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**DEPARTMENT OF HOMELAND SECURITY****U.S. Customs and Border Protection****DEPARTMENT OF THE TREASURY****19 CFR Parts 162 and 163**

[CBP Dec. 11-20; USCBP-2009-0029]

RIN 1515-AD65 (Formerly RIN 1505-AC00)

**CBP Audit Procedures; Use of Sampling Methods and Offsetting of Overpayments and Over-Declarations****AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.**ACTION:** Final rule.

**SUMMARY:** This document amends the U.S. Customs and Border Protection (CBP) regulations by adding provisions for the use of sampling methods in CBP audits and prior disclosure cases and for the offsetting of overpayments and over-declarations when an audit involves a calculation of lost duties, taxes, or fees or monetary penalties under 19 U.S.C. 1592. The sampling provision may be used by both CBP and private parties in certain circumstances. The offsetting provision is in accordance with CBP's authority under 19 U.S.C. 1509(b)(6).

**DATES:** This rule is effective December 27, 2011.

**FOR FURTHER INFORMATION CONTACT:** For Legal Aspects: Alan C. Cohen, Penalties Branch, Regulations and Rulings, Office of International Trade (202) 325-0062; For Audit and Operational Aspects: Keith Richard, Regulatory Audit, Office of International Trade, (704) 401-4701.

**SUPPLEMENTARY INFORMATION:****I. Background**

CBP is authorized to conduct audits under 19 U.S.C. 1509 (section 1509) (sometimes referred to in this document as CBP audits or section 1509 audits). The statute authorizes CBP to examine the records of, including conducting an audit of, parties subject to the agency's authority for the following purposes: ascertaining the correctness of any entry; determining the liability of any person for duty, fees, and taxes due, or which may be due, the United States; determining liability for fines and penalties; or insuring compliance with the laws of the United States administered by CBP. Under section 1509(b), specific procedures are set forth

for conducting a formal audit authorized under the statute.

On October 21, 2009, CBP published in the **Federal Register** (74 FR 53964) a proposed rule to amend title 19 of the Code of Federal Regulations (19 CFR) pertaining to prior disclosure procedures and audit procedures by amending §§ 162.74, 163.1, and 163.11 (19 CFR 162.74, 163.1 and 163.11). The proposed amendments concerned the use of statistical sampling methods by CBP and private parties and the offsetting of overpayments of duties and fees or over-declarations of quantities or values on finally liquidated entries<sup>1</sup> against underpayments or under-declarations on finally liquidated entries under certain prescribed circumstances. The proposed changes regarding sampling methods were designed to reflect in the regulations (19 CFR 163.11) a practice recognized in both government and industry as the most practical and expeditious way to reliably assess voluminous numbers of transactions, such as are often encountered per audit in the modern commercial importation environment. A corresponding change was proposed to the CBP prior disclosure regulations (19 CFR 162.74) to reflect that sampling may be used by private parties submitting prior disclosures. The proposed changes regarding offsetting reflected the amendment made by the Trade Act of 2002 ("Trade Act") (Pub. L. 107-210, 116 Stat. 933 (2002)) to section 1509 pertaining to CBP audit procedures (19 CFR 163.11).

Section 382 of the Trade Act amended section 1509(b) by adding the following paragraph (6):

(6)(A) If, during the course of any audit conducted under this subsection, the Customs Service [now CBP] identifies overpayments of duties or fees or over-declarations of quantities or values that are within the time period and scope of the audit that the Customs Service [CBP] has defined, then in calculating the loss of revenue or monetary penalties under section 592 [of the Tariff Act of 1930, as amended; 19 U.S.C. 1592], the Customs Service [CBP] shall treat the overpayments or over-declarations on finally liquidated entries as an offset to any underpayments or under-declarations also identified on finally liquidated entries, if such overpayments or over-declarations were not made by the person being audited for the purpose of violating any provision of law.

<sup>1</sup>The term "liquidation" refers to the formal fixing of the terms of the entry by CBP. In liquidation, CBP fixes the appraisement, classification, and duties, taxes, and fees owed on imported merchandise (19 U.S.C. 1500). An entry is said to be "finally liquidated" when the period for filing a protest under 19 U.S.C. 1514 has expired. To protest the liquidation of an entry, the protest must be filed within 180 days of the date of liquidation (19 U.S.C. 1514(c)(3)(A)).

(B) Nothing in this paragraph shall be construed to authorize a refund not otherwise authorized under section 520 [of the Tariff Act of 1930, as amended, 19 U.S.C. 1520].

The proposed amendments also included removal of the term "compliance assessments" from 19 CFR Part 163 as the term has become superfluous as a result of CBP policy changes with respect to audits.

**II. Discussion of Comments**

Comments were solicited on the proposed rule, and nine commenters responded. Collectively, the commenters raised numerous issues that CBP sets forth and responds to below.

**A. Proposed Amendments Regarding Statistical Sampling**

*Comment:* One commenter asserted that there is no authority in the customs laws for CBP to employ statistical sampling in an audit and that customs laws and regulations require an entry-by-entry review.

*CBP response:* CBP disagrees. Under section 1509, CBP is authorized to conduct audits of importers (and others subject to the customs laws and other laws enforced by CBP) to ensure compliance with the customs laws of the United States and other laws enforced by CBP. Section 1509 does not specify or limit the methods CBP may use in conducting an audit, thereby leaving these decisions to CBP discretion. Statistical sampling is a legitimate and widely accepted method of examining vast amounts of data to produce reliable results. As pointed out in the proposed rule regarding the proposed offsetting amendments, Congress acknowledged that CBP has and retains the authority to define an audit's time period, scope, and methodology.<sup>2</sup>

*Comment:* Several commenters requested that CBP provide audit guidelines and/or an informed compliance publication on statistical sampling that includes information on statistical sampling factors and parameters used by CBP in audits. These aids would help importers understand statistical sampling and effectively apply sampling in internal audits and prior disclosures.

<sup>2</sup>In House Report 107-320 pertaining to the offsetting law, Congress provided that "[a] government audit should be an even-handed and neutral evaluation of a person's compliance with the law.

\* \* \* The Committee redrafted this provision on the basis of concerns from Customs [now CBP]. It is the Committee's intention that this provision shall not affect in any way Customs' [CBP's] current authority to define an audit's scope, time period, and methodology." While this report applies to the offsetting law, this statement of Congressional intent is relevant to CBP's audit authority.

*CBP response:* CBP cannot provide specific guidance regarding sampling parameters because assessing sampling risk and establishing sampling parameters involve the auditor's professional judgment applied on a case-by-case basis to the unique facts of a specific audit situation. However, information and basic guidelines on statistical sampling and auditing are currently provided as part of the Focused Assessment Program (FAP) on the CBP Web site at [http://cbp.gov/xp/cgov/trade/trade\\_programs/audits/focused\\_assessment/fap\\_documents/](http://cbp.gov/xp/cgov/trade/trade_programs/audits/focused_assessment/fap_documents/). The Web site information will eventually be removed, and CBP will publish an informed compliance document following the effective date of this rule. As set forth in the proposed rule, CBP expects private parties to employ a sampling plan and sampling procedures that are consistent with generally recognized sampling approaches. A number of commercial statistical sampling programs are available for guidance on sampling in addition to the above mentioned sources. CBP may reject a private party's sampling plan and/or methodology if it is not consistent with generally recognized sampling approaches.

For purposes of clarity, CBP is adding to the regulation a description of "projection," which refers to the application of the sampling results to the universe of transactions identified as within the time period and scope of the audit. Accordingly, a new paragraph (c)(2) under § 163.11 is added in this final rule, and paragraph (c)(2) of proposed § 163.11 is redesignated as paragraph (c)(3) in this final rule.

