

An Analysis of the New Importer Security Filing

Chris Peterson

Spring 2009

The events of September 11, 2001 left a wake of fear and confusion in America. Every aspect of national security had to be re-examined, including the international supply chain. Although no act of terrorism in the United States was facilitated by use of a marine container, securing this Nation's supply chain became a top priority. It soon became obvious to Congress how little information the government had in regard to trade and container security.

Since that time, Customs has implemented programs with acronyms such as CSI, AMS, and ISF designed to thwart terrorist attacks. These programs present a minefield for the unsuspecting importer or carrier. This paper proposes to address the compliance aspects of the ISF program as it relates to importers. 90% of the world's cargo moves by container (67 Fed. Reg. 66318, 66319 (October 31, 2002)) and therefore, this paper will only address containerized cargo.

A History of Ship's Manifests

To understand the new Importer Security Filing (ISF), one must look into the history of the use of a ship's manifest by Customs. The first manifest requirements appeared in 1799. Act March 2, 1799, c. 22 § 23-25, 1 Stat. 646. Sections 23 and 25 provided that all masters of vessels from foreign ports must present a cargo manifest to any United States collector, naval officer, or surveyor. The manifest had to disclose, among other things, the ports where the merchandise was laden; the destination ports in the United States; a "just and particular account of all goods"; the "number or quantity and description of the packages"; and the name of the consignee except where the shipment was "to order" of the shipper. Section 24 provided that any cargo not manifested was subject to forfeiture and that the master would have to pay a sum of the value of the forfeited cargo.

These provisions went unchanged until 1922. The Prohibition laws placed a burden on U.S. Customs and the Coast Guard to prevent smuggled alcoholic beverages from entering the United States. Congress attempted to meet the challenge by adopting the Fordney-McCumber Act (Tariff Act of 1922, 42 Stat. 989). The former manifest sections of Act March 2, 1799 were consolidated in the Tariff Act of 1922, § 431. Additionally, a \$500.00 penalty was included where the master failed to produce a manifest on demand. Tariff Act of 1922, § 584. Survival of the forfeiture provision was challenged and upheld in *Gillam v. U.S.*, 27 F.2d 296 (4th Cir., 1928).

It was argued in *United States v. Sisco*, 262 U.S. 165, 43 S. Ct. 511, 67 L. Ed. 925, (1923) that the manifest-forfeiture provision was inapplicable to contraband because the forfeiture did not involve the collection of Customs duties. *Sisco* involved a smuggled shipment of opium, for which there were not applicable Customs duties. The Court stated that, “the collection of duties is not the only purpose of a manifest...A Government wants to know, without being put to a search, what articles are brought into the country and to make up its own mind...whether it will allow the goods to enter at all.” *Id.* at 167. Thus the proposition that Customs could utilize the manifest for security purposes was upheld.

The modern version of a ship’s manifest requirement first appeared in the Tariff Act of 1930, codified under 19 U.S.C. § 1431. This section saw amendments in 1953, 1984, 1988, 1993, and 1996. 19 U.S.C.S. § 1431 (Lexis 2009). The current statute requires Customs to promulgate regulations for the collection of ship’s manifest data, including data in electronic form. These regulations are found in 19 C.F.R. §4. Customs requires that, along with submission of the ship’s manifest, the carrier must submit a “cargo declaration”. The cargo declaration was to be completed on Customs Form (CF) 1302 and had to include the inward

foreign cargo description, name of the shipper and consignee, vessel details, bill(s) of lading, container number, and port of loading. 19 C.F.R. 4.7a(c)(1)-(c)(3) and CF 1302.

Pursuant to its data-gathering powers under 19 U.S.C. § 1431, Customs created the Automated Manifest System (AMS). AMS allowed carriers the ability to transmit their manifest, including the cargo declaration, to Customs electronically. However, this manifest information only needed to be transmitted to Customs prior to vessel arrival in a US port. This rule only allowed Customs to identify and target a suspect shipment immediately prior to arrival in the US; it did not allow Customs to examine the shipment prior to arrival.

