

MASTERPIECE

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ISF PENALTY GUIDELINES

ISF Penalty Guidelines Published

On July 17, 2009, U.S. Customs and Border Protection published mitigation guidelines for liquidated damages claims associated with the Importer Security Filing (ISF-10+2) program. Emphasizing its goal of getting importers to participate as soon as possible, the first mitigating factor listed by Customs is an importer's history of compliance with ISF. If you wait until the last minute to start filing - just before the January 26, 2010, enforcement deadline, and there are mistakes, or delays causing late filing, do not expect any mitigation or clemency from Customs.

If the ISF is not filed, filed late, or filed with inaccuracies, the importer will be penalized. Determining when loading occurs remains a challenge. Although Customs has said it will start consulting vessel operator data as to dates of departure, how importers are expected to figure out loading times is unclear. At the same time, figuring out when you have to file is another challenge, but the flexibility as to how to declare certain data elements and when to declare others has not changed.

Penalties:

Customs may issue a claim for liquidated damages in the amount of \$5,000.00, which will be based on the final version of the ISF. If you fail to file, Customs may withhold release or transfer of the shipment. Just as Customs will issue a penalty for late or inaccurate ISFs, they will also issue a penalty for an ISF that should have been withdrawn, but was not (shipment not arriving in U.S.).

Customs has also said that they will issue penalties for serious and repetitive errors under 19 USC 1595a(b), not subject to \$5,000.00 limitation, but rather tied to the value of the shipment.

Mitigation:

Late or inaccurate ISF, or the failure to withdraw an ISF already on file may be canceled upon payment of an amount between \$1,000 and \$2,000 for first offense. Subsequent offenses will go no lower than \$2,500. If law enforcement goals are compromised, there will be no mitigation.

Mitigating factors:

- Progress in implementing ISF during the flexible enforcement period - pre-January 26, 2010;
- Small number of violations compared to number of shipments;

- Tier 2 or Tier 3 C-TPAT membership;
- Demonstrated remedial action;
- Vessel diversion due to factors outside the ISF importer's control, e.g., weather (but accidents should be included and were not mentioned by Customs); and
- For inaccurate filings, did the importer acquire data from a third party and reasonably rely on it, plus was not reasonably able to verify the data - considered an extraordinary factor.

Aggravating factors include:

- Lack of cooperation with CBP;
- Impeding CBP activity;
- Evidence of actual or attempted smuggling (may be considered an extraordinary aggravating factor);
- Multiple errors on the ISF; and
- Rising error rate indicating deteriorating performance.

In the case of third-party data, Customs has said it will consider ordinary commercial practices and how the presenting party acquired the data, and whether and how that presenting party is able to verify that data. If the importer is unable to verify the data, the standard is "reasonably believes to be true." If Customs agrees that the importer could reasonably believe the data was accurate, it may lead to outright cancellation of any liquidated damages claim.

Customs retains the right to:

(1) issue "do not load" messages; (2) delay or deny the carrier's preliminary entry permit to unlade; (3) withhold release or transfer of cargo; and (4) apply statutory penalties, such as 19 U.S.C. 1595a(b), for aiding unlawful importations.

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For more details, contact your local Masterpiece office.

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