*Comment:* One commenter asserted that statistical sampling of entries and projection will not produce accurate audits unless an audit takes into account the specifics for each transaction, such as circumstances of sale, relationship of the seller to the buyer, related parties versus non-related parties, trade preference program transaction, etc.

*CBP response:* CBP conducts performance audits in accordance with generally accepted government audit standards (GAGAS) issued by the Government Accountability Office (GAO), which can be found on the GAO Web site at <http://www.gao.gov/govaud/ybk01.htm>. CBP auditors apply their professional judgment in establishing and executing sampling plans based on the particular factors, or relevant specifics, involved in a given audit situation. CBP auditors will apply appropriate sampling techniques, on a case-by-case basis, that address the commenter's concern. CBP is committed

to employing sampling in accordance with widely accepted professional standards and best practices to ensure the efficiency and accuracy of audits that employ sampling.

*Comment:* One commenter requested that CBP clarify whether CBP will use statistical sampling to calculate penalties under 19 U.S.C. 1592 and the circumstances under which it may do so.

*CBP response:* As set forth in the proposed regulations and this final rule, CBP may use statistical sampling in an audit in circumstances it determines are appropriate for its use under section 1509, including the calculation of lost duties and/or monetary penalties under 19 U.S.C. 1592 (section 1592) or lost revenue and monetary penalties under 19 U.S.C. 1593a (section 1593a). In some circumstances, CBP may determine that an entry-by-entry review and calculation are more appropriate to the situation. CBP notes that use of sampling is not strictly limited to section 1509 audits (unlike offsetting which is so limited), but its use will be concentrated in the audit program.

*Comment:* One commenter suggested that CBP's use of sampling and projection to calculate penalties under section 1592 in an audit context should be subject to agreement by the audited party prior to commencement of the audit.

*CBP response:* Pursuant to section 1509, and as set forth in this final rule (19 CFR 163.11), CBP has sole discretion to determine the audit's methodology: either entry-by-entry, statistical sampling or, in some circumstances, both. Statistical sampling is a widely accepted and legitimate method of examining extensive quantities of data in an audit context and includes, by definition, projection of sample results to the universe of transactions set forth in the sampling plan. Neither the statute nor the regulations subject CBP's authority to determine an audit's methodology to the concurrence of the audited entity. In accordance with the proposed regulation and this final rule (§ 163.11(c)(1)), CBP and the audited entity will discuss the specifics of the sampling plan before commencement of the audit; however, CBP's authority to conduct the audit or employ a statistical sampling method is not dependent on the audited entity's concurrence or its acceptance of the sampling plan.

*Comment:* One commenter inquired whether the reduced penalties for prior disclosure would apply to projected violations (lost duty or revenue) where the audited entity makes a prior disclosure of a violation during a CBP audit.

*CBP response:* In most cases, the penalty for prior disclosure is based on the lost duty or lost revenue amount (interest on that amount). Thus, assuming that the prior disclosure meets all requirements and that CBP has approved the sampling results, including the projection as applied, the reduced penalty for the prior disclosure would apply to the lost duty or revenue as calculated, either by CBP or by the claimant with CBP approval. (See 19 CFR Part 171, App. B.)

*Comment:* One commenter claimed that statistical sampling will not reduce the cost to audited entities because the audit scope will be expanded to multiple years, thus requiring the audited entity to expend additional resources.

*CBP response:* CBP disagrees. Audits already cover multiple years, whether the review method is entry-by-entry or statistical sampling. The review of entries over a particular time period will be less costly when sampling is employed because fewer entries are actually examined by CBP, thus requiring less audit time on the audited entity's premises, less time required of the audited entity to pull supporting records and documents, and less time required from audited entity personnel.

*Comment:* One commenter asserted that statistical sampling should be utilized only to conduct annual audits of the audited entity and that expanded-scope audits by CBP as a result of statistical sampling should be limited to violations of 19 U.S.C. 1592 and/or 1593(a) that are discovered in the course of single-year audits.

*CBP response:* CBP disagrees. First, the scope of audits will not be expanded due to CBP's use of statistical sampling methods. Some audits cover multiple years whether the method of review is entry-by-entry or sampling. Second, it is within CBP's discretion to determine its audit program goals in accordance with agency priorities. That discretion includes determining the purpose and the time period and scope of audits. CBP will not adopt this limiting formula for implementing its audit program.

*Comment:* One commenter requested that CBP provide criteria for determining when an entry-by-entry or statistical sampling method is appropriate for an audit and asserted that CBP should not be able to change the audit's method midstream, before completing the audit.

*CBP response:* The decision regarding use of entry-by-entry or statistical sampling methodology in an audit is dependent on the unique circumstances involved and is therefore a matter of professional judgment. CBP auditors

will exercise that judgment on a case-by-case basis based on information and data available to CBP. Proposed § 163.11(c)(2), adopted without change as § 163.11(c)(3) in this final rule, provides general guidance on when sampling methods are appropriate: Review of 100% of the entries/transactions is impossible or impractical in the circumstances; the sampling plan is prepared in accordance with generally recognized sampling procedures; and the sampling procedure is executed in accordance with the sampling plan. The decision to employ sampling or entry-by-entry review is solely within the auditor's discretion.

Regarding changing methodology during the course of an audit, the auditor may encounter circumstances that were unknown when the sampling plan was created. The new circumstances may require changing the audit method from sampling to entry-by-entry, or vice-versa, in order to properly complete the audit. In some circumstances (see next comment response), CBP may expand the audit, either to address a disclosure presented by the audited entity during the course of the audit or to examine additional entries due to new circumstances. This may result in a change in the audit methodology or a different methodology applied to the expanded segment of the audit.

*Comment:* A commenter inquired whether the proposed regulations permit CBP to go outside the sampling plan to examine entries and, if so, under what circumstances may CBP do so.

*CBP response:* Generally, CBP will stay within the sampling plan. In some circumstances, the auditors may discover information or problems that warrant an expansion of the audit and a corresponding adjustment of the sampling plan if necessary. The amended regulations do not specify when CBP may expand the audit, as the various circumstances that may warrant an expansion or other adjustment cannot be captured categorically and evaluation of these circumstances must be left to the observation and professional judgment of the auditors involved. Two examples of when circumstances may warrant an expansion of the audit are where the audited entity requests approval to do self-testing of entries that do not fall within the sampling plan or where it presents a prior disclosure during the course of the audit. Again, expanding the audit will be at CBP discretion.

*Comment:* One commenter asserted that the inapplicability of "finality of liquidation" in proposed § 163.11(c)(1) is not supported by the law or the intent

of Congress because it concerns only audits conducted to identify lost duty under section 1592.

*CBP response:* CBP disagrees. CBP may examine finally liquidated entries in an audit for the purpose of either determining compliance with applicable laws and regulations or identifying lost duties or revenue. Pursuant to sections 1592(d) and 1593a(d), CBP may demand payment of lost duties or revenues, respectively, and impose appropriate penalties relative to violations discovered in finally liquidated entries, notwithstanding the finality of liquidation rule.

*Comment:* One commenter requested that CBP define its supervisory role in self-testing.

*CBP response:* As used in the context of proposed § 163.11(c)(3) (redesignated as § 163.11(c)(4) in this final rule), CBP supervision means that CBP auditors will determine whether to approve the audited entity's request to do self-testing and whether the parameters of the sampling plan (including time period and scope), directing the execution of the sampling plan, and evaluating and verifying the sampling plan's execution and results. CBP may either provide the sampling plan to the audited entity for its execution or permit the audited entity to develop its own plan, with the auditors' direction, and present the plan to the auditors for acceptance prior to execution.

