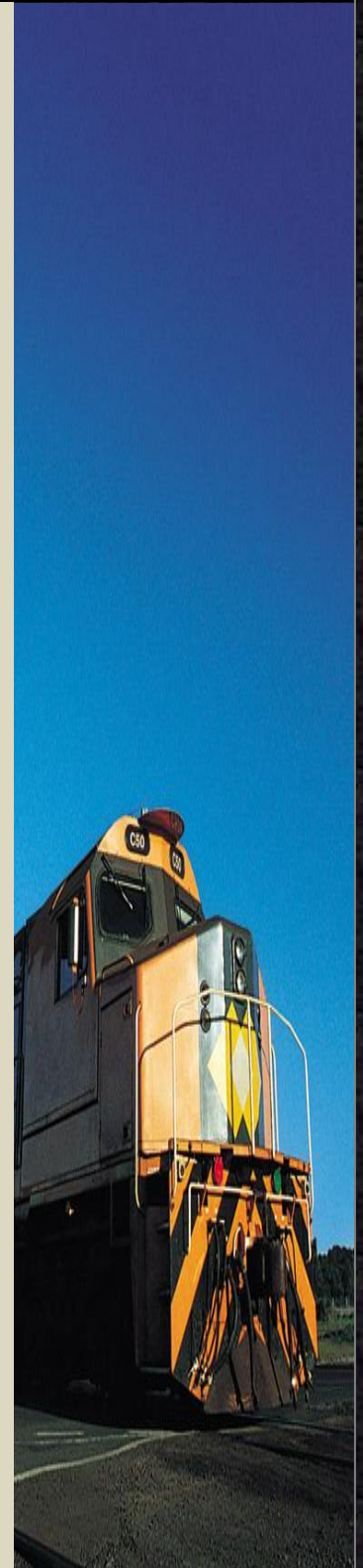
LIQUIDATED DAMAGES PENALTIES

Late filing: If an ISF Importer submits a late ISF, Port Directors may assess a claim for liquidated damages against the party in the amount of \$5,000 per late ISF.

Inaccurate filing: If an ISF Importer submits an inaccurate ISF, Port Directors may assess a claim for liquidated damages against the party in the amount of \$5,000 per inaccurate ISF.

Updates: If an ISF Importer submits an inaccurate ISF update, Port Directors may assess a claim for liquidated damages against the party for the first inaccurate ISF update in the amount of \$5,000.

Withdrawals: If an ISF Importer fails to withdraw an ISF as required by 19 CFR 149.2(e), Port Directors may assess a claim for liquidated damages against the party in the amount of \$5,000.





CANCELLATION OF LIQUIDATED DAMAGES

First violation: If an ISF Importer incurs a liquidated damages claim for filing a late or inaccurate ISF or an inaccurate ISF update, the liquidated damages claim may be cancelled upon payment of an amount between \$1,000 and \$2,000, depending on the presence of mitigating or aggravating factors, if CBP determines that law enforcement goals were not compromised by the violation.

Subsequent violations: If an ISF Importer incurs a subsequent liquidated damages claim for filing a late or inaccurate ISF or an inaccurate ISF update, the liquidated damages claim may be cancelled upon payment of an amount not less than \$2,500 if CBP determines that law enforcement goals were not compromised by the violation.

Law enforcement goals: No relief will be granted if CBP determines that law enforcement goals were compromised by the violation.

MITIGATING AND AGGRAVATING FACTORS

CBP will consider all available information in a petition, taking into account any mitigating, aggravating, and extraordinary factors, in determining the final assessed claim for liquidated damages or penalties.

Mitigating factors (these are not exhaustive):

- a) Evidence of progress in the implementation of the ISF requirement during the flexible enforcement period (i.e., January 26, 2009 through January 26, 2010).
- b) Small number of violations compared to the number of shipments for which ISFs were required.
- c) An ISF Importer which is a certified Tier 2 or Tier 3 C-TPAT member may receive additional mitigation of up to 50% of the normal mitigation amount, depending upon tier of C-TPAT participation.
- d) Demonstrated remedial action has been taken to prevent future violations.
- e) ISF information was filed late because of vessel diversion due to factors outside of the ISF Importer's control (e.g., due to weather).
- f) Regarding an inaccurate filing, the presenting party acquired the information from another party in accordance with ordinary commercial practices, and can demonstrate that it reasonably believed the information to be true, and it was not reasonably able to verify the information. This is an extraordinary mitigating factor that may warrant cancellation of a claim without payment.

Aggravating factors:

- a) Lack of cooperation with CBP or CBP activity is impeded with regard to the case.
- b) Evidence of smuggling or attempt to introduce or introduction of merchandise contrary to law. This may be considered an extraordinary aggravating factor.
- c) Multiple errors on the ISF.
- d) There is a rising error rate which is indicative of deteriorating performance in the transmission of ISF information.





ADDITIONAL PENALTIES FOR SERIOUS OR REPETITIVE VIOLATIONS

A penalty may be assessed under the provisions of 19 USC 1595a(b), or any other applicable statutory authority, with CBP Headquarters approval for serious or repetitive violations. Section 1595a(b) penalties will be mitigated in a manner consistent with current guidelines for section 1595a(b) penalties for violations of a statute other than 19 USC 1448 or 1499.

BOND GUIDELINES DUE

Bond Guidelines are still being worked on internally at CBP and are expected to be issued soon. The Single Transaction Bond process and the ISF standalone continuous bond limit of liability are expected to be fully outlined in the Bond Guidelines.

We thank you very much for your time and should you require any assistance or if you have any questions, please consult with your local James J. Boyle & Co. office listed below.

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