

Guidelines on Liquidated Damages for Importer Security Filing Violations

U.S. Customs and Border Protection issued 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. Under the ISF rule importers are required to submit ten additional data elements for shipments entering the U.S., including information that identifies the manufacturer, supplier, seller, buyer and consignee; the country of origin and tariff classification number; where and by whom the goods were stuffed into the container; and the party responsible for compliance with applicable import requirements. In addition, carriers are generally required to submit two additional data elements for containers loaded on vessels destined to the U.S., a vessel stow plan and container status messages.

Importer Security Filing – Failure to File

- Liquidated damages cannot be assessed for failure to file an ISF if no bond is in place.
- If goods for which an ISF has not been filed arrive in the U.S., CBP will withhold the release or transfer of the cargo until it receives the required ISF information and has had the opportunity to review the documentation and conduct any necessary examination.
- CBP reserves the right to limit the permit to unlade so as to not permit unloading of merchandise for which no ISF has been filed. If such cargo is unladen without permission, it may be subject to seizure. All seizures will be approved by CBP headquarters.

Importer Security Filing – Late or Inaccurate Filing

- Port directors may assess claims for liquidated damages in the amount of \$5,000 per ISF for (a) late filed ISFs, (b) inaccurate ISFs or ISF updates, and (c) failure to withdraw an ISF when required. Penalties may be assessed, with CBP headquarters approval, for serious or repetitive violations.
- Liquidated damages claims for late ISFs or inaccurate ISFs or ISF updates may be canceled, provided CBP determines that law enforcement goals were not compromised by the violation, upon payment of (a) between \$1,000 and \$2,000 (depending on the presence of mitigating or aggravating factors) for the first violation and (b) not less than \$2,500 for subsequent violations.
- Mitigating factors include evidence of progress in implementing the ISF requirement during the flexible enforcement period (i.e., Jan. 26, 2009, through Jan. 26, 2010), small number of violations compared to the number of shipments for which ISFs were required, certification as Tier 2 or Tier 3 member of the Customs-Trade Partnership Against Terrorism, demonstrated remedial action to prevent future violations, and vessel diversion due to factors outside the ISF importer's control. For inaccurate filings, if the importer acquired information from another party in accordance with ordinary commercial practices and can demonstrate that it reasonably believed the information to be true and was not reasonably able to verify the information, this will be considered an extraordinary mitigating factor that may warrant cancellation of a claim without payment.
- Aggravating factors include lack of cooperation with CBP or impeding CBP activity with regard to the case, evidence of actual or attempted smuggling (this may be considered an extraordinary aggravating factor), multiple errors on the ISF, and a rising error rate indicative of deteriorating performance

Vessel Stow Plans

- When a carrier arrives at a port of entry where a vessel stow plan is required, port directors may assess a claim for liquidated damages against the carrier in the amount of \$50,000 per plan when a complete, accurate and timely plan is not submitted. A claim for liquidated damages in the amount of \$50,000 may be assessed for each vessel arrival. Penalties may be assessed, with CBP headquarters approval, for serious or repetitive violations.

- For failure to file, liquidated damages claims may be canceled, provided CBP determines that law enforcement goals were not compromised by the violation, upon the payment of (a) between \$5,000 and \$25,000 (depending on the presence of mitigating or aggravating factors) for a first violation and (b) \$25,000 for subsequent violations.
- For late and inaccurate filings, liquidated damages claims may be canceled, provided CBP determines that law enforcement goals were not compromised by the violation, upon the payment of (a) between \$2,500 and \$10,000 (depending on the presence of mitigating or aggravating factors) for a first violation and (b) not less than \$5,000 for subsequent violations.
- Mitigating factors include evidence of progress in the implementation of the vessel stow plan requirement during the flexible enforcement period, vessel diversion due to factors outside of the carrier's control, validation and good standing in C-TPAT, and demonstrated remedial action to prevent future violations. Demonstrating that the carrier acquired the information from another party in accordance with ordinary commercial practices, reasonably believed this information to be true and was not reasonably able to verify the information is an extraordinary mitigating factor that may warrant cancellation of a claim without payment.
- Aggravating factors include lack of cooperation with CBP or impeding CBP activity with regard to the case, evidence of actual or attempted smuggling (this may be considered an extraordinary aggravating factor), multiple errors on the vessel stow plan, and a rising error rate indicative of deteriorating performance.

Container Status Messages

- Port directors may assess claims for liquidated damages against carriers in the amount of \$5,000 per CSM for failing to submit a CSM, late filing a CSM, or submitting an inaccurate CSM. Such claims may be assessed up to a maximum of \$100,000 per vessel arrival. Penalties may be assessed for serious or repetitive violations.
- For failure to file, liquidated damages claims may be canceled, provided CBP determines that law enforcement goals were not compromised by the violation, upon the payment of (a) between \$1,000 and \$2,000 (depending on the presence of mitigating or aggravating factors) for a first violation and (b) \$2,500 for subsequent violations.
- For late and inaccurate filings, liquidated damages claims may be canceled, provided CBP determines that law enforcement goals were not compromised by the violation, upon the payment of (a) between \$500 and \$1,000 (depending on the presence of mitigating or aggravating factors) for a first violation and (b) not less than \$1,500 for subsequent violations.
- Mitigating factors will include evidence of progress in the implementation of the CSM requirement during the flexible enforcement period, small number of violations compared to the number of CSMs submitted, validation and good standing in C-TPAT, and demonstrated remedial action to prevent future violations. Demonstrating that the carrier acquired the information from another party in accordance with ordinary commercial practices, reasonably believed this information to be true and was not reasonably able to verify the information is an extraordinary mitigating factor that may warrant cancellation of a claim without payment.
- Aggravating factors include lack of cooperation with CBP or impeding CBP activity with regard to the case, evidence of actual or attempted smuggling (this may be considered an extraordinary aggravating factor), multiple errors on the CSM, and a rising error rate indicative of deteriorating performance.

Other Penalties

CBP states that in addition to liquidated damages that may be assessed as provided above, the failure of an arriving carrier or ISF importer to provide the required advance electronic cargo information in the time period and manner prescribed may result in the issuance of a do not load 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 had the opportunity to review the documentation and conduct any necessary examination.