#### *B. Proposed Amendment Regarding the Audited Entity's Waiver of the Ability To Object to the Sampling Plan and/or Methodology*

*Comments:* Most commenters raised objections to the waiver provision of proposed § 163.11(c)(1), under which an audited entity, prior to commencement of the audit work that involves sampling,<sup>3</sup> would waive its ability to contest CBP's sampling plan and methodology once the parties have discussed and accepted it. Some of these comments also cited proposed § 162.74(j), since it permits sampling in a prior disclosure. The primary objections and points are represented in the following comments and responded to further below:

(a) An audited entity should not be limited to challenging only computational and clerical errors and should be allowed to challenge CBP's sampling plan, methodology, and results to ensure that the proposed

sampling plan was actually implemented as proposed and that the results were correctly analyzed and presented. An audited entity's waiver of its ability to appeal or challenge CBP's findings would likely result in the unwillingness of audited entities to accept CBP's statistical sampling plan.

(b) Limiting an audited entity's right to challenge only computational and clerical errors is too narrow and would result in the audited entity waiving its right to challenge allegations of substantive and material errors, such as, for example, CBP allegations of misclassification, undervaluation, etc., and violations of sections 1592 or 1593a.

(c) The waiver is a violation of Congressional intent for even-handed audits.

(d) The regulation should reflect that once the parties accept the sampling plan, CBP waives its ability to subsequently contest the sampling plan's validity and methodology and, with the exception of fraud, waives its ability to review transactions outside the sampling plan for the purpose of determining the total loss of duties, taxes, and fees within the audit period and scope.

(e) The waiver presents due process and fairness concerns, as CBP's projection of underpayments (*i.e.*, violations) will result in a calculation of lost duty/revenue for entries that CBP has not examined, while the audited entity will have waived its ability to contest, administratively and judicially, what it believes may be CBP's failure to identify overpayments or its misidentification of lost duty or revenue.

(f) The regulations should clearly identify what is being waived and what is not being waived.

(g) The regulations should provide a procedure that would allow an audited entity the opportunity to be heard and to exhaust its available administrative and/or judicial challenges to violations alleged by CBP from the transactions actually examined.

(h) Proposed § 162.74(j) may be interpreted to bind the disclosing party to the sampling plan and methodology initially submitted with the prior disclosure without providing for an opportunity to modify and cure defects in the sampling before CBP makes its determination on the sampling results.

(i) An audited entity performing self-testing using an agreed upon sampling plan should also be able to demonstrate facts to contest the validity and/or methodology of that plan, and to propose remedies, before CBP makes a determination on the results.

<sup>3</sup> The use of sampling (or its possible use) will be discussed at the audit's opening conference, but normally cannot be discussed in detail until the audit work has begun and the auditors have been able to observe facts and circumstances involved in the particular audited entity's situation.

(j) CBP should clarify in the regulation that the waiver must be in writing and must be signed by a person with authority to make the waiver, such as an officer of the entity or other person with authority to sign it. If a corporation, the signed waiver should be accompanied by a board resolution or similar authorization.

(k) With respect to any dispute between CBP and the audited entity in the Court of International Trade, CBP's final calculation of the lost duty or revenue owed based on the projection of the sampling plan's results is not binding on the court.

*CBP response:* CBP believes that most of the concerns raised by the commenters, including those regarding due process, fairness, even-handedness, and waiving the right to challenge substantive findings or allegations, can be resolved with a fuller explanation of the waiver. The waiver takes effect when the audited entity accepts the sampling plan and methodology after having discussed it with CBP auditors. (This also applies when an audited entity has been authorized to do self-testing in an audit.) The waiver, which must be in writing (see below), is designed primarily to avoid the contention and delay that could result from disputes over the sampling plan and methodology at the end of an audit, and to later avoid a protracted battle of sampling experts in any administrative or judicial proceeding concerning the details of a sampling approach that both parties had agreed to previously.

It is noted, however, that the waiver is limited. The audited entity would be waiving only its ability to contest the sampling and methodology employed in the audit. The audited entity would not be waiving its ability to raise substantive objections it may have concerning the audit's underlying findings of violations of section 1592 (false statements in an entry regarding classification, valuation, etc., or failure to have required documentation) or violations of section 1593a (false drawback claims). As has always been the case where an audited entity has substantive disagreements with CBP's audit findings identifying violations of sections 1592 or 1593a and/or with the audit's lost duty or revenue calculations (that cannot be resolved through further discussions with, and working with, the auditors), the audited entity is not bound to tender payment in accordance with those findings and calculations. The audited entity instead may opt to pursue its substantive objections as the process continues through any ensuing administrative penalty action initiated by CBP with issuance of either a notice

of liability for lost duty or revenue under sections 1592(d) or 1593a(d) or a prepenalty notice under sections 1592(b) or 1593a(b).

Through the formal penalty action, the audited entity, now the subject of this statutory process, will have access to various procedures under the current CBP regulations to challenge allegations, including audit findings upon which allegations are based. Under § 162.79b of the regulations, the subject may seek CBP Headquarters review when a notice of liability is issued under either section 1592(d) or 1593a(d). Under § 171.14, the subject may seek CBP Headquarters advice regarding the penalty allegations when CBP issues a prepenalty notice under section 1592(b)(1) or 1593a(b)(1). Also, as always, the subject would be able to raise its substantive objections in response to the prepenalty notice and in response to a later-issued penalty notice under section 1592(b)(2) or 1593a(b)(2), thereby having two opportunities to challenge CBP's determinations/allegations. The latter response would be in the form of a petition filed under 19 U.S.C. 1618 (section 1618). Where CBP decides the section 1618 petition to the subject's dissatisfaction, the subject may submit a supplemental petition under § 171.61 and § 171.62, still another opportunity to argue its case. At any time after CBP issues a decision on an initial petition, the subject may pursue an offer in compromise under 19 U.S.C. 1617, putting forth its substantive objections to support the settlement offer. Finally, the subject may defend withholding tender of the penalty and/or lost duty or revenue, and continue its substantive objections, in a judicial enforcement action where all substantive issues will be heard.

The sampling waiver also applies to prior disclosures submitted outside the context of a CBP audit under § 162.74(j) and § 163.11(c)(5) of this final rule, when the prior disclosure is reviewed by CBP's Office of International Trade, Regulatory Audit (RA). All such prior disclosures will be reviewed by RA in some form (although any claiming offsetting will get RA review; see comment response further below). Often, with these prior disclosures, the claimant and RA will have the opportunity to discuss any sampling proposed by the claimant after the initial disclosure is submitted.<sup>4</sup> The

<sup>4</sup> To establish the basic elements of the prior disclosure claim before CBP initiates an investigation, claimants will often submit the prior disclosure letter to disclose the circumstances of the violation and request an extension to finalize the calculation and submit lost duties/revenue. In discussions with CBP, the claimant may propose a sampling plan, work with CBP to develop one, or

claimant's acceptance of the sampling approach arrived at through these discussions with RA constitutes the waiver, as limited per the discussion above. In this context, a claimant may request that CBP calculate the lost duty/revenue under § 162.74(c) and may seek CBP Headquarters review of the field office's calculation (subject to limitations, such as a minimum monetary amount and the statute of limitations), at which time the claimant can raise its substantive objections to the underlying CBP allegations involved.

Thus, under the proposed regulation, and as adopted in this final rule, an audited entity, or prior disclosure claimant in the circumstances described above, waives its ability to object to the sampling and methodology to which it agreed, but does not thereby forfeit its ability to challenge underlying substantive findings or allegations through available procedures under the regulations. CBP is modifying proposed §§ 162.74(j) and 163.11(c) in this final rule to clarify the waiver provision with respect to what is not being waived by, respectively, a prior disclosure claimant or an audited entity.

