

ISF Enforcement Summary
As of August 27, 2013



Industry Concerns	CBP Response	Surety Comments
Lack of information as to timeliness of ISF filing.	CBP is exploring whether or not vessel departure date can be added as a data field in response to a bill of lading (B/L) or manifest query.	Sureties would like to have access to this information also.
New ISF hold codes have been created but some CBP port personnel do not seem to understand what they mean.	CBP HQ has committed to reach out to the port personnel to attempt to correct this problem.	We are very concerned by the fact that CBP HQ has stated that they will not (except regarding the requirement to obtain HQ approval before mailing of liquidated damages (LD) demands during the current phase) impose uniform operations policy upon various ports of entry.
Ports should not place a no load at port of loading too far in advance of vessel loading. Lack of an automated manifest system (AMS) match should not, in and of itself, cause a no load message to be issued.	As of 8/9/13, CBP HQ considered this to be a mysterious problem and requested specific examples so this could be investigated. It was stated that no load should not be a part of this process except when national security issues are associated with the specific situation in question.	Issuance of a no load at port of loading has serious ramifications for importers (and may be necessary for border security purposes) but does not have direct bonding implications.
Lack of communication between HQ and ports regarding enforcement.	CBP HQ has provided direction to ports and has stated that port bulletins on ISF enforcement are, for the most part, consistent with such direction. They have declined to discuss operational elements of such communications.	Based on prior (non-ISF) LD experience, sureties and bond principals have reason to be concerned about lack of uniformity among ports. Note that, on port public bulletins issued as of now, the common element among all is "ISF jail" on shipments where no ISF has been filed prior to filing of entry. CBP statements to date suggest that importers should expect, at minimum, a non intrusive inspection (NII) and in some cases an intensive exam may be ordered.

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<p>Lack of uniformity among ports on placing of ISF holds and issuance of LD.</p>	<p>Owing to port-to-port variations with respect to operating concerns and resources, HQ will not impose uniformity upon ports (other than as mentioned above) on operational matters. CBP HQ acknowledges (without explicitly defining the term) that "leniency" will vary from port to port. The general thrust of HQ comments in this regard is that ports can expect HQ support of port policy positions on operations.</p>	<p>See previous comments.</p>
<p>Will LD issuance become essentially "automatic" such as it currently is on late filing of 7501s?</p>	<p>During the current phase in which HQ approval is required before mailing of 5955As, no. Eventually, yes.</p>	<p>This is consistent with longstanding CBP LD policy/practice in general and CBP's repeated statements that the ultimate objective is "100% compliance". If current compliance rates were to persist, the result would be an exponential (3900%) increase in annual LD case count - all breach types/all bond activity codes combined. Even using far more conservative numbers presented by a major port since July 9, a five-fold overall increase would occur, radically altering surety loss development.</p>
<p>Various issues relating to B/L mismatches.</p>	<p>CBP HQ has asked to be provided with specific examples of problems on B/L matching/duplicate ISF/house bill of lading (HBL) issues.</p>	<p>At some point, LD issuance will become inevitable in situations where CBP's systems cannot match B/L information in the ISF to AMS data. There will certainly be times when an importer will ultimately be able to prove that there was in fact no violation but you should expect that this will need to be accomplished via the petitioning process, not before. ISF filers are at the mercy of the information provided them by importers, ocean carriers, NVOCCs, and other parties. It seems highly unlikely that CBP will ever retract its policy of not allowing release prior to receiving an ISF.</p>

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Need for consistency on policy regarding holds on consolidated containers when there is ISF compliance by some HBL holders but not by all.	CBP HQ will not dictate operations policy to ports.	CBP has stated they do not see an immediate solution to this problem. Again, we are very concerned about the ramifications of port-to-port inconsistencies.
The most recent ISF FAQ on the CBP website was three years old as of July 2013. When will this be updated?	This information is to be updated sometime in August or September 2013.	Please contact your Roanoke Trade representative for guidance with any bond related questions.
What is the status of enforcement on ISF-5s?	There is a need for clarification of ISF-5 filing responsibilities, especially with regard to freight remaining on board (FROB). ISF-5 enforcement is not currently in LD enforcement mode.	There will potentially be additional instances of ambiguity/controversy with respect to responsibility for ISF filing, especially in situations where a shipment arrives in the U.S. and no ISF-10 has been filed. One example could be where a sale in transit has occurred.
Will CBP require larger Activity Code 1 continuous bonds (C1) from importers using their bond to secure ISF liabilities?	CBP will not require a larger continuous import bond merely because it is used to secure ISFs.	We don't expect CBP to impose an across-the-board increase in C1 requirements for importers of goods by ocean, but it is conceivable that adverse ISF LD experience could alter this for specific importers. Do expect selective mandated increases if ISF LD claims are not resolved in a timely fashion by specific importers. CBP already requires Activity Code 1 STBs used to secure unified ISF/entry filings to be increased by \$10,000 per bond.
What is the maximum amount of ISF LD assessment in connection with a single ISF?	CBP has made a policy decision to put a \$10,000 aggregate LD cap on a single ISF, irrespective of the number of violations.	The Customs Regulations do not provide for a cap on single ISF liability, only a \$5,000 gross LD assessment per violation. Multiple violations on a single ISF resulting in LD assessments in excess of \$10,000 are, from a statistical standpoint expected to be extremely rare. Note that \$10,000 cap is, on its face, consistent with CBP policy regarding STB amounts on unified filings.

