

GUIDELINES FOR THE ASSESSMENT AND MITIGATION OF PENALTIES AGAINST ARRIVING VESSEL, AIR AND RAIL CARRIERS FOR FAILURE TO COMPLY WITH THE ADVANCE ELECTRONIC CARGO INFORMATION REQUIREMENTS; GUIDELINES FOR THE ASSESSMENT AND CANCELLATION OF CLAIMS FOR LIQUIDATED DAMAGES AGAINST CARRIERS, NVOCCS, SLOT CHARTERERS AND OTHER PARTIES ELECTING TO TRANSMIT THE ADVANCE ELECTRONIC CARGO INFORMATION FOR FAILURE TO COMPLY WITH THE ADVANCE ELECTRONIC CARGO INFORMATION REQUIREMENTS - 19 U.S.C. 1436, 19 C.F.R. 4.7, 4.7a, 113.62, 113.64, 122.48a, and 123.91 (CBP Dec. 11-11)

Pursuant to section 343(a) of the Trade Act of 2002, as amended (set forth at 19 U.S.C. 2071 note), U.S. Customs and Border Protection (CBP) published in the Federal Register (68 FR 68140), a Final Rule (CBP Dec. 03-32) on December 5, 2003, requiring that CBP receive, by way of a CBP-approved electronic data interchange system, information pertaining to cargo before the cargo is either brought into or sent from the United States by any mode of commercial transportation (sea, air, rail or truck). Pursuant to CBP Dec. 03-23, certain manifest information must be filed with CBP within specific time frames outlined in the rule. Failure to file the required information accurately and timely can result in the assessment of penalties or liquidated damages.

On July 6, 2005, CBP published “**Guidelines for the Assessment and Mitigation of Penalties Against Arriving Vessel, Air and Rail Carriers for Failure to Comply with the Advance Electronic Cargo Information Requirements; Guidelines for the Assessment and Cancellation of Claims for Liquidated Damages Against NVOCCs, Slot Charterers and Other Parties Electing to Transmit the Advance Electronic Cargo Information for Failure to Comply with the Advance Electronic Cargo Information Requirements**” in the CBP Bulletin and Decisions as CBP Dec. 05-23. On May 25, 2011, CBP published amended guidelines in the CBP Bulletin and Decisions as CBP Dec. 11-11. The guidelines below are based on those publications.

I. Enforcement in General

In addition to the enforcement actions, penalties and liquidated damages that may be taken and assessed as provided for below, the failure of an arriving carrier (vessel, air or rail) to be automated in the Automated Manifest System (“AMS”) at all ports of entry in the United States, or the failure of an arriving carrier (vessel, air or rail) or of any authorized electronic transmitter to provide the required advance electronic cargo information in the time period and manner prescribed by the U.S. Customs and Border Protection (CBP) regulations may result in the delay or denial of a vessel carrier’s preliminary entry-permit/special license to unlade, an air carrier’s landing rights, a train carrier’s permission to proceed, and/or the assessment of any other applicable statutory penalty. CBP may also take other

enforcement action as necessary, including withholding the release or transfer of the cargo until CBP receives the cargo declaration information and has had the opportunity to review the documentation and conduct any necessary examination. Where the party electronically presenting to CBP the cargo information required in sections 4.7a(c), 122.48a(d) and 123.91(d) of the CBP regulations (19 CFR 4.7a(c), 122.48a(d) and 123.91(d)) receives any of this information from another party, CBP will take into consideration how, in accordance with ordinary commercial practices, the presenting party acquired such information, and whether and how the presenting party is able to verify this information. Where the presenting party is not reasonably able to verify such information, CBP will permit the party to electronically present such information on the basis of what the party reasonably believes to be true.

II. Denial of Unlading/Landing Rights/Permission to Proceed

For vessel cargo, the failure to timely transmit the cargo information or the failure to transmit accurate or valid electronic cargo information by the arriving vessel carrier, slot charterers, non-vessel operating common carriers (NVOCCs), or other authorized electronic transmitters may result in the delay or the denial of the permit to unlade. Also, a term permit or special license already issued will not be applicable to any inbound vessel carrier for which CBP has not received the advance electronic cargo information in the time period and manner required. For any cargo that arrives in the United States by air at a port, the failure to timely transmit the cargo information or the failure to transmit accurate or valid electronic cargo information may result in the delay or the denial of the carrier's permit/special license to unlade or in the denial of its landing rights. Also, a term permit or special license already issued will not be applicable to any inbound flight for which CBP has not received the advance electronic cargo information in the time period and manner required. For any cargo that arrives in the United States by rail, the failure to timely transmit the cargo information or the failure to transmit accurate or valid electronic cargo information may result in the delay or the denial of the carrier's permit/special license to unlade (including the delay or denial of the carrier's permit to proceed). Also, a term permit or special license already issued will not be applicable to any inbound rail carrier for which CBP has not received the advance electronic cargo information in the time period and manner required.

