

Old Dominion Freight Line, Inc. ISF Update – July 2009

ISF Mitigation Guidelines are expected to be published by July 17

Customs and Border Protection expects the Importer Security Filing (ISF) Mitigation Guidelines to be published in the Federal Register on July 17, 2009. .

Circumstances Initiating a Liquidated Damages Case:

There are four situations that may initiate the issuance of liquidated damages:

1. the importers' failure to file an ISF as required by law
2. a late submission
3. an inaccurate submission
4. the failure to withdraw a filing

Where law enforcement goals are clearly compromised, such as smuggling attempts, fraudulent activities, terrorist activities, and other actions clearly contrary to law, importers can expect to receive no consideration of circumstances for mitigation.

Failure to File an ISF:

CBP indicates that they may choose one of several paths for those shipments where there is a complete failure to file an ISF:

- A. the issuance of a Do Not Load (DNL) message to the carrier at the foreign port of lading
- B. withholding permission issued to the carrier to unload the subject goods at the first U.S. port of arrival
- C. delay in issuing permission to unload at the first U.S. port of arrival
- D. issuance of a seizure notification; withholding Customs release of the goods allowing the goods to move to General Order
- E. the issuance of a liquidated damages case.

The Failure to Withdraw a Filing:

A liquidated damages case will be issued in the amount of \$5,000. CBP has indicated that it is important that importers and filers withdraw an ISF when it is known to be invalid.

This may be a result of the cancellation of an order, the discovery of a significant change in the information necessitating a new ISF filing, a complete change in routing, or for other commercial reasons.

Mitigation Amounts:

There is a potential for a total of \$10,000 in liquidated damages per ISF filing. These may be mitigated based on several factors. For the first violation, CBP may cancel the liquidated damages case for the payment of \$1,000 - \$2,000. For second and subsequent violations, CBP may cancel the liquidated damages case for the payment of \$2,500.

Mitigation Factors:

CBP will outline six mitigation factors for use in determining cancellation of liquidated damages cases. A summary is provided below:

1. Evidence of progress in implementing ISF compliance during the phase-in period.
2. The number of ISFs compared with the number of violations.
3. C-TPAT Tier 3 and Tier 2 importers will receive consideration of up to 50 percent mitigation for violations.
4. The importer has demonstrated that remedial actions have been taken to address the circumstances surrounding the violation.
5. Inaccurate filings due to circumstances beyond the importer's control, such as vessel diversions and rolling bookings completely due to carrier actions.
6. Receiving incorrect information from another party in the supply chain, if this information is found to be incorrect at a date later than allowed under the correction timeline. Under certain circumstances the liquidated damages may be canceled without payment.

An Inaccurate Submission of Information on an ISF:

A liquidated damages case will be issued in the amount of \$5,000. In this area CBP has clearly attempted to strike fear by indicating they will take into consideration how and from whom the ISF importer obtained the information for use in the ISF and the importer's ability to commercially verify the information received.

CBP will continue to allow parties to present information that they believe to be reasonably true at the time of filing, and will continue to be flexible so long as the importer is able to demonstrate that it has taken measures to verify the information to the extent commercially possible.

CBP acknowledges that some data is beyond the control of the importer, such as rolled bookings and vessel diversions. In those cases CBP will take these factors into account when issuing liquidated damages cases.

If there are successive filings of the ISF data to perfect or correct the data transmitted, CBP will consider *only* the filing closest to the allowed filing timeframe, which is typically the last ISF filed, for the purposes of issuance of liquidated damages. This suggests there will not be a per transmission penalty. CBP also acknowledges that data may change somewhat during the transaction itself, and that the correction process is designed to allow for reporting of changed information prior to arrival in the U.S.

A Late Submission of an ISF:

A liquidated damages case will be issued in the amount of \$5,000. As CBP expected, the phase-in period has demonstrated several commercial challenges in obtaining all of the information required in a timely manner. CBP indicates they will be fair in evaluating the timeliness of the filing and will continue to work with those parties who have participated in the process to date. The filing of provisional data is always an option for importers and by only utilizing the filing closest to the timeline of filing for the issuance of liquidated damages, CBP encourages all importers to file data based on that which is commercially available to meet the timelines.

Aggravating Factors:

There are four aggravating factors that will be outlined in the guidelines. A summary is provided below:

1. The lack of cooperation with CBP.
2. Smuggling attempts and other actions contrary to law in association with the shipment.
3. Multiple errors on one ISF.
4. A rising error rate calculated over all ISFs.

Bond Guidelines Due

Bond Guidelines are still being worked on internally at CBP and are expected to be issued a few weeks after the mitigation guidelines. While the mitigation guidelines do spell out a likely limit of liability in that there is a possible total of \$10,000 in liquidated damages that may be issued, the Single Transaction Bond process and the ISF stand alone continuous bond limit of liability is expected to be fully outlined in the Bond Guidelines.

Old Dominion is able to assist with your ISF filing and other brokerage needs. For more information regarding Old Dominion's ISF program, please contact your local Solutions Specialist or you can contact the OD Global via e-mail at Global.Services@ODFL.com