The fear that a weapon of mass destruction could be shipped in a marine container and detonated as a vessel was approaching a port motivated Customs to revise 19 C.F.R. Parts 4, 113, and 178. This revision is also known as the “24 Hour Rule”. Customs first proposed this rule on August 8, 2002 in 67 Fed. Reg. 51519. The final rule was published on October 31, 2002 in 67 Fed. Reg. 66318. The final rule remained unchanged from the proposed rule from August 2002.

The 24 Hour Rule required that Customs must receive a vessel’s cargo manifest from the carrier at least 24 hours prior to loading of the cargo at the foreign port. 19 C.F.R. §4.7(b)(2) (2009). The information required on the manifest was to include: the last foreign port before the vessel departs for the United States; the carrier’s Standard Carrier Alpha Code (SCAC); the carrier-assigned voyage number; the date the vessel is scheduled to arrive at the first U.S. port in Customs territory; the numbers and quantities of the carrier’s bills of lading; the first foreign port where the carrier takes possession of the cargo destined for the United States; a precise description and weight of the cargo; the shipper’s complete name and address (from all bills of lading); the consignee or owner’s complete name and address (from all bills of lading); the

vessel name, country of documentation, and official vessel number; the foreign port where the cargo is laden on board; HAZMAT code, if applicable; container numbers; and container seal numbers. 19 C.F.R. § 4.7a(c)(4).

The shipper and consignee name/address requirements presented a new obstacle. Carriers would often contract with certain forwarders known as Non-Vessel Operation Common Carriers (NVOCCs) under a master bill of lading. The NVOCC would then issue a house bill of lading for the actual shipper and consignee. The carrier would never know the identity of the actual shipper and consignee. The NVOCCs' businesses, premised on keeping client identities confidential, were threatened now that carriers were required to disclose this confidential information to Customs. As a compromise, Customs agreed to allow duly bonded and FMC-approved NVOCCs to transmit house bill-level information to Customs via AMS themselves.

Customs now had some basic information from which to make intelligent targeting choices (the process by which Customs identifies for examination high-risk cargo). But how would Customs use this information? Customs concurrently launched the Container Security Initiative (CSI), a partnership with foreign governments that would identify and pre-screen high-risk containers at port of loading. 67 Fed. Reg. 66318, 66319. Customs already had the criteria and automated targeting in place. *Id.* CSI promoted the use of more secure containers as well as advanced large scale x-ray and gamma ray machines and radiation detection devices. *Id.* CSI, in conjunction with the 24 Hour Rule, now gave Customs the ability to target and examine a shipment overseas and prevent a weapon of mass destruction from entering a U.S. port. As of October 2, 2007, 58 CSI ports were operational, including: Rotterdam, Bremerhaven, Antwerp, Tokyo, Yokohama, Hong Kong, Felixstowe, Le Havre, Port Klang, Laem Chabang, Dubai,

Shanghai, Santos, Kingston, Freeport, Haifa, and Alexandria. CSI Fact Sheet, U.S. Customs & Border Protection, (October 2, 2007).

ISF- Notice of Proposed Rulemaking (NPRM)

Internal and external governmental reviews concluded that the information gathered by the 24 Hour Rule was not enough to comprehensively assess a shipment's risk. 73 Fed. Reg. 90, 91 (January 2, 2008). In response, Congress passed the SAFE Port Act, 6 U.S.C. 943, in October 2006, which required Customs to develop, by regulation, an Automated Targeting System that would "identify and seek the submission of data related to the movement of a shipment of cargo through the international supply chain" and "analyze the data...to identify high-risk cargo for inspection." The data transmission was to be done electronically and in advance of loading in a foreign port.