Regarding comments concerning the ability of a prior disclosure claimant, within or outside of a CBP audit, to cure defects in sampling once the disclosure is submitted to CBP, CBP, upon review of the sampling, will allow a reasonable opportunity for the claimant to resolve defects. It is recognized that in some cases the sampling will be so flawed it cannot form the basis of an acceptable prior disclosure or be cured through reasonable efforts.

The recommendations that the regulations include a waiver by CBP of its ability to challenge or change the sampling or methodology or to go outside the sampling plan to examine entries, after there is acceptance of the sampling plan by the parties, cannot be adopted in this final rule. CBP is authorized under law to conduct audits to ensure compliance with the customs laws and other laws in order to protect the revenue and enforce various restrictions. The audit program is CBP's primary means for ensuring this compliance. It is a critical oversight and enforcement function. To effectively perform this function, CBP must have flexibility to make necessary adjustments while conducting audits.

Regarding the recommendation that the regulations provide for a written waiver, CBP agrees that a written waiver would be appropriate. Therefore, CBP is

explain one that it has already worked through (without finalizing the calculation).

adding to the regulation in this final rule (19 CFR 163.11(c)(1)) that a management official with authority to bind the audited entity must sign the waiver on the audited entity's behalf. This official should have responsibility over the company's importation or trade matters and/or other matters involving the customs laws and regulations, or other trade related laws and regulations. The appropriate RA field director will have authority to sign for CBP. It is noted, however, that in some instances, the sampling plan and/or methodology must be adjusted or modified after it has been discussed and accepted or after it has been commenced. In these instances, further discussions of these adjustments/modifications would require another written waiver to evidence the audited entity's acceptance of the changes.

### C. Proposed Amendments Regarding Offsetting

*Comment:* Several commenters requested clarification as to whether an audited entity authorized (pre-approved) by CBP to conduct self-testing in a CBP audit, under CBP supervision, may apply offsetting in a prior disclosure resulting from the self-testing.

*CBP response:* An audited entity in the described circumstances (self-testing in a CBP audit) may apply offsetting in a prior disclosure. The offsetting will be approved where, upon review, RA determines that all the requirements for offsetting set forth in this final rule have been met and RA approves the audited entity's implementation and results of the self-testing, whether an entry-by-entry or sampling methodology was used.

*Comment:* Several commenters asserted that offsetting should be permitted for overpayments in prior disclosures that are not submitted in the context of a CBP audit. Several commenters also requested that CBP clarify, for purposes of offsetting, the circumstances under which CBP's verification or review of a prior disclosure submitted outside the context of a CBP audit would constitute a section 1509 audit as defined by the proposed regulation (§ 163.11(c)).

*CBP response:* CBP's offsetting authority under section 1509(b)(6)(A) was limited by Congress to audits conducted by CBP under section 1509 and to calculations of lost duty and monetary penalties under section 1592. The law does not include exceptions to this restriction. CBP cannot apply offsetting in an audit calculating lost revenue under section 1593a; nor can CBP apply offsetting in a prior

disclosure submitted to CBP outside the context of a section 1509 audit unless CBP performs such an audit or review of the prior disclosure submission. The proposed regulation did not include a provision for offsetting in a prior disclosure submitted outside the context of a CBP audit, but that scenario was discussed in the proposed rule's preamble. Based on the many comments received on this issue and further consideration of the matter, CBP, in this final rule, is providing a regulatory process for ensuring that all of these prior disclosures are referred to RA for review and evaluation of the offsetting.

Initially, it is noted that, consistent with the proposed rule, this final rule recognizes that some CBP audits will be full-scale reviews that follow all the procedural steps for a formal on-site review of an audited entity's records, such as would be appropriate to conduct a focused assessment audit, and others will be less formal and extensive for conducting audits with a more narrow purpose. The definition of "audit" set forth in proposed § 163.11(c), and adopted with a minor change in this final rule, provides that a CBP audit "may be as extensive or simple as CBP determines is warranted to achieve the audit's purpose under applicable laws and regulations." This concept is consistent with CBP's practice under current regulations. CBP has always had the flexibility to vary the approach of audits depending on the audit's purpose and the circumstances involved. Proposed § 163.11(f) is modified in this final rule to reflect this flexibility, as the formal process of § 163.11(a) is not conducive to a CBP RA review of a prior disclosure.

The referenced change to the proposed definition of "audit" reflects a refining of terms, as the words "examination or review" have been replaced in this final rule with the word "evaluation." Another modification to the definition is designed to clarify that the self-testing approved by CBP within the time period and scope of the audit includes the time period and scope as originally set and as sometimes later modified by CBP at its discretion where warranted.

Under this final rule, all prior disclosures with offsetting submitted outside the context of a CBP audit will be referred to CBP's RA for a review and evaluation that will be deemed a section 1509 audit for offsetting purposes. Due to limits stemming from the availability of resources and the press of other priorities and responsibilities, RA will vary its approach to reviewing these prior disclosures depending on their circumstances. The extent of the review

will be based on an internal evaluation of the prior disclosure's complexity and risk factors. The monetary value of the disclosure also may be a factor at times. In some instances, RA will review sufficient documentation submitted by the claimant plus CBP's own records and databases. In other instances, RA may contact the claimant for discussion or additional documentation. In still other instances, an on-site visit may be warranted, with a partial or full-scale review of entries/documents depending on RA's assessment of the circumstances. Where RA determines that its review of the prior disclosure, whether limited or extensive, shows, to its satisfaction, that the claim and its calculations of lost duty meet all statutory and regulatory requirements regarding offsetting, and sampling where sampling is employed, offsetting may be applied, provided it meets the basic requirements of the prior disclosure regulations, as determined by the appropriate Fines, Penalties, and Forfeitures (FP&F) office.

CBP notes that offsetting may not be allowed in every case, but CBP is committed to providing offsetting in accordance with the statute and this final rule whenever, under its procedures, it performs a section 1509 audit/review involving lost duty calculations under section 1592.

*Comment:* One commenter claimed that CBP's disallowance of offsetting under proposed § 163.11(d)(5), in cases where identified underpayment entries involve fraud, violates Congressional intent for even-handed audits under the Trade Act. Under this paragraph, all properly identified overpayments would be disallowed for offsetting, while CBP would seek collection for all properly identified underpayments (violations). This commenter also asserted that the restriction on refunds under proposed § 163.11(d)(8) violates this Congressional intent. Under that paragraph, refund payments are limited to properly identified overpayment entries that qualify for a refund under the requirements of 19 U.S.C. 1514 (section 1514) or 19 U.S.C. 1520 (section 1520). These statutes provide for a refund where the audited party can identify an error correctable under one of their provisions.

*CBP response:* CBP disagrees. Section 1509(b)(6)(A) precludes offsetting when overpayments/over-declarations were made for the purpose of violating any provision of law. Proposed § 163.11(d)(5)'s disallowance of offsetting when entries identified in an audit were made knowingly and intentionally (fraudulently) is self-evident and consistent with CBP's

treatment of fraud violations under section 1592 as distinct from violations based on negligence or gross negligence. An importer should not be permitted to gain through offsetting in instances where it committed knowing and intentional violations. This provision is retained in this final rule as § 163.11(d)(6).

Regarding the disallowance of refunds under proposed § 163.11(d)(8) (§ 163.11(d)(9) in this final rule), it is in fact the intent of Congress to limit refund payments to specific, limited circumstances. Under section 1509(b)(6)(B), the offsetting provision is not to be construed as authorizing a refund that is not otherwise authorized under section 1520. This clearly means that a refund is payable only if the particular circumstances of the overpayment entries involved would independently meet the very specific circumstances set forth under any provision of section 1520 that involves liquidated entries, including any requirement to timely file a petition or claim for relief under the provision.

