

DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION

CBP Dec. 09-26

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

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: Pursuant to Section 203 of the Security and Accountability for Every Port Act of 2006 (Pub. L. 109-347, 120 Stat. 1884 (SAFE Port Act)) and section 343(a) of the Trade Act of 2002, as amended (set forth at 19 U.S.C. 2071 note), U.S. Customs and Border Protection (CBP) published in the Federal Register (73 FR 71730), an Interim Final Rule (CBP Dec. 08-46) on November 25, 2008, requiring that CBP receive, by way of a CBP-approved electronic data interchange system, information pertaining to cargo destined to the United States by vessel. Pursuant to CBP Dec. 08-46, carriers are generally required to submit two data elements – a vessel stow plan and container status messages relating to containers loaded on vessels destined to the United States – in addition to the elements they are already required to electronically transmit in advance; and Importer Security Filing (ISF) Importers, as defined in the regulations, are generally required to submit an ISF containing 10 data elements relating to cargo destined to arrive within the limits of a port in the United States by vessel. Under the authority of 19 U.S.C. 1623, this document publishes guidelines for the assessment and cancellation of claims for liquidated damages incurred by carriers and ISF Importers for failure 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.

EFFECTIVE DATE: These guidelines will take effect July 17, 2009.

FOR FURTHER INFORMATION CONTACT: Chris Pappas, Penalties Branch, Regulations and Rulings, Office of International Trade, (202) 325-0109.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to Section 203 of the Security and Accountability for Every Port Act of 2006 (Pub. L. 109-347, 120 Stat. 1884 (SAFE Port Act)) and section 343(a) of the Trade Act of 2002, as amended (set forth at 19 U.S.C. 2071 note), U.S. Customs and Border Protection (CBP) published in the Federal Register (73 FR 71730), an Interim Final Rule (CBP Dec. 08-46) on November 25, 2008, requiring that CBP receive, by way of a CBP-approved electronic data interchange system, information pertaining to cargo destined to the United States by vessel. Pursuant to CBP Dec. 08-46, carriers are generally required to submit two data elements – a vessel stow plan and container status messages relating to containers loaded on vessels destined to the United States – in addition to the elements they are already required to electronically transmit in advance; and Importer Security Filing (ISF) Importers, as defined in the regulations, are generally required to submit an ISF containing 10 data elements relating to cargo destined to arrive within the limits of a port in the United States by vessel. Under the authority of 19 U.S.C. 623, this document publishes guidelines for the assessment and cancellation of claims for liquidated damages incurred by carriers and ISF Importers for failure 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 text of the guidelines is set forth below.

Date: June 24, 2009

JAYSON P. AHERN,
Acting Commissioner,
Customs and Border Protection.

Guidelines for the Assessment and Cancellation of Claims for Liquidated Damages for Failure to Comply with the Vessel Stow Plan Requirements (19 CFR 4.7c) and Container Status Message Requirements (19 CFR 4.7d); Guidelines for the Assessment and Cancellation of Claims for Liquidate Damages for Failure to Comply with the Importer Security Filing Requirements (19 CFR 149.2)

I. In General

In addition to liquidated damages that may be assessed as provided for below, the failure of an arriving carrier or Importer Security Filing (ISF) Importer to provide the required advance electronic cargo information in the time period and manner prescribed by the regulations in Title 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. Where the ISF Importer receives any of the ISF information from another party and where the carrier receives any of the vessel stow plan and container status message 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.

II. Failure to File Complete, Accurate and Timely Vessel Stow Plan (19 CFR 4.7c)

A. Requirements

- A vessel stow plan is required for all vessels subject to 19 CFR 4.7(a), except for any vessel exclusively carrying break bulk cargo or bulk cargo.
- The incoming carrier (i.e., vessel operator) is required to submit the vessel stow plan.
- The vessel stow plan must be submitted so that CBP receives it no later than 48 hours after the vessel departs from the last foreign port. For voyages less than 48 hours in duration, CBP must receive the stow plan prior to arrival at the first U.S. port.
- Inasmuch as CBP requires that an accurate and complete stow plan be submitted, a carrier must submit a new accurate vessel stow plan immediately upon discovery of any inaccuracies.

B. Violations

- It is a violation to fail to submit a vessel stow plan when one is required, to submit a late vessel stow plan, or to submit an inaccurate vessel stow plan.

C. Assessment of Liquidated Damages Claims for Vessel Stow Plan Violations

- 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 vessel stow plan under 19 CFR 113.64(f), for violation of 19 CFR 4.7c when a complete, accurate, and timely vessel stow plan was not submitted.
- A claim for liquidated damages in the amount of \$50,000 may be assessed for each vessel arrival.