Customs published their proposed rule in the Federal Register on January 2, 2008. 73 Fed. Reg. 90. The rule contemplated adding a new section 149 to chapter 19 of the Code of Federal Regulations and revising sections 4, 12, 18, 101, 103, 113, 122, 123, 141, 143, and 192. Customs' new rule had to adhere to the parameters of section 343(a) of the Trade Act of 2002, which required Customs to consider: the existence of competitive relationships among parties upon which the information collection requirements are imposed; different commercial practices and operational characteristics, and the technological capacity to collect and transmit information electronically; the need for interim requirements to reflect the technology that is available at the time of promulgation of the regulations for purposes of the parties transmitting, and CBP receiving and analyzing electronic information in a timely fashion; the use of additional information collected pursuant to these regulations only for security purposes and not for entry

purposes; the protection of privacy of business information; balancing the impact on the flow of commerce with the impact on cargo security; avoidance of redundancy; and a need for a transition period. 73 Fed. Reg. 90, 92.

The rule would require two additional data elements from carriers and ten additional data elements from importers. Thus, the rule acquired the nickname “10+2”. The data elements required for importers were: 1) manufacturer (or supplier) name and address; 2) seller name and address; 3) buyer name and address; 4) ship to name and address; 5) container stuffing location; 6) consolidator name and address; 7) importer of record number (importer number, SSN, or EIN); 8) consignee number (importer number, SSN, or EIN); 9) country of origin; 10) HTSUS number (the first six digits). 73 Fed. Reg. 90, 94. This information must be transmitted to Customs at least 24 hours prior to loading. Customs contemplated enforcement by way of liquidated damages penalties, up to the value of the shipment, for each violation of three new proposed bond conditions (only two of which apply to importers.)

Prior to publication of the NPRM, Customs met with the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Homeland Security Functions (COAC) and solicited comments from other industry groups, including the American Association of Exporters and Importers (AAEI), the American Association of Port Authorities (AAPA), the Joint Industry Group (JIG), the National Association of Manufacturers (NAM), the National Customs Brokers and Forwarders Association of America (NCBFAA), the International Compliance Professionals Association (ICPA), the Retail Industry Leaders Association (RILA), the Transportation Safety Network (TSN), the U.S. Chamber of Commerce, and the World Shipping Council (WSC). These groups provided the comments published in the NPRM. 73 Fed. Reg. 90, 92.

One concern these industry groups brought up was the cost to importers. Customs estimated that the total cost, in 2007 dollars, would be between \$300 million and \$520 million for 2008, and rising each year in relation to increases in import volumes. 73 Fed. Reg. 90, 105. Customs estimated that cost to an importer, on a per shipment basis, would be between \$24 and \$38. 73 Fed. Reg. 90, 106.

ISF- Final Rule

On November 25, 2008, Customs published its final rule in 73 Fed. Reg. 71730. The final rule incorporated some substantial changes from the proposed rule: there would be a structured review and flexible enforcement period; the maximum liquidated damages penalty amount was lowered; and new bond requirements were published. 73 Fed. Reg. 71730, 71735-71736.

The structured review and flexible enforcement period was included to give the trade opportunity to adjust to the new requirements before being subjected to a penalty. 73 Fed. Reg. 71730, 71734. Although Customs required importers to begin ISF filings on January 26, 2009, no penalty would be issued for failure to make a filing or for making an inaccurate filing for shipments prior to January 26, 2010.

Additionally, the final rule was flexible for some of the data elements. Customs placed these flexible data elements in two categories. The first category involved timing. Customs recognized that certain business relationships required flexibility as to timing on declaring the Container Stuffing Location and Consolidator. These elements could be submitted as late as 24 hours prior to *arrival* in a U.S. port. The second category involved interpretive flexibility and covered the data elements of Manufacturer, Ship to Party, Country of Origin, and HTSUS. A

range of acceptable responses were allowed for these elements provided base data was submitted 24 hours prior to loading. In the event it become known to the importer that a change was necessary, that data could and would have to be amended no less than 24 hours prior to arrival.

The liquidated damages amount for violations were lowered to \$5,000 for each violation of 19 C.F.R. §113.62(j) (Basic Importation and Entry Bond Conditions) and Appendix D to 19 CFR §113 (Importer Security Filing Bond). This was a welcome change, as originally proposed, the penalty amount was the value of the merchandise.