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<p>Will an importer's past compliance record (positive or negative) be taken into account when considering relief on ISF LD?</p>	<p>On some occasions, CBP has emphatically stated "yes." (On one occasion, a CBP HQ representative said this will be the case "always and ever.") On another occasion, the same official stated that a previously compliant importer whose performance significantly deteriorates at a later time could be viewed as an egregious offender.</p>	<p>ISF LD mitigation prospects in general are problematic. CBP published ISF mitigation guidelines in July of 2009. The minimum assessment (after mitigation) on a first violation is \$1,000 and the minimum assessment for a subsequent violation is \$2,500. (C-TPAT importers can qualify for additional relief.) Furthermore, when CBP published its interim final rule in the Federal Register in November of 2008, they stated categorically that "mitigation will be the exception and not the rule for violations of these requirements."</p>
<p>What are CBP's enforcement tools in addition to LD?</p>	<p>CBP has on various occasions advised the public that they may assess penalties under 19 U.S.C. § 1595a(b).</p>	<p>CBP clearly uses ISF holds/NIIIs/intensive exams to motivate non-compliant parties. During preliminary discussions with the international trade community (which did not include sureties), no load was the only remedy specified and CBP now talks about that as a rarely applied last resort. It is possible that attorneys for importers will raise questions as to the applicability of 19 U.S.C. § 1595a(b) should CBP resort to such actions.</p>
<p>How long will HQ review of LD prior to issuance to violators be a part of the process?</p>	<p>In most instances, CBP has said that HQ review/approval will be required for at least one year (i.e., until a time not earlier than July 9, 2014). They have committed to sending a CSMS message at least 30 days before the HQ review requirement is terminated.</p>	<p>In at least one instance, CBP has also said the HQ review requirement would continue for "6 to 12 months" but in the preponderance of instances the 12 month period has been stated. It is certainly everyone's hope that going forward, senior CBP officials will not overrule those who have worked to date to implement ISF processes and impose harsher policies.</p>

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<p>Will CBP consider committing to limit its LD issuance actions to a period shorter than the six year statute of limitation?</p>	<p>While they want to see ISF LD claims issued promptly, they do not have complete control over port processing. They will not agree to be bound by a limit other than the one specified in the statute. Certain comments suggest they expect 30 to 60 days to be the norm.</p>	<p>It is unrealistic to expect a federal agency to enter into a binding agreement on an across-the-board basis that waives statutory protections afforded them. In reality, the implications of the six year statute (which applies to any bond-originated liability) in the context of ISF liability is no different for a surety than it is in the context of other liabilities, such as supplemental duties. The expectation is that attorney's will argue that the statute begins to run on ISFs at the time the filing of the ISF is required. On supplemental duties, attorneys may be expected to argue that the statute runs from liquidation, which can be years after entry date. ISFs do not liquidate. Importer liability for duty is not limited by bond amounts but ISF (and other) LD liabilities are. Collateral retention/release policy on ISFs may vary from one surety to another.</p>
<p>Will CBP assess LD on any violations which occurred prior to 7/9/13?</p>	<p>HQ has consistently asserted that retroactive LD assessment is not their intention but has also on many occasions added the disclaimer that they reserve all rights to enforcement actions deemed appropriate under given circumstances, especially in the case of egregious offenders.</p>	<p>We think it unlikely that HQ will approve mailing of an LD claim involving a violation that occurred prior to 7/9/13. Note that, although CBP has used the term "egregious" on many occasions, they have been unable to define it.</p>

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<p>If you know an ISF is past due, should you file?</p>	<p>CBP has consistently emphasized that what they are primarily seeking is information and importers are urged in all instances to file an ISF, even if it's late.</p>	<p>We join CBP in urging you to file an ISF no matter how late it may be. While it is true that we (and, to our knowledge, other sureties) require collateral in order to authorize an ISF STB on a late filing, other possibilities may be considered. All Activity Code 1, 2, 3, and 4 continuous bonds cover ISF liability and no surety can bar you from using an importer's continuous bond which is in effect on the applicable date (ISF due date, in the current context) to fulfill a lawful requirement which is addressed by the conditions of that bond. As of now, CBP still accepts ISF Submission Type 5 (late ISF-10 with no bond), although it is possible they will refuse a filing on this basis if the importer responsible (in their opinion) for filing had a continuous bond of Activity Code 1, 2, 3, or 4 in effect on the ISF due date. <u>Roanoke Trade strongly cautions customs brokers against filing ISFs and/or entries against their own bond.</u></p>

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<p>What is "timely" for ISF filing purposes?</p>	<p>Departure from the foreign port (of the vessel that will actually bring the cargo into a port in the U.S.) minus 24 hours (i.e., the same time one day earlier).</p>	<p>The actual regulation states the ISF is due 24 hours prior to loading but CBP concedes that neither they, importers, customs brokers, nor other ISF filers, have any way of accurately ascertaining such time. Strict regulatory requirements notwithstanding, it is difficult to envision this changing in the foreseeable future.</p>
<p>Broker recordkeeping requirements are five years but the statute of limitation applicable to ISFs is six years. Will CBP be adopting special recordkeeping requirements on ISFs?</p>	<p>There is no special recordkeeping requirement applicable to ISFs but CBP has said that keeping the records for six years "might be the best practice."</p>	<p>There are other substantive conflicts in law and regulations regarding recordkeeping requirements. ADD/CVD entries often take more than five years to liquidate (and the statute runs from liquidation) but brokers frequently dispose of ADD/CVD entry records (along with records on other types of transactions) at five years from date of entry. The regulation in question states records must be retained "for <u>at least</u> 5 years after the date of entry" (19 C.F.R. § 111.23 - emphasis added). Brokers should consult their legal advisors before formulating record retention policy.</p>

"Surety Comments" represent opinions, observations, and/or expectations expressed by Roanoke Trade.

"CBP Response" sets forth input from CBP officials as paraphrased by Roanoke Trade participants in various associations, committees, and organizations.