It is noted that the proposed regulation and the regulation as amended in this final rule includes section 1514 in its refund restriction, along with the statutorily enumerated section 1520, on the grounds that Congress intended that CBP have the authority to pay a refund when an overpayment entry's circumstances constitute clerical error, mistake of fact, or other inadvertence now correctable under section 1514(a). At the time the offsetting law was enacted, relief for a clerical error, mistake of fact, or other inadvertence was provided for under section 1520.

*Comment:* One commenter asserted that CBP should make clear that the inapplicability of the "finality of liquidation" rule is limited to an audit conducted to assess lost duties, including offsetting of overpayments, only in cases of 19 U.S.C. 1592. The commenter also requested that CBP clarify whether offsetting is permitted for overpayments on unliquidated entries identified within the time period and scope of the audit.

*CBP response:* The proposed rule made clear that offsetting would apply only to finally liquidated entries identified in a CBP audit for calculating lost duties and monetary penalties under section 1592, provided that all requirements for offsetting are met, including that the identified overpayments are within the audit's time period and scope (and within the time period and scope of any sampling plan applied in accordance with proposed § 163.11(c)) (proposed

§ 163.11(d)(3) is § 163.11(d)(4) in this final rule). It also made clear that section 1592 permits the lost duty calculation on liquidated entries despite the fact that their liquidations have become final. This calculation of lost duties under section 1592 now includes offsetting of overpayments by virtue of section 1509(b)(6)(A).

Regarding offsetting for unliquidated entries, it is possible that both unliquidated and liquidated entries may be properly identified in a CBP audit; however, section 1509(b)(6)(A) limits offsetting to overpayments/over-declarations identified on finally liquidated entries, provided that the overpayments/over-declarations were not made by the audited entity for the purpose of violating any provision of law and meet the other requirements of the statute.

*Comment:* One commenter recommended that members of the Importer Self-Assessment Program (ISA) be allowed to benefit from offsetting.

*CBP response:* The ISA program is a voluntary partnership program between CBP and companies operating under the customs laws, generally importers. An ISA program member receives certain benefits under the program, the most notable being removal from the pool of companies subject to focused assessment audits (the general audit program administered by RA for ensuring compliance with the customs laws and regulations). CBP has a high degree of confidence in member companies based on RA's initial evaluation of the companies' internal processes and systems during the application process. ISA members are companies with high compliance ratings, and CBP believes that the trust it has in members is warranted and the benefits enjoyed by members are earned and deserved. In addition to their initial evaluation by CBP in the application process, member companies must perform an annual self review of its customs operations that it submits to RA. The ISA annual self-review may occasionally result in the discovery of errors that lead to the filing of a prior disclosure.

The benefit of offsetting in prior disclosures is available to ISA members just as it is available to any importer. As trusted members of the ISA program whose records, systems performance, and regular monitoring engender CBP confidence, ISA member prior disclosures may not require extensive CBP RA review, though that is a judgment for RA to make on a case-by-case basis.

*Comment:* One commenter stated that because offsetting is an importer's right

under the statute, the discretionary "may" should be changed to "shall" and "will" under, respectively, proposed § 163.11(d)(1) pertaining to CBP's authority to allow offsetting and proposed § 163.11(d)(2) pertaining to an audited entity's offsetting when self-testing under CBP supervision.

*CBP response:* CBP agrees that "may" should be changed. Therefore, "may" has been changed to "will" in both provisions. CBP has also added language in both provisions to clarify that the approval of offsetting by CBP is dependent on all the requirements for offsetting in § 163.11(d) being met.

*Comment:* One commenter stated that proposed § 163.11(d)(4) has an incorrect reference to paragraph (d)(4) that should instead reference paragraph (d)(3).

*CBP response:* CBP agrees and has made the correction. However, in this final rule, proposed § 163.11(d)(3) has been redesignated as § 163.11(d)(4) and proposed § 163.11(d)(4) has been redesignated as § 163.11(d)(5). Thus, the reference is now to § 163.11(d)(4) and is found in § 163.11(d)(5).

#### D. Proposed Amendments to Prior Disclosure Regulations

*Comment:* One commenter requested that CBP modify proposed § 162.74(j) to require that CBP approve the statistical sampling plan proposed by a private party prior to submission of a prior disclosure. The commenter stated that failure by CBP to accept the sampling plan prior to submission could subject the private party to expensive and time consuming entry-by-entry analysis even though the statistical sampling analysis and lost duties/revenues have been tendered to CBP. One commenter inquired whether a prior disclosure claimant would have an opportunity to correct a prior disclosure sampling plan that CBP, upon post-submission review, is unable to accept due to a defect in the plan or its execution.

*CBP response:* CBP's review of a prior disclosure with sampling may include, at CBP's discretion, reasonable efforts, as determined in the circumstances by CBP, to work with the private party to cure defects in the sampling plan or its execution. It is recognized that in some cases the sampling will be so flawed it cannot form the basis of an acceptable prior disclosure or be cured through reasonable efforts.

In this regard, to effectively review a prior disclosure claimant's sampling and calculations or sampling/methodology proposal, CBP must be able to understand them. Therefore, the claimant must submit with its disclosure a brief but clear explanation of its sampling plan and methodology.

Proposed § 162.74(j) has been modified accordingly in this final rule.

*Comment:* One commenter inquired whether an audited entity authorized by CBP to conduct self-testing in a CBP audit can file a prior disclosure without triggering a formal investigation.

*CBP response:* Where an audited entity performs self-testing during a CBP audit, the discussion that precedes the self-testing concerns the particulars involved, and it is not likely that an investigation would be triggered by such discussions. However, an audited entity is advised to be aware of the restrictions to prior disclosure set forth in the prior disclosure regulations. Under these regulations, a prior disclosure may be approved where the claimant discloses the circumstances of a violation before, or without knowledge of, the commencement of a formal investigation (see §§ 162.74(a) and 162.74(g)). Thus, where CBP auditors have already uncovered evidence of violations, created a writing recording those suspected violations (commencing a formal investigation), and raised those suspected violations with the audited entity (§ 162.74(i)(1)(i)), the restriction to prior disclosure eligibility may apply.

#### *E. Proposed Amendment Regarding Restriction on Defense of Reasonable Care*

*Comment:* One commenter recommended that CBP clarify proposed § 163.11(e)'s restriction on the defense of "reasonable care"<sup>5</sup> as applied to entries involved in a previous audit's sampling plan.

*CBP response:* Under proposed § 163.11(e), the mere fact that an entry was within the time period and scope of a previous CBP audit that employed a sampling plan cannot be claimed as a defense in a later penalty action. The proposed provision is retained in this final rule without change.

### **III. Conclusion Regarding Comment Analysis and Additional Changes**

Based on the comments received and CBP's reconsideration of the various issues raised and discussed in this document, CBP is adopting as final the proposed rule's changes, with certain

<sup>5</sup> Under 19 U.S.C. 1484(a)(1), an importer of record, or its agent, is obligated to exercise reasonable care in performing certain actions related to the entry of merchandise into the United States. Under 19 CFR Part 171, App. B, Para. (C)(1), a penalty is warranted where a person fails to exercise "the degree of reasonable care and competence expected" in the circumstances, and the failure results in a false statement or material omission under the statute. Generally, a showing that the importer acted with reasonable care is a defense to allegations of a negligence violation under 19 U.S.C. 1592 or 1593a.

modifications and additions that are explained throughout the comment discussion section of this document. The major additions are as follows:

(1) A requirement that a private party's prior disclosure that employs sampling must include an explanation of the sampling plan and methodology employed. The explanation must be adequate, to CBP's satisfaction, to permit CBP to understand the sampling and methodology employed. This reflects in the regulation a procedure that is already practiced by prior disclosure claimants. An explanation of the sampling and methodology is fundamental and inherent in a proper prior disclosure using sampling as a means of disclosing the circumstances of the violations involved. (See 19 CFR 162.74(j) and 163.11(c)(5) of this final rule.)