Two major changes were made with respect to bonds. 73 Fed. Reg. 71730, 71736. First, Customs changed the requirements of the Basic Importation and Entry Bond Conditions by amending the language of 19 C.F.R. §113.62. Section (j) was added, which reads:

(j) The principal agrees to comply with all Importer Security Filing requirements set forth in part 149 of this chapter including but not limited to providing security filing information to Customs and Border Protection in the manner and in the time period prescribed by regulation. If the principal defaults with regard to any obligation, the principal and surety (jointly and severally) agree to pay liquidated damages of \$ 5,000 for each violation.

In other words, any new single entry bond and all continuous bonds must cover ISF violations. The provision also meant that importers with active continuous bonds would not necessarily have to maintain a separate bond for ISF purposes.

Customs also added Appendix D to part 113, which outlined a new kind of bond: The Importer Security Filing Bond. This new bond gave the importers flexibility in determining if it

needed or desired a new, separate bond or would prefer new bond language pursuant to 19 C.F.R. §113.62(j).

Customs updated their original figures regarding costs to importers in the final rule. 73 Fed Reg. 71730 , 71769. The estimated costs (in 2008 dollars) were now between \$48 and \$390 per shipment. Set against the median value of \$37,900 per shipment, the additional ISF compliance costs were estimated to raise import costs between .13% and 1.03%. *Id.*

Pursuant to its obligations under the Regulatory Flexibility Act (RFA) of 1980, Customs concluded that, “a *substantial* number of small entities are likely to be affected by the rule.” 73 Fed. Reg. 71730, 71773, (emphasis in original). Customs was unable to “certify that the rule will not have a significant impact on a substantial number of small importers.” 73 Fed. Reg. 71730, 71769.

Comparison of ISF to AMS (Automated Manifest System),

AES (Automated Export System), and Entry

Customs currently collects international trade data electronically pursuant to four significant programs: AES, ABI (Automated Broker Interface), AMS, and ISF. Export information is handled by the Automated Export System. AES can be filed by the Exporter or a duly authorized agent of the exporter. 15 C.F.R. §30.3 (2009). With a few exceptions, export data must be submitted to Customs prior to export of the shipment. AES is submitted to Customs via the web-based portal accessible at <http://www.aesdirect.gov/> or from a system meeting the specifications of 15 C.F.R. §30.5 (2009).

An export declaration contains the following information: Exporter of Record; Shipper; Consignee; HTS (known as Schedule B) for any line items valued over \$2,500; and manifest data. 15 C.F.R. §30.3. Customs construes the Exporter of Record as the United States Principal Party in Interest (USPPI), usually identified by the exporter's EIN. 15 C.F.R. §30.1 (2009). The USPPI is the U.S. (in most cases) party that receives the primary benefit of the export transaction. Customs and the Census Bureau will seek to penalize the Exporter of Record for inaccurate AES filings. 15 C.F.R. §30.71 (2009).

Carriers are prohibited from loading cargo without a proper AES filing having been made first, and Customs will penalize carriers for loading cargo without an AES filing. 15 C.F.R. §30.71. Most carriers accept statements from exporters or freight forwarders affirming that the filing has been completed. Customs will penalize the exporter or freight forwarder in those cases.

AES serves three purposes- it collects trade data for the Census Bureau, it allows Customs an opportunity to inspect goods subject to duty drawback, and it allows Customs to prevent export of any item that would violate any number of national security laws. 70 Fed. Reg. 8200 (February 17, 2005).

Entry of imported merchandise works in many of the same ways. First, the data required is substantially similar: HTS, shipper, consignee, and manifest information. Instead of an Exporter of Record, there is an Importer of Record, also identified by the Importer's EIN. Additionally, Customs requires the country of origin and value for all of the cargo in order to determine admissibility and duty.