D. Additional Statutory Penalties. A penalty may be assessed under the provisions of 19 U.S.C. 1436 with CBP Headquarters approval for serious or repetitive violations. Such penalties will be mitigated in a manner consistent with current guidelines for section 1436 penalties. *See* the applicable guidelines, published in the CBP Bulletin and Decisions (CBP Dec. 05-23) on July 6, 2005.

E. Cancellation of Liquidated Damages Claims for Vessel Stow Plan Violations

1. Failure to File

- a. First violation. For the first violation, if an arriving carrier incurs a liquidated damages claim for failure to file a vessel stow plan, the liquidated damages claim may be cancelled upon payment of an amount between \$5,000 and \$25,000, depending on the presence of mitigating or aggravating factors, if CBP determines that law enforcement goals were not compromised by the violation.
- b. Subsequent violations. If an arriving carrier incurs a subsequent liquidated damages claim for failure to file a vessel stow plan, the liquidated damages claim may be cancelled upon payment of an amount not less than \$25,000 if CBP determines that law enforcement goals were not compromised by the violation.
- c. No relief will be granted if CBP determines that law enforcement goals were compromised by the violation.

2. Late and Inaccurate Filings

- a. First violation. For the first violation, if an arriving carrier incurs a liquidated damages claim for filing a late or inaccurate vessel stow plan, the liquidated damages claim may be cancelled upon payment of an amount between \$2,500 and \$10,000, depending on the presence of mitigating or aggravating factors, if CBP determines that law enforcement goals were not compromised by the violation.
- b. Subsequent Violations. If the arriving carrier incurs a subsequent liquidated damages claim for filing a late or inaccurate vessel stow plan, the liquidated damages claim may be cancelled upon payment of an amount not less than \$5,000 if CBP determines that law enforcement goals were not compromised by the violation.
- c. No relief will be granted if CBP determines that law enforcement goals were compromised by the violation.

F. 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.

1. Mitigating Factors (these are not exhaustive):

- a. Evidence of progress in the implementation of the vessel stow plan requirement during the flexible enforcement period (i.e., January 26, 2009 through January 26, 2010).
- b. Vessel stow plan information was filed late because of vessel diversion due to factors outside of the carrier's control (e.g., due to weather).
- c. A carrier which has been validated and is in good standing with the (Customs-Trade Partnership Against Terrorism) C-TPAT program may receive additional mitigation of up to 50% of the normal mitigation amount.
- d. Demonstrated remedial action has been taken to prevent future violations.
- e. Regarding an inaccurate vessel stow plan, 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.

2. Aggravating Factors (these are not exhaustive):

- 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 vessel stow plan.
- d. There is a rising error rate which is indicative of deteriorating performance in the transmission of vessel stow plan information.

III. Failure to File Complete, Accurate and Timely Container Status Messages (19 CFR 4.7d)

A. Requirements

- A container status message (CSM) is required if the carrier creates or collects a CSM, relating to a container which is destined to arrive within the limits of a port in the United States from a foreign port by vessel, in its equipment tracking system reporting that event:
 - (1) When the booking relating to a container is confirmed.
 - (2) When a container undergoes a terminal gate inspection.
 - (3) When a container arrives or departs a facility (These events take place when a container enters or exits a port, container yard, or other facility. Generally, these CSMs are referred to as "gate-in" and "gate-out" messages.).
 - (4) When a container is loaded on or unloaded from a conveyance (This includes vessel, feeder vessel, barge, rail and truck movements. Generally, these CSMs are referred to as "loaded on" and "unloaded from" messages).
 - (5) When a vessel transporting a container departs from or arrives at a port (These events are commonly referred to as "vessel departure" and "vessel arrival" notices).
 - (6) When a container undergoes an intra terminal movement.
 - (7) When a container is ordered stuffed or stripped.
 - (8) When a container is confirmed stuffed or stripped.
 - (9) When a container is shopped for heavy repair.
- The incoming vessel operating carrier is required to submit CSMs.

- Carriers must submit container status messages no later than 24 hours after the CSM is entered into the carrier's equipment tracking system.
- If a carrier does not create or collect CSMs in an equipment tracking system, the carrier is not required to submit CSMs to CBP.

B. Violations

- Where a CSM is required, it is a violation to fail to submit a CSM, to submit a late CSM, or to submit an inaccurate CSM.

