

This is a pre decisional document created by the Air Cargo Advance Screening (ACAS) Working Group for submission to the COAC Global Supply Chain Subcommittee for consideration. These documents reflect input from industry that helped foster discussions within subject matter experts and government representatives.

August 2013

COAC ACAS WG – Recommendations on ACAS Compliance Regime

I. An Appropriate ACAS Compliance Regime

By February of 2013, with the completely voluntary ACAS pilot being in operation for only 2 years, a coverage rate of over 82% of inbound cargo had been achieved. As additional carriers and forwarders progress toward full “operational” ACAS status, this coverage percentage will continue to rise. The ACAS project has shown that monetary penalties are not required to incentivize a high level of compliance with efficiently-designed air cargo security regulations. ACAS pilot participants have made significant investments in compliance processes and security, and are constantly striving to improve these processes to achieve higher goals.

Given these facts, and building upon the strong co-creation and bi-directional education pillars that have made the ACAS pilot a game-changing success story, ACAS pilot participants strongly believe that the ACAS compliance regime should be focused not on transaction-based monetary penalties, but on an account-based, compliance-oriented, holistic framework geared toward the quickest possible identification and remediation of compliance failures. Compliance assessment should take into account factors such as the filing party’s existing level of compliance with ACAS and other advance data requirements, the filer’s participation in trusted trader programs, the totality of circumstances surrounding the compliance failure, and the filer’s existing quality improvement efforts, and should target the government response at achieving a speedy and effective compliance result.

This paper sets forth industry’s ideas to better align the compliance regime with the ethos of the ACAS pilot by incorporating the above characteristics.

Specifically:

- Generally compliant companies that demonstrate progress to remedy identified compliance issues should enjoy broad discretion regarding the possible assessment of monetary penalties. Penalty assessment should be focused on situations where filers will not address/remedy identified compliance failures, where a consistent pattern of non-compliance is evident, or where filers are found to be willfully negligent or engaging in fraud.
- Filing parties should not be penalized for data inaccuracies for submission of information received from third parties that they reasonably believe to be true and where the business model does not allow for certain information to be available such as real senders and receivers (3PL, courier companies). Penalties for data or untimely submission should be assessed only when such failure has a material impact on the security status of a shipment in terms of increased threat, e.g. if the data indicates the shipment is a Do Not Load.

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- When circumstances warrant penalty assessment, CBP should consider an “offsetting approach” where an ACAS participant would be allowed to apply all or part of the penalty assessment to making concrete investments in improving security practices. In this manner, the assessed penalty would directly and necessarily lead to tangible security improvements.

In such a manner, CBP’s limited resources can be best targeted against parties negligently failing to comply with or deliberately evading the regulation, who pose the greatest threat to compliant air carriers and the air cargo system as a whole. At the same time, a compliance regime based upon the above principles will eliminate the unintended consequence of damaging a key foundation of the ACAS pilot: the earliest possible delivery of data for targeting to allow the earliest possible resolution of problems and/or removal of problem shipments from the air cargo supply chain. A transaction-based regime that does not take the big picture into account is likely to encourage filers to deliver data much later, and to discourage filing by parties other than the carrier, leading to significant negative operational consequences for CBP and all trade parties and thereby reducing ACAS’s overall security benefit for air cargo.

While the ACAS regulatory compliance regime must be aligned with existing authority to impose penalties in accordance with regulations and legislation, CBP’s policy should be to issue penalties only in cases of significant problems as outlined above. ACAS pilot participants therefore suggest that the policy aspects that cannot be clearly articulated in regulations be clearly set out in compliance policy guidance materials for CBP and industry that are issued in advance of or simultaneously with the effective date of the regulations.

Additionally, mitigation of issued penalties requires considerable resources from both CBP and trade – resources that, from a security point of view, would be better marshaled to address and correct the root causes of non-compliance. ACAS pilot participants therefore strongly advocate that the ACAS penalty structure be implemented in a manner similar to APIS enforcement on the passenger side, in which proposed penalties are first reviewed centrally by a carrier’s CBP account manager who is familiar with the carrier’s overall compliance level and historical performance, as well as any ongoing work by the carrier to remedy compliance issues via improvements to processes and/or enhancements to software. Penalties should be issued only in cases where justified by overall circumstances. And as discussed above, ACAS filers should have the opportunity to offset monetary penalties with concrete investments to improve security practices. Any security impact caused by ACAS non-compliance will thereby be remedied in the quickest and most cost-effective manner by all stakeholders. The utilization of an account management structure is a critical component in the decision to assess, and subsequently mitigate, ACAS penalties and should be adopted as soon as possible. Account management will have applications far beyond ACAS issues, and will provide numerous benefits to CBP and participating carriers. For example, the CBP carrier account manager would also help to provide visibility across the range of advance information that a filer provides, and ensure review of any infraction prior to determination of the proper compliance response based upon the “big picture”.