Entry data is submitted via the Automated Broker Interface (ABI) by either the importer or a licensed Customhouse broker. Cargo need not be cleared prior to arrival, but cargo not cleared by Customs within 15 days of arrival into the port of clearance is subject to General Order auction. Inaccuracies in the Entry can open the Importer of Record up to a penalty by Customs. The manifest information on the Entry must match the manifest information in AMS before a shipment can clear Customs (more specifically, released by the carrier).

An Entry's primary purpose is to assess admissibility and duty of cargo. Customs may examine cargo for which an Entry has been made to confirm its admissibility. This is known as an "intensive" examination. To a much lesser extent, Customs will examine cargo under Entry for security purposes.

Ship's manifest information is transmitted to Customs via the Automated Manifest System (AMS). As discussed above, AMS must be transmitted at least 24 hours prior to loading in the foreign port. AMS is transmitted by the carrier or by a duly authorized NVOCC. The information transmitted through AMS include, among other things: the shipper and consignee information ; a cargo description; and manifest identification data such as bill of lading number, container number, piece count, and weight.

The carrier and/or NVOCC is responsible for the timeliness of the AMS filing. Untimely or inaccurate AMS filings subject the cargo to either a "do not load" message (used for cargo not yet laden) or a "Customs manifest hold" message upon arrival in the United States. The Customs manifest hold message will mean that, at the very least, the cargo will have to undergo a VACIS (Vehicle and Cargo Inspection System) examination (or X-Ray/Gamma Ray exam) upon arrival in the United States. Additional examinations are possible as well.

Customs uses the information obtained from AMS to target high-risk cargo for examination. Late or inaccurate transmissions may cause a shipment to be deemed “high risk”. Customs uses other factors (which are not public but are most likely: the shipper and consignee information; the cargo description; and the country of origin) in selecting a shipment for examination. This information is run through the Automated Targeting System (ATS) for examination selection.

Additional cargo information is now covered by the Importer Security Filing (ISF). The data elements of ISF are similar to an Entry; ISF requires: HTS (but only to the six digit level), shipper, consignee, country of origin, and manifest information. ISF also requires disclosure of the Importer, which appears to be the corresponding “Importer of Record” from the Entry. However, this is a major compliance point that warrants discussion below. The Importer and consignee are both identified by the IRS-issued Employer’s Identification Number (EIN also known as the taxpayer ID) or a social security number.

As discussed, the timing on the filing is 24 hours prior to loading. It is not clear if this requirement is interpreted in the same manner as the 24 hour rule for AMS. The filing is made by any authorized agent of the Importer (but, as a practical matter, is done by the importer, customs broker, or NVOCC). The filing is done through AMS or ABI. Penalties for late or inaccurate filings go solely to the importer.

Customs proposes to use the data obtained to enhance its cargo targeting process. This data is fed into ATS, which is why matching the ISF filing manifest information to an AMS filing is critical (and another compliance issue discussed below). Customs has insisted that the ISF data is not used for Entry purposes (and is, therefore, not “Customs business” for the

purposes of Customhouse brokers) and no comparison of ISF and Entry data will take place at this time.

Below is a chart summarizing the characteristics of each program:

	Purpose	Filer	Penalty	Filing Method	Data elements	Timing
AES	Security and statistics	Exporter Or agent	Exporter or Carrier	AES Direct	S, C, Value, HTS, manifest	Prior to Export
Entry	Admissibility & Duties & Statistics	Broker or Importer	Importer of Record	ABI	S, C, Value, HTS, manifest, C/O, IOR	Prior to GO
AMS	Security	Carrier/ NVOCC	Carrier/NVOCC	AMS	S, C, port, description, manifest	24 hrs prior to Loading
ISF	Security	Importer or Agent	Importer	AMS/ABI	S, C, Value, HTS, manifest, C/O, IOR	24 hrs prior to loading

The ISF program, then, most imitates an Entry in form and data elements. The filer requirements are more akin to AES. The security purpose and timing requirements are similar to AES and AMS. The penalty aspects are entirely novel.