III. Penalty Assessment against Arriving Carriers

When a carrier (vessel, air or rail) arrives at a port of entry, Port Directors may assess a civil monetary penalty, under 19 U.S.C. 1436, for violation of sections 4.7, 4.7a, 122.48a or 123.91 of the CBP regulations (19 CFR 4.7, 4.7a, 122.48a or 123.91), against the master, pilot or person in charge of any arriving carrier (vessel, air or rail) which is not automated in the AMS or who fails to electronically transmit the advance cargo information. A penalty of \$5,000 may be assessed against the master of the vessel, pilot of the airplane, or person in charge of the train in care of the carrier. A \$10,000 penalty (also under 19 U.S.C. 1436) may be

assessed against the same master of the vessel, pilot of the airplane, or person in charge of the train in care of the carrier for any subsequent violation. In addition to a penalty pursuant to 19 U.S.C. 1436, CBP may take any other necessary enforcement action, including but not limited to, denying the permit/special license to unlade (including the delay or denial of a carrier's permission to proceed), denying the term permit or special license to unlade, denying an air carrier's landing rights, denying a vessel's preliminary entry-permit/special license to unlade, and/or assessing any other applicable statutory penalty.

Also, when a carrier (vessel, air or rail) arrives at a port of entry, Port Directors may assess a civil monetary penalty, under 19 U.S.C. 1436, for violation of sections 4.7, 4.7a, 122.48a or 123.91 of the CBP regulations (19 CFR 4.7, 4.7a, 122.48a or 123.91), against the master, pilot or person in charge of any arriving carrier (vessel, air or rail) who untimely files electronic cargo information, or who files inaccurate or invalid electronic cargo information. A penalty of \$5,000 may be assessed against the master of the vessel, pilot of the airplane, or person in charge of the train in care of the carrier. A \$10,000 penalty (pursuant to 19 U.S.C. 1436) may be assessed against the same master of the vessel, pilot of the airplane, or person in charge of the train in care of the carrier for any subsequent violation. In addition to a penalty pursuant to 19 U.S.C. 1436, CBP may take any other necessary enforcement action, including but not limited to, denying the permit/special license to unlade (including the delay or denial of a carrier's permission to proceed), denying the term permit or special license to unlade, denying an air carrier's landing rights, denying a vessel's preliminary entry-permit/special license to unlade, and/or assessing any other applicable statutory penalty.

IV. Assessment of Liquidated Damages Claims against Carriers, NVOCCs, Slot Charterers, and Authorized Electronic Transmitters

When a vessel carrier or an air carrier arrives at a port of entry, Port Directors may assess, in addition to any other applicable statutory penalty, a claim for liquidated damages against any carrier, NVOCC, slot charterer or other authorized electronic transmitter who elects to transmit cargo information but who fails to transmit the advance electronic cargo information to the CBP-approved electronic data interchange system, transmits the electronic cargo information untimely, or transmits inaccurate or invalid electronic cargo information. Specifically, Port Directors may assess a claim for liquidated damages in the amount of \$5,000 for each violation of the advance cargo information requirements in sections 4.7, 4.7a, or 122.48a of the CBP regulations (19 CFR 4.7, 4.7a or 122.48a), to a maximum of \$100,000 per conveyance arrival under 19 CFR 113.64(c) or 19 CFR 113.62(k)(2). A claim for liquidated damages in the amount of \$5,000 for each violation, to a maximum of \$100,000 per conveyance arrival, may be assessed for subsequent violations related to subsequent arrivals.

V. Other Considerations Regarding the Assessment of Penalties

For each departure to the United States where multiple violations for untimely filing of advance cargo information consistent with the above occur, a single penalty may be assessed against the master, pilot or person in charge of the train under 19 U.S.C. 1436.

In cases where inaccurate or invalid electronic cargo information is transmitted for multiple shipments on the same arrival, a single penalty may be assessed against the master, pilot or person in charge of the train under 19 U.S.C. 1436.

VI. Mitigation of Penalties/Cancellation of Liquidated Damages Claims

Under 19 U.S.C. 1618, CBP has authority to mitigate penalties and liquidated damages. Exercise of such mitigation authority is within the sole discretion of CBP. The following provisions set forth guidelines that CBP will use in making mitigation decisions, but they do not establish any rights enforceable by carriers or other parties.

A. First Violation

If an arriving carrier (vessel, air or rail) incurs a penalty for failing to be automated in the AMS or to electronically transmit the required cargo information, for untimely filing electronic cargo information, or for filing inaccurate or invalid electronic cargo information, CBP, at its sole discretion, may mitigate the penalty to an amount between \$1,000 and \$3,500, if CBP determines that law enforcement goals were not compromised by the violation. A carrier that has been validated and is in good standing with the C-TPAT program may receive, at CBP's sole discretion, additional mitigation to an amount not more than 50% of the normal mitigation amount. For example, if a penalty is normally mitigated to \$1,000 (the lowest mitigation amount for first violations by non-C-TPAT members), a penalty assessed against a validated C-TPAT member generally will be mitigated to an amount of no more than \$500, but may be mitigated to a smaller mitigated penalty (e.g. \$400, \$300, etc.).

