

1996,<sup>72</sup> a rule is “major” if it has resulted, or is likely to result in:

- An annual effect on the U.S. economy of \$100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments to Exchange Act Rule 14a–16 would be a “major rule” for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

#### IX. Statutory Authority and Text of Rule and Form Amendments

We are proposing the amendments pursuant to Sections 6, 7, 10, and 19 of the Securities Act of 1933, as amended, Sections 3(b), 13, 14, 15, and 23(a) of the Securities Exchange Act of 1934, as amended, and Sections 8, 20(a), 24(a), 24(g), 30, and 38 of the Investment Company Act of 1940, as amended.

#### List of Subjects in 17 CFR Parts 230 and 240

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulation is proposed to be amended as follows.

#### PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read in part as follows:

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

\* \* \* \* \*

2. Amend § 230.498 by revising paragraph (f)(2) to read as follows:

#### § 230.498 Summary Prospectuses for open-end management investment companies.

\* \* \* \* \*

(f) \* \* \*

(2) *Greater prominence.* If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund’s Summary

Prospectus shall be given greater prominence than any materials that accompany the Fund’s Summary Prospectus, with the exception of other Summary Prospectuses, Statutory Prospectuses, or a Notice of Internet Availability of Proxy Materials under § 240.14a–16 of this chapter.

\* \* \* \* \*

#### PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

4. Amend § 240.14a–16 by:
  - a. Revising paragraph (d)(1).
  - b. Redesignating paragraphs (d)(2) through (d)(8) as paragraphs (d)(5) through (d)(11);
  - c. Adding new paragraphs (d)(2) through (d)(4);
  - d. Removing the word “and” at the end of paragraph (f)(2)(ii);
  - e. Revising paragraph (f)(2)(iii);
  - f. Adding paragraph (f)(2)(iv); and
  - g. Revising paragraph (f)(2)(ii).

The revisions and additions read as follows:

#### § 240.14a-16 Internet availability of proxy materials.

\* \* \* \* \*

(d) \* \* \*

(1) A prominent legend in bold-face type that states “Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]”;

(2) An indication that the communication presents only an overview of the more complete proxy materials, which contain important information and are available on the Internet or by mail and encouraging a security holder to access and review the proxy materials before voting;

(3) The Internet Web site address where the proxy materials are available;

(4) Instructions regarding how a security holder may request a paper or e-mail copy of the proxy materials at no charge, including the date by which they should make the request to facilitate timely delivery, and an indication that they will not otherwise receive a paper or e-mail copy;

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(iii) In the case of an investment company registered under the Investment Company Act of 1940, the company’s prospectus, a summary prospectus that satisfies the requirements of § 230.498(b) of this chapter, or a report that is required to be transmitted to stockholders by section 30(e) of the Investment Company Act (15 U.S.C. 80a–29(e)) and the rules thereunder; and

(iv) An explanation of the process of receiving and reviewing the proxy materials and voting as detailed in this section.

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(ii) The date on which it files its definitive proxy statement with the Commission, provided its preliminary proxy statement is filed no later than 10 calendar days after the date that the registrant files its definitive proxy statement.

\* \* \* \* \*

Dated: October 14, 2009.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

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#### DEPARTMENT OF HOMELAND SECURITY

#### Bureau of Customs and Border Protection

#### DEPARTMENT OF THE TREASURY

#### 19 CFR PARTS 162 and 163

[USCBP–2009–0029]

RIN 1505–AC00

#### Use of Sampling Methods and Offsetting of Overpayments and Over-Declarations in CBP Audit Procedures; Sampling Under Prior Disclosure

**AGENCY:** Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document proposes to amend the Customs and Border Protection (CBP) regulations to provide further guidance for the use of sampling methods in CBP audits and prior disclosure cases. It also provides guidance for the offsetting of overpayments and over-declarations when an audit involves a calculation of lost revenue or monetary penalties

<sup>72</sup> Public Law 104–121, Title II, 110 Stat. 857 (1996).

under 19 U.S.C. 1592. The proposed amendment also includes the deletion of a superfluous term from the audit procedures regulations.

**DATES:** Written comments must be received on or before December 21, 2009.

**ADDRESSES:** You may submit comments, identified by docket number, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2009-0029.

- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, U.S. Customs and Border Protection, 799 9th Street, NW. (Mint Annex), Washington, DC 20229.

*Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, U.S. Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

**FOR FURTHER INFORMATION CONTACT:** *For Legal Aspects:* Alan Cohen, Penalties Branch, Regulations and Rulings, Office of International Trade (202) 325-0062; *For Audit and Operational Aspects:* Matthew Krinski, Regulatory Audit, Office of International Trade, (202) 863-6004.

**SUPPLEMENTARY INFORMATION:** This proposed rule is organized as follows:

- I. Public Participation
- II. Background
- III. Proposed Amendments Concerning Statistical Sampling
  - A. What Is Statistical Sampling?
  - B. General Requirements Applicable to Statistical Sampling
  - C. Benefits for CBP from Statistical Sampling
  - D. Statistical Sampling Used by Audited Persons under CBP Supervision

- E. Private Party Reviews and Use of Sampling in Prior Disclosure Cases
- F. Proposed Amendments Concerning Statistical Sampling
- IV. Proposed Amendments Concerning Offsetting Overpayments and Over-Declarations Identified by CBP Auditors for Purposes of Lost Revenue or Monetary Penalty Calculations under 19 U.S.C. 1592
  - A. The Trade Act of 2002
  - B. Offsetting Prior to the Trade Act of 2002
  - C. Offsetting after the Trade Act of 2002
  - D. Offsetting and Statistical Sampling
  - E. Proposed Amendments Concerning Offsetting
- V. Amendment to Prior Disclosure Regulations
- VI. Other Changes
- VII. Statutory and Regulatory Reviews
  - A. Regulatory Flexibility Act
  - B. Executive Order 12866
  - C. Paperwork Reduction Act
  - D. Signing Authority

### I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP in developing these regulations will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. *See ADDRESSES* above for information on how to submit comments.