(2) A requirement that a written waiver evidence a private party's acceptance of the sampling plan and methodology to be employed in an audit or, where appropriate, in circumstances of self-testing or prior disclosure as described in 19 CFR 163.11(c)(4) and (c)(5), respectively. The waiver limits the private party's objections to the sampling procedure to but does not limit any other substantive claims. The appropriate RA field director will sign for CBP. Acceptance of subsequent adjustments or modifications to the sampling plan or methodology also must be in writing. (See 19 CFR 163.11(c)(1) of this final rule.)

(3) A provision under which CBP will refer to RA for review and evaluation all prior disclosures submitted outside the context of a CBP audit that apply or seek to apply offsetting under 19 CFR 163.11(d). (See 19 CFR 163.11(d)(3) of this final rule.) RA will approve the offsetting where it determines that the requirements of the statute and this final rule are satisfied.

### **IV. Statutory and Regulatory Reviews**

#### *A. Executive Order 12866*

Executive Order 12866 (Regulatory Planning and Review; September 30, 1993) requires Federal agencies to conduct economic analyses of significant regulatory actions as a means to improve regulatory decision-making. Significant regulatory actions include those that may "(1) [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) [c]reate a serious inconsistency or

otherwise interfere with an action taken or planned by another agency; (3) [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order." This rule does not meet any of the above criteria and is thus not a significant regulatory action. This rule has not been reviewed by the Office of Management and Budget (OMB) under this order.

As described above, this final rule does not impose additional requirements or procedural burdens on entities affected and would not have an economic impact on them except in certain penalty cases in which the entities affected would realize a reduction in the amount of a penalty, or in the amount of lost revenue owed, due to the allowance of offsetting. CBP did not receive any comments that would contradict our conclusion that this rule is not a significant regulatory action or our assertion that to the extent this rule does have economic impacts, they will be marginally beneficial to the trade community and CBP.

#### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires federal agencies to examine the impact a rule would have on small entities. A small entity may be a small business; a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The entities affected by this final rule are importers and various other parties who are subject to a CBP audit under the CBP regulations. "Importers" are not defined as a "major industry" by the Small Business Administration (SBA) and do not have a unique North American Industry Classification System (NAICS) code; rather, virtually all industries classified by SBA include entities that import goods and services into the United States. Thus, entities affected by this final rule would likely consist of the broad range of large, medium, and small businesses operating under the customs laws and other laws that CBP administers and enforces. These entities include, but are not limited to, importers, brokers, and freight forwarders, as well as other businesses that operate under drawback, bonded warehouse, and foreign trade zone procedures and those conducting various activities under bond.

The finalized rule concerning audit procedures brings the CBP regulations up to date with CBP practices by explicitly providing for the use of sampling methods in audits conducted by CBP under 19 U.S.C. 1509. The use of sampling methods is expected to facilitate and enhance the effectiveness of the CBP audit process for both CBP and private entities, thus making the process less burdensome for all involved. The finalized rule brings the regulations up to date with existing law regarding the offsetting of overpayments and over-declarations for the purpose of calculating loss of revenue or monetary penalties under 19 U.S.C. 1592.

Because these amendments to the regulations affect such a wide-ranging group of entities involved in the importation of goods to the United States, the number of entities subject to this final rule would be considered "substantial." Additionally, these changes to the regulations would confer a small, positive economic benefit to affected entities as a result of a more efficient audit process and, in some cases, a reduction of duties found owing to the government. Neither of these benefits, however, would rise to the level of being considered a "significant" economic impact. We solicited comments on this conclusion and did not receive any comments contradicting our findings. Therefore, CBP certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The collections of information in part 163 of the current CBP regulations have already been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and have been assigned OMB control number 1651-0076 (General recordkeeping and record production requirements). This final rule does not involve a change to either the number of respondents or the burden estimates contained in the existing approved information collection. Affected persons are already required to provide relevant information or records requested by CBP during an audit procedure conducted under the authority of 19 U.S.C. 1509 (the CBP audit statute) and the CBP regulations. Records or information having to do with overpayments or over-declarations for offset purposes under paragraph (b)(6) of the statute fall within this existing requirement. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the

collection of information displays a valid control number assigned by OMB.

D. Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his or her delegate) to approve regulations pertaining to certain revenue functions.

List of Subjects

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 163

Administrative practice and procedure, Customs audits, Customs duties and inspection, Imports, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

For the reasons set forth in the preamble, parts 162 and 163 of the CBP regulations (19 CFR Parts 162 and 163) are amended as set forth below:

PART 162—INSPECTION, SEARCH AND SEIZURE

■ 1. The general authority citation for part 162 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1592, 1593a, 1624; 6 U.S.C. 101; 8 U.S.C. 1324(b).

■ 2. Section 162.74 is amended by adding new paragraph (j) to read as follows:

§ 162.74 Prior disclosure.

\* \* \* \* \*

(j) Prior disclosure using sampling. (1) A private party may use statistical sampling to "disclose the circumstances of a violation" and for calculation of lost duties, taxes, and fees or lost revenue for purposes of prior disclosure, provided that the statistical sampling satisfies the criteria in 19 CFR 163.11(c)(3). The prior disclosure must include an explanation of the sampling plan and methodology that meets with CBP's approval. The time period, scope, and any sampling plan employed by the private party, as well as the execution and results of the self-review, are subject to CBP review and approval. In accordance with 19 CFR 163.11(c)(1), in circumstances where the private party and CBP have discussed and accepted the sampling plan and its methodology, or adjustments to it, the private party submitting a prior disclosure employing sampling under this paragraph may not

contest the validity of the sampling plan or its methodology, and challenges of the sampling itself will be limited to computational and clerical errors after CBP conducts its review and makes a determination. This is not a waiver of the private party's right to later contest substantive issues it may properly raise under applicable regulations, as provided in 19 CFR 163.11(c)(1).

(2) If a private party submits a prior disclosure claim employing sampling, CBP may review other transactions from the same time period and scope that are the subject of the prior disclosure.

PART 163—RECORDKEEPING

■ 3. The general authority citation for part 163 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1484, 1508, 1509, 1510, 1624.

\* \* \* \* \*

§ 163.0 [Amended]

■ 4. Section 163.0 is amended by removing from the second sentence the words, "or compliance assessment".

■ 5. Section 163.1 is amended by:

- a. Revising paragraph (c); and
■ b. Removing paragraph (e) and redesignating existing paragraphs (f) through (l) as paragraphs (e) through (k).

The revision of § 163.1(c) reads as follows:

§ 163.1 Definitions.

\* \* \* \* \*

(c) Audit. "Audit" means an evaluation by CBP under 19 U.S.C. 1509 of records required to be maintained and/or produced by persons listed in § 163.2, or pursuant to other applicable laws or regulations administered by CBP, for the purpose of furthering any investigation or review conducted to: ascertain the correctness of any entry; determine the liability of any person for duties, taxes, and fees due, or revenue due, or which may be due the United States; determine liability for fines, penalties, and forfeitures; ensure compliance with the laws of the United States administered by CBP; or determine that information submitted or required is accurate, complete, and in accordance with any laws and regulations administered or enforced by CBP. An audit does not include a quantity verification for a customs bonded warehouse or general purpose foreign trade zone. An audit may be as extensive or simple as CBP determines is warranted to achieve the audit's purpose under applicable laws and regulations.