C. Assessment of Liquidated Damages Claims for CSM Violations

- Failure to file. If a carrier fails to submit a CSM where one is required to be submitted, Port Directors may assess a claim for liquidated damages against the carrier in the amount of \$5,000 per container status message under 19 CFR 113.64(g) for violation of 19 CFR 4.7d.
- Late filing. If a carrier submits a late CSM where one is required to be submitted, Port Directors may assess a claim for liquidated damages against the carrier in the amount of \$5,000 per container status message under 19 CFR 113.64(g) for violation of 19 CFR 4.7d.
- Inaccurate filing. If a carrier submits an inaccurate CSM, Port Directors may assess a claim for liquidated damages against the carrier in the amount of \$5,000 per container status message under 19 CFR 113.64(g) for violation of 19 CFR 4.7d.
- Claims for liquidated damages for failure to file a CSM, late CSMs, and inaccurate CSMs may be assessed up to a maximum of \$100,000 per vessel arrival.

D. Additional Statutory Penalties. A penalty may be assessed under the provisions of 19 U.S.C. 1436, or any other applicable statutory penalty authority, with CBP Headquarters approval for serious or repetitive violations. Section 1436 penalties will be mitigated in a manner consistent with current guidelines for section 1436 penalties. See the applicable guidelines, published in the CBP Bulletin and Decisions (CBP Dec. 05-23) on July 6, 2005.

E. Cancellation of Liquidated Damages Claims for CSM Violations

1. Failure to File

- a. First violation. For the first violation, if a carrier incurs a liquidated damages claim for failure to file a CSM, the liquidated damages claim may be cancelled upon payment of an amount between \$1,000 and \$2,000 per CSM not filed, depending on the presence of mitigating or aggravating factors, if CBP determines that law enforcement goals were not compromised by the violation.
- b. Subsequent violations. If a carrier incurs a subsequent liquidated damages claim for failure to file a CSM, the liquidated damages claim may be cancelled upon payment of an amount not less than \$2,500 per CSM not filed if CBP determines that law enforcement goals were not compromised by the violation.
- c. No relief will be granted if CBP determines that law enforcement goals were compromised by the violation.

2. Late and Inaccurate Filings

- a. First violation. For the first violation, if a carrier incurs a liquidated damages claim for filing a late or inaccurate CSM, the liquidated damages claim may be cancelled upon payment of an amount between \$500 and \$1,000 per late or inaccurate CSM, depending on the presence of mitigating or aggravating factors, if CBP determines that law enforcement goals were not compromised by the violation.
- b. Subsequent violations. If a carrier incurs a subsequent liquidated damages claim for filing a late or inaccurate CSM, the liquidated damages claim may be cancelled upon payment of an amount not less than \$1,500 per late or inaccurate CSM if CBP determines that law enforcement goals were not compromised by the violation.
- c. No relief will be granted if CBP determines that law enforcement goals were compromised by the violation.

F. 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.

1. Mitigating Factors (these are not exhaustive):

- a. Evidence of progress in the implementation of the container status message 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 container status messages submitted by the carrier.
- c. A carrier which has been validated and is in good standing with the C-TPAT program may receive additional mitigation of up to 50% of the normal mitigation amount.

- d. Demonstrated remedial action has been taken to prevent future violations.
 - e. Regarding an inaccurate container status message, 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.
2. Aggravating Factors (these are not exhaustive):
- 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 container status message.
 - d. There is a rising error rate which is indicative of deteriorating performance in the transmission of container status message information.

IV. Failure to File Complete, Accurate, and Timely Importer Security Filing (19 CFR Part 149)

A. Importer Security Filing (ISF) Requirements Generally

- The ISF Importer, or its agent, must submit an ISF before cargo is laden at a foreign port for all non-bulk cargo destined to arrive in the United States by vessel.
- An ISF is required for each shipment, including elements at the lowest bill of lading level (i.e., at the house bill level, if applicable).
- The party who filed the ISF must update the ISF if, after the filing and before the goods arrive within the limits of a port in the United States, there are changes to the information filed or more accurate information becomes available.

B. ISF Importer

- The party required to submit the ISF (i.e., the ISF Importer) is the party causing the goods to enter the limits of a port in the United States.
- The ISF Importer is the carrier for foreign cargo remaining on board (FROB).
- The ISF Importer is the party filing for the immediate exportation (IE), transportation and exportation (T&E), or foreign trade zone (FTZ) documentation for those types of shipments.
- The ISF Importer is the goods' owner, purchaser, consignee, or agent such as a licensed customs broker for shipments other than FROB, IE, and T&E inbond shipments, and goods to be delivered to an FTZ.
- The ISF Importer, as a business decision, may designate an authorized agent to file the ISF on the ISF Importer's behalf.

