



For more information or if you have any questions please contact the Venable attorneys below.

Authors:

Lindsay B. Meyer
lbmeyer@Venable.com
202.344.4829

Ashley W. Craig
awcraig@Venable.com
202.344.4351

Carrie Kroll
cakroll@Venable.com
202.344.4574

U.S. Customs and Border Protection "10 + 2 Initiative": Enforcement Has Begun!

It's the new year and U.S. Customs and Border Protection's ("CBP") Importer Security Filing ("ISF") and Additional Carrier Requirements Rule, commonly called the "10 + 2 Initiative," is now in full effect.

January 26, 2010 marked the end of a 12-month "flexible enforcement period" during which CBP monitored efforts at compliance with these filing requirements. U.S. importers and carriers are now *required* to provide additional advance trade data for non-bulk cargo shipments prior to a vessel's loading at a foreign port⁽¹⁾. ISF information generally consists of 10 additional data elements from U.S. importers⁽²⁾, and two (2) from carriers⁽³⁾. In order to augment U.S. national security at the point of entry, ISF must be filed electronically with CBP no later than 24 hours *before* the cargo is laden aboard a vessel destined for the United States.

Now, the time for discretionary compliance is over! While CBP will take a gradual "common sense" approach to the escalation of its enforcement measures under ISF requirements (in order to achieve maximum compliance), this should *not* be seen as an extension of "flexible" enforcement. Rather, CBP will enforce the ISF, vessel stow plan, and container status message requirements through the assessment of liquidated damages and penalties in accordance with existing Customs entry requirements, laws and regulations.

We fully expect CBP enforcement to generally proceed, as follows:

First and Second Quarters (January through June):

Non-Compliance. At the outset, CBP's efforts will be concentrated on those "non-compliant" ISF importers and carriers, namely, those who are not filing ISFs for U.S.-bound shipments. At the very least, non-compliant importers should expect to receive a warning and experience delays in the release of their cargo while CBP analyzes and mitigates any potential risks associated with such cargo. ISF importers and carriers that have not invested the time and effort into fulfilling these Regulations will see their shipments undergo a nonintrusive inspections ("NII") exam upon arrival in the U.S., "document reviews," and physical examinations of all cargo with no ISF, which could result in the assessment of penalties.

Attempted Compliance. Hopefully, most ISF importers and carriers have begun to integrate these requirements into their day-to-day operations. This is central, as CBP plans to work with importers who experience trouble filing ISF as a part of its phasing-in program. In 2009, CBP monitored all ISF submissions for timeliness, accuracy and completeness and now agrees to work with those importers that showed progress during this period. On a case-by-case basis, an entity's progress in the implementation of the rule during the delayed enforcement period will be a mitigating factor in any enforcement action following the delayed enforcement period that began on January 26, 2010.

CBP will also use data collected during the first quarter – including a lack of filings or inaccurate filings-- when considering enhanced enforcement measures, which kick in at the end of the year.

Bonds. Since January 26th, ISF importers are also required to secure a bond under the 10 + 2 Initiative. Under the bond terms, the principal agrees to comply with ISF requirements and, in the event of breach, agrees to pay liquidated damages of \$5,000 *per* violation.

Third/Fourth Quarters (July through December):

As its enforcement "regime" graduates, CBP warns that non-compliant importers and carriers will continue to see increases in the amount of manifest holds and examinations, further delaying cargo, and disrupting business and basic domestic port operations. They will also be subject to stricter enforcement measures, such as *liquidated damages*, and "Do Not Load" ("DNL") holds. CBP has suggested that importers who received warning letters and calls during the early part of the year, and did not improve their performance will be more likely to be subject to liquidated damages claims from CBP.

Also, C-TPAT companies that remain non-compliant may be considered for reduction, suspension or even revocation of their C-TPAT status. All evaluations of non-compliance will be undertaken on a case-by-case basis, and will consider the totality of factors surrounding a potential violation before applying enforcement action.

Possible Violations, Penalties and Liquidated Damages?

There are four possible violations specific to ISF that may result in penalties to importers:

- Failure to file;
- Late filing;
- Inaccurate/incomplete filing; and/or
- Failure to withdraw a filing.

Under the 10 + 2 Initiative, liquidated damages claims are now set at \$5,000 per violation. Under the recent CBP "Guidelines" regarding the failure to comply with the vessel stow plan, container status message, and import security filing requirements, CBP may assess *more* than one claim for liquidated damages per ISF transmission. For example, violations may be assessed as follows: a) \$5,000 per late ISF, b) \$5,000 per inaccurate ISF, and c) \$5,000 for the first inaccurate ISF update. Thus, damages have the potential to add up quickly!

As we await publication of a Final Rule confirming certain specific enforcement measures, such as the liquidated damages process, as well as other ISF administrative details, enforcement of these Regulations are already in effect. And, while CBP notes that it will take a "measured approach" to enforcing the 10 + 2 Initiative, it remains essential for all ISF importers and Carriers to begin internally assessing their ISF compliance immediately. CBP has made clear that an importer's ISF filing history, especially if illustrating an effort at improving compliance (including during 2009), can and will be used as a mitigating factor in the face of potential penalties and liquidated damages. The message is simple: don't delay further; rather, act now!

To find out how your business may be affected in the coming year and how Venable may be able to assist you, contact Ashley W. Craig, awcraig@Venable.com, or at 202.344.4351 or Lindsay B. Meyer, lbmeyer@Venable.com, or at 202.344.4829.

[1] Pursuant to Section 203 of the SAFE Port Act of 2006 and Section 343(a) of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002.

[2] These ISF importer data elements are: (1) Importer of Record Number; (2) Consignee Number; (3) Seller (Owner) Name/Address; (4) Buyer (Owner) Name/Address; (5) Ship to Party; (6) Manufacturer (Supplier) Name/Address; (7) Country of Origin; (8) Commodity HTS-6; (9) Container Stuffing Location; and (10) Consolidator (Staffer) Name/Address.

[3] The two data elements required from carriers are: 1) Vessel stow plans; and 2) Container status messages.

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