If a carrier, NVOCC, slot charterer or other authorized electronic transmitter incurs a liquidated damages claim for failing to transmit the required cargo information, untimely filing cargo information, or for filing inaccurate or invalid electronic cargo information, the liquidated damages claim may be cancelled, at CBP's sole discretion, upon payment of an amount between \$1,000 and \$3,500, if CBP determines that law enforcement goals were not compromised by the violation. A carrier, NVOCC, slot charterer, or other authorized electronic transmitter that has been validated and is in good standing with the C-TPAT program may receive additional mitigation

generally to an amount not more than 50% of the normal mitigation amount. For example, if a liquidated damages claim is normally mitigated to \$1,000 (the lowest mitigation amount for first violations by non-C-TPAT members), a liquidated claim assessed against a validated C-TPAT member may be mitigated to an amount of no more than \$500, but may be mitigated to a smaller mitigated penalty (e.g. \$400, \$300, etc.).

B. Subsequent Violations

1. Definitions and Examples

A violation of 19 U.S.C. 1436 shall be considered a subsequent violation only if the violation involves a violation of the same regulation (19 CFR 4.7 and 4.7a, 122.48a, or 123.91), and involves the same type of violation within each regulation, and only if the subsequent violation was committed more than 30 days after the issuance of a notice of penalty (CBP Form 5955A) for the first violation, which is not remitted in full. The four types of violations are (1) failing to be automated in AMS; (2) failing to electronically transmit the required cargo information; (3) untimely filing the required cargo information; and (4) filing inaccurate or invalid cargo information. A violation shall be considered a subsequent violation without regard to the port of arrival; however, the commercial vessel, aircraft or train involved in the subsequent violations must have had the same master, pilot, or person in charge.

Example 1. An arriving carrier untimely transmits the electronic cargo information on November 1, 2005. On November 15, 2005, CBP issues the notice of penalty against the air carrier. On December 20, 2005, and again on December 21, 2005, the same arriving carrier untimely transmits the electronic cargo information. The December 20, 2005 and December 21, 2005 violations will be considered subsequent violations. However, if the later untimely transmissions occur on December 10, 2005, and December 21, 2005, the December 10, 2005 violation will not be considered a subsequent violation but the untimely transmission of December 21, 2005 will be considered a subsequent violation.

Example 2. An arriving carrier untimely transmits the electronic cargo information, and, more than thirty days after the issuance of a penalty notice for this violation, transmits inaccurate or invalid cargo information for a subsequent arriving flight. The second violation is not considered a subsequent violation because the violations are not of the same type (i.e., the first violation involves an untimely transmission while the second violation involves an inaccurate or invalid transmission).

2. Mitigation and Cancellation Amounts

If the arriving carrier (vessel, air or rail) incurs a subsequent penalty for untimely filing cargo information or for filing inaccurate or invalid electronic cargo information, the penalty may be mitigated to an amount between \$3,500 and \$5,000, if CBP determines that law enforcement goals were not compromised by the violation. If a carrier, NVOCC, slot charterer or other authorized electronic transmitter incurs a claim for liquidated damages for a subsequent violation which is related to a subsequent arrival for untimely filing cargo information, or for filing inaccurate or invalid electronic cargo information, the claim for liquidated damages may be cancelled upon payment of an amount not less than \$3,500.

If a carrier, NVOCC, slot charterer, or other authorized electronic transmitter which has been validated and is in good standing with the C-TPAT program untimely files electronic cargo information or files inaccurate or invalid cargo information, the C-TPAT member may receive additional mitigation to an amount not more than 50% of the normal mitigation amount. For example, if the penalty or liquidated damages claim is normally mitigated to \$3,500 (the lowest mitigation amount for subsequent violations by non-C-TPAT members), a penalty or liquidated damages claim assessed against a C-TPAT member should be mitigated to no more than \$1,750, but may be mitigated to a smaller mitigated penalty (e.g. \$1,500, \$1,250, \$1,000, etc.).

However, CBP will grant no mitigation for subsequent violations for failing to be automated in the AMS or for failing to electronically transmit the required cargo information, regardless of whether the violator is a C-TPAT member.

C. Information to Transmitter from Another Party

Where the party electronically presenting to CBP the cargo information required by CBP regulations receives any of this information from another party, CBP will take into consideration how, in accordance with ordinary commercial practices, the presenting party acquired such information, and whether and how the presenting party is able to verify this information. Where the presenting party is not reasonably able to verify such information, CBP will permit the party to electronically present such information on the basis of what the party reasonably believes to be true.

VII. Mitigating and Aggravating Factors

A. Mitigating Factors:

1. Inexperienced in transmitting advance electronic cargo information.
2. A general good performance and low error rate in handling of cargo.
3. A carrier, NVOCC, slot charterer, or other authorized electronic transmitter that has been validated and is in good standing with the C-TPAT program may receive additional mitigation to an amount not more than 50% of the normal mitigation amount.
4. Demonstrated remedial action has been taken to prevent future violations.

B. Aggravating factors:

1. Lack of cooperation with CBP or CBP activity is impeded with regard to the case.
2. Evidence of smuggling or attempt to introduce or introduction of merchandise contrary to law. This may be considered an extraordinary aggravating factor.
3. There is a rising error rate which is indicative of deteriorating performance in the transmission of cargo information.