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To develop a clear understanding of the kinds of problems that may arise under an ACAS regulatory regime that would require issuing penalties, the ACAS participants recommend that a phased and flexible approach be adopted for implementing the ACAS regulation. CBP should allow a significant period of time for companies to adjust to the new regulation and ensure their processes are fine tuned to meet all requirements. In this regard, the long-term strategy employed in achieving full implementation of the ISF penalty regime over a period of several years is a useful precedent. A longer implementation period also will allow for development of appropriate benchmarks, definitions, and achievable goals and permit the end-state penalty regime to be modified as necessary through lessons learned during the implementation period, much as ACAS has been tweaked over the course of the pilot, as well as providing sufficient time to improve existing compliance levels.

Development of an ACAS compliance regime also should address the following issues:

- To avoid creating competitive disadvantages, the rules should apply equally to all air cargo entities, including USPS, which import goods into the United States.
- CBP's mitigation protocols with an industry participant should be a factor in determining compliance measures.
- Filing failures caused by technical failures or other factors outside the control of the filer should be taken into account prior to assessing penalties.
- The compliance regime should be based on realistic standards based on the lessons learned from the pilot and be implemented without impacting trade flows.
- As with other aspects of the ACAS regulatory regime, its compliance measures will have a global effect on other regions (e.g. EU) which may not have highly developed mitigation strategies similar to those employed by CBP. Management of any public statements regarding penalties should be sensitive to this impact.

II. Recommendations

- Each element of the compliance regime developed for ACAS should take into account the lessons learned during the pilot period, and should promote the key ACAS goals of early data transmission / early resolution and minimal negative impact on the movement of legitimate goods. To avoid creating competitive disadvantages, the compliance regime should apply equally to all air cargo entities, including USPS, which import goods into the United States.
- **The penalty assessment process should be targeted at negligently or intentionally non-compliant parties, particularly those found to be engaging in fraud. Broad discretion should be used in the determination to assess penalties against generally compliant parties making best efforts to meet ACAS requirements.**
 1. Parties demonstrating high overall compliance and progress to remedy identified compliance issues should not generally be subject to transaction-based penalties.

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Penalties should be targeted toward filers who do not address/remedy identified compliance failures or who are found to be willfully negligent or engaging in fraudulent behavior.

2. Filing parties should not be penalized for data inaccuracies for information received from third parties that they reasonably believe to be true. Penalties for data or untimely submission should be assessed only when such failure has a material impact on the security status of a shipment in terms of increased threat, e.g., if the data indicates the shipment is a Do Not Load.
 3. An account management structure should be established in which proposed penalties are first reviewed centrally by a carrier's CBP account manager, who is familiar with the carrier's overall compliance level, historical performance, and any ongoing work by the carrier to remedy compliance issues. Such account managers should be overseen by CBP HDQ in order to ensure consistent application of standards across all ACAS filers.
- **Taking into account the limited resources of both CBP and industry, the penalty mitigation regime should be aimed first and foremost at securing tangible security benefits.**
1. The compliance regime should include clear definitions and benchmarks describing the size of the penalty for different infractions and also include a transparent process of mitigation based on compliance with ACAS as well as participation in other CBP programs for security and trade compliance.
 2. An "offsetting approach" should be employed that allows the penalty recipient to apply all or part of the penalty to remedial actions to improve their security posture.
- The ACAS regulation should provide for a long implementation period of informed compliance that allows compliance levels to be raised as the program is fully imbedded in operations.
- Aspects of the ACAS compliance regime that are not elaborated in regulations should be clearly set out in compliance assessment and mitigation guidance documentation, and made available to CBP and the trade well in advance of implementation of the ACAS regulation.
- As with other aspects of ACAS in which CBP leads world developments, the ACAS compliance regime will influence potential advance data penalties in other countries and regions that have not adopted CBP's highly-developed mitigation strategies and/or do not share CBP's commitment to co-creation and bi-directional education. Management of public statements and documentation should therefore be sensitive to this impact.