

## Customs Issues “10+2” Penalty Mitigation Guidelines

On July 7, 2009, U.S. Customs and Border Protection (“CBP”) announced it will publish guidelines to mitigate the penalties imposed under the importer and carrier security filing requirements known as the “10+2” rule (“Rule”). The Rule, available at <http://edocket.access.gpo.gov/2008/pdf/E8-27048.pdf>, was finalized on November 25, 2008, and became effective on January 26, 2009. CBP instituted flexible enforcement for the phase-in period during the first 12 months of the Rule’s enactment.

The Rule requires importers to provide ten additional data elements through an Importer Security filing (“ISF”) 24 hours in advance of a cargo lading at port. These additional data elements include identification of the seller and buyer; importer of record number/FTZ applicant information number; consignee number(s); the manufacturer or supplier; identification of ship to party; country of origin; HTSUS number; container stuffing location and consolidator (stuffer). Early reports indicate the Rule would cause importers to incur substantial costs by requiring them to collect and provide the additional data. As discussed below, the penalties and liquidated damages imposed on importers for noncompliance can be severe.

The penalty guidelines will help clarify instances where CBP may impose penalties and circumstances where such penalties may be mitigated or cancelled. Key elements of the forthcoming guidelines include:

- Situations triggering potential liquidated damages: CBP may impose liquidated damages in four situations: where there is a complete failure to file an ISF; where the submission is inaccurate; where the ISF is filed late; and where an importer fails to withdraw a filing known to be invalid. In the latter three situations, the liquidated damages case will be issued in the amount of \$5,000. When there is a complete failure to file an ISF, CBP may choose to impose liquidated damages or issue a Do Not Load message to the carrier, withhold permission or delay issuing permission for the carrier to unload the subject goods at the first U.S. port of arrival, or withhold Customs release of the goods for movement to General Order.
- Mitigating factors: CBP will consider the following six factors in determining the mitigation or cancellation of liquidated damages cases: evidence of progress in implementing ISF compliance during the initial 12-month phase-in period; the number of ISFs compared with the number of violations; remedial actions taken to address the circumstances surrounding the violation; inaccurate filings due to circumstances beyond the importer’s control; receipt of incorrect information from another party in the supply chain (if such information is discovered to be incorrect after the deadline for correction); and whether the importer is a C-TPAT Tier 3 or Tier 2 importer, in which case it will receive consideration of up to 50% mitigation for violations.
- Aggravating factors: CBP will also consider the following four aggravating factors in determining liquidated damages cases: lack of cooperation with CBP; smuggling attempts and other illegal actions in association with the shipment; existence of multiple errors on one ISF; and a rising error rate calculated over all ISFs.

CBP will not assess liquidated damages for ISF violations during the phase-in period, though importers are still required to make a good faith effort to comply with the new Rule. CBP will issue Do Not Load messages if there is a safety or security risk. The new penalty guidelines will be published in next week’s *CBP Bulletin*.

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