

ISF Enforcement Update
As of April 4, 2014



Industry Concern	Status/Comments
Bill of lading mismatch issues	It is anticipated that this will continue to plague ISF importers and filers for a long time to come. CBP has indicated that an ISF containing an incorrect B/L number is an inaccurate ISF. Bear in mind and avail yourselves of opportunities to update ISFs with more current/accurate information prior to vessel arrival.
Lack of information as to timeliness of ISF filing	CBP has begun to provide <i>some</i> vessel departure information, but it is incomplete. Our surety's last monthly ISF activity report retrieved from the ACE Portal contained VDM information on only about 1/8 of the line items.
Liquidated damage issuance	CBP commenced its "limited LD enforcement phase" in July of 2013. Due to various concerns and inconsistencies, they suspended LD issuance after about one month. At this time, LD issuance continues to be suspended and CBP has not announced a firm date for resumption of these activities. As always, they reserve their right to assess LD or take other enforcement actions deemed necessary by them for border security reasons.
Compliance rates	CBP states that the current compliance rate (as of March 2014) is "in the low 90% range." This is stated to represent the percentage of importers who are required to file and are actually doing so. CBP has not announced any statistics on compliance as regards timeliness or accuracy of filing. Due to deficiencies in ACE Portal data, timeliness projections by sureties would be of little value at this time.
LD mitigation	CBP has been granting a 50% reduction of assessed amounts (not gross amounts but mitigated amounts) when the ISF importer or the filer is C-TPAT certified. By way of illustration, this means the mitigated amount on first offenses has in some instances been \$500 rather than the \$1,000 minimum specified in mitigation guidelines.
Actual LD experience	CBP has publicly stated that only 20 LD cases have been issued to date, all of them during the summer of 2013 and all of them involving late filing vs. inaccurate filing.
Claims outlook	Considering the number of ISFs annually (approximately ten million) and a mere 20 LD cases to date, there is clearly no statistically sound basis for any inferences regarding the LD claims landscape that will emerge in the future. CBP continues to emphasize that their LD enforcement objectives will be to address/alter the behavior of chronic and/or egregious offenders. The latter would include importers engaging in fraudulent conduct. Absent fraud, this renders the analysis of importer behavior a subjective exercise.

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What constitutes serious or egregious offenses?	CBP often remarks that they are not interested in heavy-handed enforcement for minor infractions, and has explicitly stated they are not focusing on "one day late" offenses. However, in our own limited claims experience, two of the LD cases received involved ISFs filed one day late. While CBP has suggested that these cases were likely approved for issuance because the importer had exhibited chronic tardiness or other repeated deficiencies in the past, they did not provide confirmation of this and, as previously mentioned - the surety's liability and obvious interest in the principal's performance record notwithstanding - CBP does not make "ISF report cards" or other definitive analysis available to the surety. Bear in mind also CBP's previous public statement that ISF LD issuance will eventually become "automatic," just like it now is on late 7501 filing violations.
Six year statute of limitation concerns	CBP has stated that it will issue "guidance to ports to issue LD claims within 6 months or so of the ISF violation, otherwise understood no claim should be forthcoming." In the event of fraud, the six month time frame will not apply. Consistent with previous comments on the subject of restrictions other than the applicable statute of limitation, CBP adds the disclaimer that such a policy does not divest CBP of its rights to issue claims up to six years per statute. Bear in mind that the six year statute of limitation on contract actions (28 U.S.C. § 2415) applies to <u>all</u> types of LD as well as surety liability for duties, taxes, and fees. The six years runs from the "time the right of action accrues." On increased duty bills, this generally translates to six years from date of <i>liquidation</i> (not entry date).
Communication with ports/uniformity	CBP has indicated that there has been substantial communication with ports on ISF enforcement matters. However, as previously reported, CBP HQ has stated it will not dictate operations policy to ports on ISF enforcement. I.e., ports will not be mandated to address ISF enforcement-related matters (e.g., holds, intensive exams, NIIs, consolidated shipments with partial compliance) uniformly.
ISF final rule	CBP expects final rule publication "sometime this year." The interim final rule under which CBP is currently operating took effect on January 26, 2009. CBP has stated that the final rule will be subject to a "60 day comment period." However, this is the conventional way for handling <i>proposed</i> rules, not <i>final</i> rules. Hence, CBP's intentions on this are not entirely clear. The primary substantive changes from the interim final are expected to be elimination of the "flexible" aspect of certain filing elements and certain changes to clarify the handling of ISF-5s. In connection with the flexible element capability, bear in mind that modifications to timely ISFs in general may be filed prior to vessel arrival in the U.S.
ISF FAQ update	The current FAQ version is nearly four years old. During the summer of 2013, CBP said it would be updated by the beginning of last autumn. As of March 2014, the revision was said to be under "OR&R review."

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ISF-5 enforcement	(FROB, T&Es, etc.) This enforcement has not yet commenced. Although not explicitly stated by CBP, it is anticipated that this will not occur prior to final rule publication.
ISF submission type 5	"Late <i>ISF-10</i> without a bond." (Not to be confused with an "ISF-5.") This option remains available and no date of termination of this capability has been specified. This continues to be aimed at one-time importers/violators. For such parties, it should be viewed as an excellent alternative to obtaining a bond and posting collateral on a late ISF. As in the past, we urge repeat importers to obtain an Activity Code 1 continuous bond to minimize expenses and limit their exposure to LD, ISF-related or otherwise. We likewise continue to strongly caution brokers against filing ISFs or entries in their own name as this unnecessarily exposes them to potentially serious liability.
CBP Headquarters review of ISF LD	CBP has not specified how long this is to continue when LD issuance resumes.

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