Compliance Issues Regarding ISF

Violation of ISF regulations subject the “Importer” to a \$5,000 penalty per violation. Customs defines “Importer” as the party that causes the shipment to arrive into the United States. Unfortunately, Customs’ definition provides little guidance otherwise.

As an example, suppose a consignee in the United States has ordered widgets from a supplier in Germany. The contract terms are on a Delivery-Duty Paid (DDP) basis, meaning that the supplier is responsible for shipping the cargo to the consignee’s door, inclusive of Customs clearance and duty payment. From the perspective of Entry, the “Importer” is the shipper because they are the party that will be responsible toward Customs for payment of duties. On the Entry, the shipper is declared as the Importer of Record and it is in the Importer of Record’s

name in which a surety bond is filed. Customs will seek monies from the surety in the case of default on the duty payment and it is then up to the surety to seek recovery from the supplier. The process is simple: without an Entry, there can be no penalty. As long as there is an Entry, there will be an Importer of Record and a surety.

But a problem arises with ISF. Many penalty situations will likely relate to the *lack* of a filing. In those cases, there is not a declared Importer of Record to whom Customs can seek damages. Customs will have to use extrinsic evidence to determine who the “Importer” is. Assuming that an Entry has been filed, this may lead Customs to penalize the Importer of Record on the Entry. But, what if no Entry has been filed? Will Customs refer to the consignee in AMS for the penalty? If the terms are DDP, they should be rightfully targeting the shipper, but Customs will not know the terms of the transaction based on information from AMS.

Perhaps more troubling is Customs’ definition of “Importer”. The Importer is the “party that caused the goods to be shipped to the United States.” This broad definition probably covers both shipper *and* consignee in most traditional aspects; it is the agreement between the shipper and consignee that causes the shipment to arrive in the United States. The commercial terms may reflect responsibilities with regard to shipment and entry, but by a strict definition of “causation”, the broad definition probably covers both parties.

This is a red flag U.S. importers must be aware of- they may be liable for penalties for ISF filings where they purchased goods on a DDP basis. Although the DDP purchaser thinks that they are completing a transaction free and clear of Customs regulations, they may be involved with a penalty regardless. Even more troubling is the possibility that a U.S. consignee could be entirely unaware of a shipment (and perhaps unrelated as well) and be subjected to an

ISF violation penalty. Assume for a moment that Customs does refer to AMS in determining ISF penalties. A very large, well-known computer company, for example, could have a shipment consigned to it from a shipper whose existence, is completely unknown to the computer company. The actions of an unknown party, the shipper, could potentially subject a U.S. company to fines for which they have no power whatsoever to avoid.

The ISF rule also fails to appreciate a common practice in certain industries. Some commodities, such as cashews, are often shipped to the United States from Asia before there is a contract concluded between the buyer and seller. In other cases, the buyer is completely unknown at the time of shipment or the merchandise is re-sold several times prior to arrival. Before there were ISF requirements, shippers handled this issue by consigning the bill of lading “to order of the shipper”. This allowed them to re-consign the shipment as necessary. The AMS consignee name and address regulation was satisfied by declaring the most likely U.S. buyer *at the time of shipment*. Assuming the terms are not DDP, the eventual consignee would make an entry in their name, as the Importer of Record.

But what about the ISF filing? The consignee would not have been aware of the transaction at the time of shipment and therefore would not have filed ISF. The foreign shipper would not have filed ISF, as they are not the Importer and may not even have knowledge of the rule. In any event, the shipper would likely not have a bond against which Customs could seek a penalty.

This leaves the consignee in a precarious position. Do they accept the shipment, make entry, and subject themselves to a possible ISF violation? Do they reject the shipment and risk their business relationship with the shipper, as well as lose the profits of a potentially good deal?

Should they file a late ISF? The best solution might be that the consignee always require proof of ISF filing before accepting any re-consigned cargo. However, the original ISF may have been filed by a competitor, who no longer has an interest in the cargo. Certainly the competitor has no interest in letting the new consignee know if an ISF was filed.

