

## CLIENT ALERT

### Customs Proposes Regulations to Allow Offsets of Duty Overpayments in Audits and Disclosures

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U.S. Customs and Border Protection (CBP) recently announced proposed amendments to its regulations to allow for sampling and offsetting of underpayments with overpayments in CBP audits and prior disclosures. 74 Fed. Reg. 53,964 (October 21, 2009). For years CBP and importers have used sampling in audits and prior disclosures, and the Trade Act of 2002 requires use of offsets in audits. Many CBP officials, however, will not accept offsets in audits and CBP does not accept offsets in prior disclosures. The proposed regulations formally establish the methods and circumstances under which CBP will allow sampling and offsets.

Statistical sampling is a generally accepted auditing tool frequently used by industry and government alike, which relies on a random selection of items from a defined universe and a statistical evaluation of the sample results. Sampling reduces the administrative burden, time, and expense incurred in a customs audit and allows CBP to base its audit on a limited time period and scope of transactions and then extrapolate the results instead of conducting an entry-by-entry review.

The proposed amendment essentially amends CBP's regulations to reflect current practices on sampling. Specifically, the proposed amendment authorizes:

- CBP's right to employ statistical sampling in a given case or to conduct a full entry-by-entry review;
- CBP's procedures to authorize audited parties to perform self-testing and how to use statistical sampling;
- CBP's requirements to accept statistical sampling used by private parties conducting an independent review and calculation of lost revenue in prior disclosures.

To benefit from sampling, the audited party must employ a sampling plan and must execute it based on documented sampling procedures under CBP's supervision and review. CBP must accept the sampling plan. Importers should be aware, however, that by accepting a sampling plan they waive their ability to challenge the validity and methodology of the sampling plan in the future and are limited to challenging only computational or clerical errors. The same waiver provision likewise applies to prior disclosures. In addition, CBP retains the authority to conduct the audit or to employ sampling without regard to the audited importer's acceptance of the sampling plan.

CBP also announced planned revisions to the process of offsetting underpayments with overpayments in audits involving lost revenue or monetary penalty cases by updating its regulations to reflect Section 382 of the Trade Act of 2002. While it is good news that CBP is now formally proposing to allow offsets as required by statute, and expanding these potential benefits to prior disclosures, there are limits to these actions. The proposed amendments only require CBP to offset overpayments of duties against underpayments if:

- Overpayments are identified by CBP during an audit conducted by CBP under section 1509(b) and are related to liquidated entries.

- Overpayments are not identified by CBP as purposefully violating any provision of law.
- Overpayments are identified by CBP as having been made within the time period and scope of the audit as defined by CBP, and within the sample agreed to by CBP.
- The audit was completed on or after August 6, 2002.

In addition, importers should be aware of certain nuances of the proposed amendments. First, the proposal does not give CBP the authorization to issue refunds relative to overpayments.<sup>1</sup> Second, CBP retains broad discretion as to when and how to use or accept sampling and offset methodologies, and retains its right to conduct a full review of all entries. Third, CBP will not allow importers to use the offset provision if the overpayments are based on preferential duty claims that were not properly made at the time of entry, or within the time allowed after entry. Finally, if CBP does not accept an importer's sampling methods to claim offsets as part of a prior disclosure, CBP may reject the prior disclosure claim. If CBP rejects an importer's claims to offset, the importer may challenge this action by filing a petition with the Fines, Penalties and Forfeitures Office.

Interested parties are encouraged to file written comments on the proposed amendments with CBP. Comments are due to CBP by December 21, 2009. Please let us know if you have any comments or questions regarding CBP's proposed regulations on sampling and offsets.

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<sup>1</sup> Importers may only obtain refunds under limited instances, i.e., if it may timely obtain refunds under 19 U.S.C. sections 1520 or 1514 (e.g., NAFTA, clerical errors or protests).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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