C. ISF-10 for Shipments Other Than Those Consisting of FROB and IE or T&E Shipments

1. ISF-10 Elements: (1) Seller; (2) Buyer; (3) Importer of record number/Foreign trade zone applicant identification number; (4) Consignee number(s); (5) Manufacturer (or supplier); (6) Ship to party; (7) Country of origin; (8) Commodity Harmonized Tariff Schedule of the United States (HTSUS) number; (9) Container stuffing location; and (10) Consolidator (stuffer).

2. Line-Item Linking. The manufacturer (or supplier), country of origin, and commodity HTSUS number must be linked to one another at the line item level.

3. ISF-10 Timing

- Two of the elements – the Container stuffing location and Consolidator (stuffer) – are subject to flexibility as to timing. These two elements must be submitted as early as possible and in any event no later than 24 hours prior to arrival in a U.S. port (or upon lading at the foreign port if that is later than 24 hours prior to arrival in a U.S. port).
- The other eight elements must be submitted no later than 24 hours prior to lading.

4. Flexibilities

- Two of the elements – the Container stuffing location and Consolidator (stuffer) – are subject to flexibility as to timing. See the ISF-10 Timing section above.
- Four of the elements – Manufacturer (or supplier), Ship to party, Country of origin, and Commodity HTSUS number are subject to flexibility as to interpretation. While these four elements must be submitted 24 hours prior to lading, the ISF Importer, in its initial filing, may provide a range of acceptable responses based on facts available to the importer at the time, in lieu of a specific response (which may become known to the importer only at a later time). The ISF Importer must update its filings with respect to these four elements as soon as

more precise or more accurate information is available, in no event later than 24 hours prior to arrival at a U.S. port (or upon lading at the foreign port if that is later than 24 hours prior to arrival in a U.S. port).

D. ISF-5 for Shipments Consisting Entirely of FROB and IE or T&E Shipments

1. ISF-5 Elements: (1) Booking party; (2) Foreign port of unloading; (3) Place of delivery; (4) Ship to party; and (5) Commodity HTSUS number.
2. ISF-5 Timing
 - The ISF for IE and T&E in-bond shipments must be submitted 24 hours prior to lading.
 - The ISF for FROB must be submitted any time prior to lading.

E. Updates. The party who filed the ISF (ISF-10 or ISF-5) must update the ISF if, after the filing and before the goods arrive within the limits of a port in the United States, there are changes to the information filed or more accurate information becomes available.¹

F. Violations

- It is a violation to fail to submit an ISF when one is required, to submit a late ISF, or to submit an inaccurate ISF.
- It is a violation to submit an inaccurate update pursuant to 19 CFR 149.2(d) or to fail to withdraw an ISF pursuant to 19 CFR 149.2(e).

G. Assessment of Liquidated Damages Claims for ISF Violations

- Failure to file. Liquidated damages cannot be assessed for the failure to file an ISF if no bond is in place. See paragraph K for instructions for enforcement for the failure to file an ISF.

¹ See the "Flexibilities" section above for additional specific update requirements applicable to the four elements that are subject to flexibility as to interpretation.

- 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 under 19 CFR 113.62(j), 113.63(g), 113.64(e), or 113.73(c) for violation of 19 CFR 149.2.
- 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 under 19 CFR 113.62(j), 113.63(g), 113.64(e), or 113.73(c) for violation of 19 CFR 149.2. With regard to liquidated damages claims assessed for an inaccurate ISF, 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.
- Updates. If an ISF Importer submits an inaccurate ISF update pursuant to 19 CFR 149.2(d), Port Directors may assess a claim for liquidated damages against the party for the first inaccurate ISF update in the amount of \$5,000 under 19 CFR 113.62(j), 113.63(g), 113.64(e), or 113.73(c) for violation of 19 CFR 149.2.
- 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 under 19 CFR 113.62(j), 113.63(g), 113.64(e), or 113.73(c) for violation of 19 CFR 149.2.

H. Additional Statutory Penalties. A penalty may be assessed under the provisions of 19 U.S.C. 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 U.S.C. 1448 or 1499. See page 16 of the Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages Informed Compliance Publication.

1. Cancellation of Liquidated Damages Claims for ISF Violations 1. 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.
2. 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.
3. No relief will be granted if CBP determines that law enforcement goals were compromised by the violation.

J. 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.

1. 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.

2. 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.

K. Failure to File

1. If goods for which an ISF has not been filed arrive in the United States, 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.
2. 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.