In addition to problems arising from Customs' definition of "Importer" and to whom a violation penalty will go, Importers also face the challenge of making accurate ISF filings. Customs has made Importers responsible for revising ISF filings where the original data is no longer accurate. Accuracy issues arise from the required data elements.

One of the data elements involves the HTS. Unlike the HTS reported on an Entry, which is the full ten digits, the HTS reported in ISF is only the first six digits. Many companies may have classification changes undergone while the shipment is en route. This could be pursuant to a Binding Ruling or simply getting more accurate information from the manufacturer. Of course, Importers change classifications post-entry all the time: through corrections to Entry Summaries, Post Entry Adjustments, and Protests. Importers are now responsible for making adjustments to the HTS for all ISF filings if the change is known prior to arrival. Fortunately, the flexible enforcement period did anticipate this problem and allows some leeway with regard to HTS declarations in ISF.

The Importer faces the same problem with respect to Consolidator, Country of Origin and Manufacturer. As the Importer becomes aware of more accurate information regarding these data elements, they must be sure to amend the ISF filing if known prior to arrival in the United States.

The Importer must also be sure that every filing matches an AMS filing. This might be the most difficult of all the requirements, as well as the most critical. Because Customs uses the data in *conjunction* with the AMS filing to create a complete data set for cargo targeting, inaccurate HTS or country of origin data is less damaging than not having *any* of that data to compare to AMS. Because the ISF Importer is, in most cases, not an AMS filer, the ISF Importer becomes painfully reliant on the information provided by the AMS filer.

ISF Penalty Mitigation Guidelines and Questions Answered

On July 17, 2009, Customs published Liquidated Damages Guidelines. Customs Bulletin and Decisions, Vol. 43, No. 28, p 30 (July 17, 2009). The guidelines addressed many of the issues stated above.

First, Customs shed a little light on how they were going to construe “Importer”. Customs maintained their definition of “the party causing the goods to enter the United States.” Customs also included under the definition “the goods’ owner, purchaser, consignee, or agent such as a licensed customs broker...” *Id.* at 37. The definition appears to be quite broad- it will probably encompass shippers whether the terms be DDP or “to order” consignments. It also recognizes the ISF Importer-agency relationship and attempts to make the agent-filer liable as well.

Customs also clarified penalty situations, identifying five circumstances under which an assessment of Liquidated Damages would be issued. Those situations are: failure to file ISF, filing a late ISF, filing an inaccurate ISF, submitting an inaccurate ISF update, and failing to withdraw an ISF filing, when required. *Id.* at 38-39. With the exception of a failure to file, each violation subjects the importer to a liquidated damages claim of up to \$5,000. Thus each *filing*

carries a potential total penalty amount of \$10,000 (late filing and inaccurate filing). Customs clarified that failures to file would be treated completely differently than late/inaccurate filings.

Mitigation is allowed for late and inaccurate filings. The liquidated damages claim for the first violation may be cancelled upon payment of an amount between \$1,000 and \$2,000, depending on the presence of mitigating or aggravating factors. *Id.* at 9. Liquidated damages claims for subsequent violations may be mitigated to an amount not less than \$2,500. *Id.* However, in every case, Customs will not grant relief if it is determined that law enforcement goals were compromised by the violation. *Id.*

Customs listed mitigating factors in determining the amount of relief. They are: evidence of progress in the implementation of the ISF requirement during the flexible enforcement period; small number of violations compared to the number of shipments for which ISFs were required; additional mitigation of up to 50% for Tier 2 and Tier 3 C-TPAT members; demonstrated remedial action; late filing due to carrier actions outside of the Importer's control; and reasonable reliance on third party data where that data resulted in an inaccurate ISF. *Id.* at 40.

Customs also identified several aggravating factors. They are: lack of cooperation with Customs with regard to the case; evidence of smuggling or attempt to introduce merchandise contrary to law; multiple errors on one ISF; and a rising error rate indicative of deteriorating ISF performance. *Id.*

As discussed above the most logically problematic situation for Customs was identifying and penalizing the "importer" where no filing was done and the importer may have not been aware or even privy to the shipment. Customs recognized this issue when issuing the penalty

guidelines when they said, “Failure to File. Liquidated damages cannot be assessed for the failure to file an ISF if no bond is in place.” *Id.* at 38.