\* \* \* \* \*



**§ 163.6 [Amended]**

■ 6. Section 163.6 is amended by removing the words “or compliance assessment” in paragraph (c)(1), first sentence, and in paragraph (c)(2), first sentence.

**§ 163.7 [Amended]**

■ 7. Section 163.7 is amended by removing the words “or compliance assessment” in paragraph (a), first sentence.

■ 8. Section 163.11 is revised to read as follows:

**§ 163.11 Audit procedures.**

(a) *General requirements.* In conducting an audit under 19 U.S.C. 1509(b), the CBP auditors, except as otherwise provided in paragraph (f) of this section, will:

(1) Provide notice, telephonically and in writing, to the person to be audited of CBP’s intention to conduct an audit and a reasonable estimate of the time to be required for the audit;

(2) Inform the person who is to be the subject of the audit, in writing and before commencement of the audit, of that person’s right to an entrance conference, at which time the objectives and records requirements of the audit, and any sampling plan to be employed or offsetting that may apply, will be explained and the estimated termination date of the audit will be set. Where a decision on a sampling plan and methodology is not made at the time of the entrance conference, CBP will discuss these matters with the person being audited as soon as possible after the discovery of facts and circumstances that warrant the possible need to employ sampling;

(3) Provide a further estimate of any additional time for the audit if, during the course of the audit, it becomes apparent that additional time will be required;

(4) Schedule a closing conference upon completion of the audit on-site work to explain the preliminary results of the audit;

(5) Complete a formal written audit report within 90 calendar days following the closing conference referred to in paragraph (a)(4) of this section, unless the Executive Director, Regulatory Audit, Office of International Trade, CBP Headquarters, provides written notice to the person audited of the reason for any delay and the anticipated completion date; and

(6) After application of any disclosure exemptions contained in 5 U.S.C. 552, send a copy of the formal written audit report to the person audited within 30 calendar days following completion of the report.

(b) *Petition procedures for failure to conduct closing conference.* Except as otherwise provided in paragraph (f) of this section, if the estimated or actual termination date of the audit passes without a CBP auditor providing a closing conference to explain the results of the audit, the person audited may petition in writing for a closing conference to the Executive Director, Regulatory Audit, Office of International Trade, Customs and Border Protection, Washington, DC 20229. Upon receipt of the request, the director will provide for the closing conference to be held within 15 calendar days after the date of receipt.

(c) *Use of statistical sampling in calculation of loss of duties or revenue.*

(1) *General.* In conducting an audit under this section, regardless of the finality of liquidation under 19 U.S.C. 1514, CBP auditors have the sole discretion to determine the time period and scope of the audit and will examine a sufficient number of transactions, as determined solely by CBP. In addition to examining all transactions to identify loss of duties, taxes, and fees under 19 U.S.C. 1592 or loss of revenue under 19 U.S.C. 1593a, or to determine compliance with any other applicable customs laws or other laws enforced by CBP, CBP auditors, at their sole discretion, may use statistical sampling methods. During the audit, CBP auditors will explain the sampling plan and how the results of the sampling will be projected over the universe of transactions for purposes of calculating lost duties, taxes, and fees or lost revenue and, where appropriate, overpayments and over-declarations eligible for offsetting under paragraph (d) of this section. The person being audited and CBP will discuss the specifics of the sampling plan before audit work under the plan is commenced. Once the sampling plan is accepted, the audited person waives the ability to contest the validity of the sampling plan or its methodology at a later date and challenges of the sampling will be limited to challenging computational and clerical errors. CBP’s authority to conduct the audit or employ statistical sampling is not dependent on the audited person’s acceptance of the specifics of the sampling plan. An audited person’s acceptance of the sampling plan and methodology must be in writing and signed by a management official with authority to bind the company in matters of trade, imports, and/or other affairs under the customs laws, CBP regulations, or other applicable laws. The audited person may submit the

signed waiver to the CBP auditor. The appropriate field director, Regulatory Audit, will sign the waiver for CBP. Where the sampling plan or methodology is subsequently adjusted or modified, at CBP’s discretion, acceptance of the adjustments or modifications also must be in writing and signed. This is not a waiver of the audited person’s right to later contest substantive issues, such as misclassification, undervaluation, etc., that may properly be raised under applicable regulations, including in a request for CBP Headquarters advice under 19 CFR 171.14, a request for CBP Headquarters review under 19 CFR 162.74(c), a response to a prepenalty notice issued by CBP under 19 U.S.C. 1592(b)(1) or 19 U.S.C. 1593a(b)(1), a petition submitted in response to a penalty notice issued by CBP under 19 U.S.C. 1592(b)(2) or 19 U.S.C. 1593a(b)(2) (19 CFR part 171) and 19 U.S.C. 1618, a supplemental petition submitted under 19 CFR 171.61 and 171.62, or any action commenced in a court of proper jurisdiction.

(2) *Projection.* For purposes of this section, “projection” of sampling results over the universe of transactions is the process by which the results obtained from the sample entries actually examined are applied to the universe of entries set within the time period and scope of the sampling plan to yield a reliable assessment of that which is sought to be ascertained or measured in the audit, including, but not limited to, lost duties or revenue, or overpayments or over-declarations, as described in paragraph (d)(1) of this section.

(3) *When CBP uses statistical sampling.* CBP auditors have the sole discretion to use statistical sampling techniques when:

(i) Review of 100 percent of the transactions is impossible or impractical;

(ii) The sampling plan is prepared in accordance with generally recognized sampling procedures; and

(iii) The sampling procedure is executed in accordance with that plan.

(4) *Statistical sampling by audited persons under CBP supervision.* CBP may authorize a person being audited to conduct, under CBP supervision, self-testing of its own transactions within the time period and scope of the audit as originally set or later modified by CBP at its discretion. Audited persons permitted in advance by CBP to conduct self-testing of certain transactions under CBP supervision within the time period and scope of a CBP audit may use statistical sampling methods, provided that the criteria contained in paragraph (c)(3) of this section are satisfied. CBP

will determine the time period and scope of the CBP-approved and supervised self-testing and will explain any sampling plan to be employed in accordance with paragraph (c)(1) of this section. The execution and results of the self-testing and the sampling plan are subject to CBP approval, and the audited person is subject to the waiver of paragraph (c)(1) of this section.

(5) *Statistical sampling by a private party submitting a prior disclosure.* A private party conducting an independent review of certain transactions and a calculation of lost duties, taxes, and fees or lost revenue for purposes of prior disclosure, in accordance with 19 CFR 162.74(j), may use statistical sampling, provided that the private party submits an explanation of the sampling plan and methodology employed and that the criteria in paragraph (c)(3) of this section are satisfied. Where the private party submits a prior disclosure employing statistical sampling, the time period, scope, and any sampling plan employed by the private party, as well as the execution and results of the self-review, are subject to CBP review and approval. Where CBP and the private party discuss and accept the sampling plan and methodology, or an adjustment to it, the waiver of paragraph (c)(1) of this section applies.

(d) *Offset of overpayments and over-declarations in 19 U.S.C. 1592 penalty cases.* (1) *General.* In conducting any audit authorized under 19 U.S.C. 1509 and this section for the purpose of calculating the loss of duties, taxes, and fees or monetary penalty under any provision of 19 U.S.C. 1592, CBP auditors identifying overpayments of duties or fees or over-declarations of quantities or values that are within the time period and scope of the audit, as established solely by CBP, will treat the overpayments or over-declarations on finally liquidated entries as an offset to any underpayments or under-declarations also identified on finally liquidated entries, provided that:

(i) The identified overpayments or over-declarations were not made by the person being audited for the purpose of violating any provision of law, including laws other than customs laws, and

(ii) The identified underpayments or over-declarations were not made knowingly and intentionally, and

(iii) All other requirements of this paragraph (d) are met.

(2) *When audited person conducts self-testing under CBP supervision.* Offsetting will apply to self-testing conducted by an audited person under CBP supervision (i.e., during a CBP audit), provided that all requirements of

this paragraph (d) are met, CBP approves the self-testing in advance and, upon review of the self-testing, CBP approves its execution and results.

(3) *When a private party submits a prior disclosure.* Offsetting will apply when a private party submits a prior disclosure, provided that the prior disclosure is in accordance with 19 CFR 162.74 and CBP approves the private party's self-review, including its execution and results. CBP's Office of International Trade, Regulatory Audit will review and evaluate all such prior disclosures and approve offsetting where it is satisfied that the requirements of 19 U.S.C. 1509(b)(6) and this paragraph (d) are met.

(4) *Time period and scope determined by CBP; projection when sampling employed.* In conducting an audit under paragraph (d)(1) of this section or authorizing an audited person's self-testing as described in paragraph (d)(2) of this section, CBP will have the sole authority to determine the time period and scope of the audit. In conducting a review of a private party's prior disclosure as described in paragraph (d)(3) of this section, the time period and scope employed will be subject to CBP approval. In each of these circumstances, where statistical sampling is involved, CBP auditors will examine only the selected sample transactions. The results of the sample examination, with respect to properly identified overpayments and over-declarations and properly identified underpayments and under-declarations, will be projected over the universe of transactions to determine the total overpayments and over-declarations that are eligible for offsetting and to determine the total loss of duties, taxes, and fees.

(5) *Same acts, statements, omissions, or entries not required.* Offsetting may be permitted where the overpayments or over-declarations were not made by the same acts, statements, or omissions that caused the underpayments or under-declarations, and is not limited to the same entries that evidence the underpayments or under-declarations, provided that they are within the time period and scope of the audit as established by CBP and as described in paragraph (d)(4) of this section.

(6) *Limitations.* Offsetting will not be allowed with respect to specific overpayments or over-declarations made for the purpose of violating any provision of law, including laws other than customs laws. Offsetting will not be allowed with respect to overpayments or over-declarations resulting from a failure to timely claim or establish a duty allowance or

preference. Offsetting will be disallowed entirely where CBP determines that any underpayments or under-declarations identified for offsetting purposes were made knowingly and intentionally.

(7) *Audit report.* Where overpayments or over-declarations have been identified in accordance with paragraph (d)(1) of this section, the audit report will state whether they have been made within the time period and scope of the audit.

(8) *Disallowance determinations referred to Fines, Penalties, and Forfeitures office.* Any determination that offsets will be disallowed where overpayments/over-declarations were made for the purpose of violating any law, or where underpayments or under-declarations were made knowingly and intentionally, will be made by the appropriate Fines, Penalties, and Forfeitures (FP&F) office to which the issue was referred. CBP will notify the audited person of a determination whether to allow offsetting in whole or in part. The FP&F office will issue a notice of penalty under 19 U.S.C. 1592(b) and/or notice of liability for lost duties, taxes, and fees under 19 U.S.C. 1592(d) where it determines that such action is warranted. If the FP&F office issues a notice of penalty, the audited person may file a petition under 19 U.S.C. 1592(b)(2), 19 U.S.C. 1618, and 19 CFR part 171 to challenge the action.

(9) *Refunds limited.* An overpayment of duties and fees will only be credited toward a refund if the circumstances of the overpayment meet the requirements of 19 U.S.C. 1520 or the requirements of 19 U.S.C. 1514(a) pertaining to clerical error, mistake of fact, or other inadvertence in any entry, liquidation, or reliquidation.

(e) *Sampling not evidence of reasonable care.* The fact that entries were previously within the time period and scope of an audit conducted by CBP in which sampling was employed, in any circumstances described in this section, is not evidence of reasonable care by a violator in any subsequent action involving such entries.

(f) *Exception to procedures.* The provisions of paragraph (a) of this section may not apply when a private party submits a prior disclosure under paragraph (d)(3) of this section. Paragraphs (a)(5), (a)(6), (b), (d)(8), and (d)(9) of this section do not apply once CBP and/or ICE commences an

investigation with respect to the issue(s) involved.

**Alan D. Bersin,**

*Commissioner, Customs and Border Protection.*

Approved: October 19, 2011.

**Timothy E. Skud,**

*Deputy Assistant Secretary of the Treasury.*

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**BILLING CODE 9111-14-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket No. USCG-2011-0899]

RIN 1625-AA00

#### **Safety Zone; Waverly Country Club Fireworks Display on the Willamette River, Portland, OR**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a safety zone on the Willamette River located at the Waverly Country Club for a private event in Portland, Oregon. The safety zone is necessary to help ensure the safety of the maritime public during the displays and will do so by prohibiting persons and vessels from entering the safety zones unless authorized by the Captain of the Port or his designated representatives.

**DATES:** This rule is effective from 8:30 p.m. until 10:30 p.m. on November 5, 2011 as detailed in the rule.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG-2011-0899 and are available online by going to <http://www.regulations.gov>, inserting USCG-2011-0899 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or e-mail BM1 Silvestre Suga III, Waterways Management Division, Coast Guard MSU Portland; telephone 503-240-9319, e-mail [silvestre.g.suga@uscg.mil](mailto:silvestre.g.suga@uscg.mil). If you have questions on viewing the docket, call

Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

#### **SUPPLEMENTARY INFORMATION:**

##### **Regulatory Information**

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest."

Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because immediate action is necessary to ensure the safety of vessels and spectators gathering in the vicinity of the fireworks launching and display sites. Following normal rulemaking procedures in this case would be impracticable and contrary to public interest since the event will have taken place by the time the notice could be published and comments taken.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because immediate action is necessary to ensure the safety of vessels and spectators gathering in the vicinity of the fireworks launching and display sites. Following normal rulemaking procedures in this case would be impracticable and contrary to the public interest, as this inherently dangerous event will have taken place by the time notice could be published and comments taken.

##### **Background and Purpose**

Fireworks displays create hazardous conditions for the maritime public because of the large number of vessels that congregate near the displays as well as the noise, falling debris, and explosions that occur during the event. The establishment of a safety zone helps ensure the safety of the maritime public by prohibiting persons and vessels from coming too close to the fireworks display and other associated hazards.

##### **Discussion of Rule**

This rule establishes a safety zone on the Willamette River in the vicinity of the Waverly Country Club for a private event that will be held on Saturday November 5, 2011. The safety zone will close a section of the Willamette River between two lines; line one starts on the

east bank at latitude 45°27'9.13" N, longitude 122°39'20.99" W then stretches across the river to the west bank at latitude 45°27'6.78" N, longitude 122°39'31.31" W, line two starts twelve hundred feet upstream on the east bank at latitude 45°26'57.09" N, longitude 122°39'14.35" W then stretches across the river to the west bank at latitude 45°26'53.81" N, longitude 122°39'25.40" W.

Geographically this safety zone covers all waters of the Willamette River in front of the Waverly Country Club extending upriver and downriver 600 feet from the firing site at approximate latitude 45°27'3.60" N, longitude 122°39'17.99" W and extending over the river to the west bank in a rectangular shape.

All persons and vessels will be prohibited from entering the safety zones during the dates and times they are effective unless authorized by the Captain of the Port or his designated representative.

##### **Regulatory Analyses**

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

##### **Regulatory Planning and Review**

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

The Coast Guard has made this determination based on the fact that the safety zone will only be 2 hours in duration on one evening. Because of this short duration, the impact on maritime operators is minimal. Before the effective period, we will publish advisories in the Local Notice to Mariners available to users of the river. Maritime traffic will be able to schedule their transits around this safety zone.

##### **Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), we have considered whether this rule would have a significant economic impact on a