So what would Customs do in those situations? Customs has taken a flexible and sensible approach. First, Customs “*shall* withhold release or transfer of the cargo *until* CBP receives the required ISF information and has had the opportunity to review the documentation and conduct any necessary examination.” *Id.* at 40-41. Thus, Customs will *force* an ISF to be made and it will, of course, always be late. Because the ISF would necessarily implicate an “importer of record”, the “importer” definition problem is solved. The late filing liquidated damages penalty would then be assessed against the importer of record. Otherwise, the cargo would never clear through Customs and would eventually be eligible for General Order.

Customs also, at its option, has the right to limit the permit to unlade so as to not permit unloading of the merchandise for which no ISF has been filed. *Id.* at 41. This appears to be a more severe security-based remedy that would probably subject the importer to contractual damages from the carrier. Finally, should the carrier unload the cargo where Customs has withheld the permit to unlade, the cargo becomes subject to seizure. *Id.*

Recommendations

Unlike the Entry process, where prior disclosures allow an importer to avoid stiff penalties, the new rules for ISF carry heavy damages not to mention the potential disruption of an importer’s supply chain. There are several things that importers must do in order to avoid these problems.

First, implement your ISF procedures now if not done already. Many importers have stated that the costs for complying right now, where there will not be any penalties assessed, are

not worth paying. Importers need to realize that their compliance rate up until January 26, 2010 is important because it is a mitigating factor when seeking relief for damages after the flexible enforcement period is over. For many, the few hundred dollars spent on ISF in the interim period is not worth it- but it surely will be when a liquidated damages claim is not mitigated.

Second, the importer should make sure that their ISF filer is qualified and competent. Customs does not regulate ISF filers like they do customs brokers; no license is required and the ISF filer does not need their own bond. Licensed customs brokers will be most familiar with both the data elements as well as ISF legal requirements. Brokers are also usually most familiar with the importer's product and probably make the best ISF filing agents. Whatever party an importer chooses to utilize in making the filing, the importer should always at least seek indemnity from damages resulting from the fault of the filer.

Most importantly, the importer must be aware of what its agent is doing. Customs provides an "ISF Report Card" to ISF filers. Responsible importers will require that their agents provide a copy of this report card to them. The report card gives the importer and filer an idea of how many filings are being made for the importer; how many filings are late; how many filings were amended; and how many filings lack a match between the bill of lading number submitted via ISF and the bill of lading number transmitted by the carrier via AMS.

Where there is no match between the ISF bill of lading number and the AMS bill of lading number, Customs has treated the ISF filing as "not complete" until there is a match. Often, the match does not take place until after the vessel has sailed- making the filing late. Because the ISF filer (usually a customs broker) and the AMS filer (the carrier or NVOCC) are often different parties, it is incumbent on the importer to make sure that the ISF and AMS filers

are on the same page. The importer is often in the best position to resolve these communication issues.

By now, importers should be aware of the many benefits of C-TPAT participation. The benefits have been enhanced even more now that the ISF penalty guidelines have been published. It is in the best interest of any regular importer to make sure they participate in C-TPAT and that their application is up to date.

Finally, the importer must be aware of the consequences of shipments that arrive without ISF filings. A savvy, organized importer will likely not have problems with respect to cargo purchased on FOB or Ex Works terms. However, cargo under DDP terms involving inexperienced shippers may subject the cargo to delay and the importer to damages if not handled properly. Importers should be educating their suppliers as to these consequences. Additionally, should a shipment arrive under these terms without ISF having been filed by the shipper, the importer should demand that the shipper indemnify the importer to potential ISF damages before any entry and late ISF filing be made.

Conclusion

ISF presents the biggest change in import law since the MOD Act. Importers need to be aware of the changes and need to be acting now in updating their compliance programs to avoid stiff potential damages.