### II. 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 CBP 1509 audits). The statute authorizes CBP to examine the records of (including conducting an audit of) parties subject to its 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.

In this document, CBP proposes to amend the CBP regulations (19 CFR part 163) pertaining to audit procedures. These proposed amendments concern the use of statistical sampling methods and the offsetting of overpayments of

duties and fees or over-declarations of quantities or values against underpayments or under-declarations under certain prescribed circumstances. The proposed change regarding sampling methods is designed to reflect in the regulations a practice recognized in both government and industry as the most practical and expeditious way to accurately assess the voluminous number of entry transactions often encountered per audit in the modern commercial importation environment. The proposed change regarding offsetting reflects the amendment made by the Trade Act of 2002 to 19 U.S.C. 1509(b) pertaining to CBP audit procedures. The proposed amendments also include a corresponding change to 19 CFR part 162 (the prior disclosure regulations, 19 CFR 162.74) and the 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.

### III. Proposed Amendments Concerning Use of Statistical Sampling

#### A. What Is Statistical Sampling?

Statistical sampling is a generally accepted auditing tool used in the private sector and by government auditors by which an audit, review, or examination of a voluminous universe of records is made more manageable through the selection of samples from that universe. These methods have become a dependable means of conducting audits for a variety of business purposes. Government agencies use statistical sampling methods when conducting audits authorized by applicable law.

More specifically, statistical sampling methodology requires random selection of items from a defined universe of items and statistical evaluation of sample results. Once the audit objective, sampling objective, and category of sampling have been defined, and the universe of entries/transactions has been analyzed in accordance with generally accepted statistical sampling concepts, the auditors will determine the sample size, sample selection technique, and sample review procedure. The results revealed by examination of the samples can then be applied to the entire universe of records, permitting conclusions to be drawn about the universe with a high degree of confidence. The sampling plan, and its preparation, is fully documented. The audit is conducted according to the sampling plan. After the audit has been completed, the basic sampling parameters, as well as the conclusions

indicated by the sampling plan's results, are disclosed in an audit report.

The use of sampling in CBP 1509 audits has produced benefits for both CBP and the trade community. Sampling produces greater efficiency in the audit process by reducing audit related costs for the auditee with respect to time (including less audit time at the auditee's premises and less time for the auditee to pull supporting documents and records) and allowing CBP to best use its resources to conduct the audit.

#### *B. General Requirements Applicable to Use of Statistical Sampling*

CBP audits are conducted in accordance with Government Accountability Office (GAO) Government Auditing Standards, and GAO generally recognizes the validity of statistical sampling approaches when properly applied, as do auditors, accountants, and statisticians within and outside the government. Private persons conducting reviews and employing statistical sampling, whether an audited person authorized by CBP to conduct self-testing in connection with a CBP 1509 audit or a private party performing an independent review and calculation of lost revenue for prior disclosure purposes (both discussed in this document), must employ a sampling plan and sampling procedures that are consistent with generally recognized sampling approaches. The sampling procedures must be executed in accordance with the sampling plan. A number of commercial statistical sampling programs are available for guidance on sampling.

#### *C. Benefits for CBP from Statistical Sampling*

Auditing has become an indispensable tool in CBP's mission to administer and enforce the customs laws and regulations. CBP conducts various kinds of commercial audits of parties engaged in various aspects of international trade. These parties, to name a few, include importers of goods, manufacturers of goods imported under provisions of the North American Free Trade Agreement (NAFTA), and drawback claimants. Audits are also conducted in furtherance of investigations of alleged criminal and civil violations of the customs and related laws. Frequently, in performing these audits, CBP encounters a universe of transactions that is too voluminous to review, on an entry-by-entry basis, in a timely or cost-effective manner. Thus, to accomplish its mission, CBP employs statistical sampling techniques to review these voluminous transactions

efficiently and to produce accurate results.

#### *D. Statistical Sampling Used by Audited Persons under CBP Supervision*

In some circumstances, CBP may authorize persons being audited to conduct certain reviews or tests of their own entries/transactions within the scope of a CBP 1509 audit. CBP auditors refer to this as "self-testing" and recognize it as a valuable tool to employ during certain audits. Self-testing within the context of a CBP 1509 audit is performed by the audited person under CBP supervision.

Self-testing occurs when CBP and the person being audited agree, prior to or during the audit, to have the audited person conduct its own review of certain entries/transactions under CBP review (*i.e.*, within the time period and scope of the audit, which, in some circumstances within the auditor's discretion, may be modified to accommodate the self-testing and serve CBP's purpose). If satisfied with the accuracy and soundness of the review, CBP may accept the results. This approach is generally used to determine the extent of certain problematic entries/transactions and to calculate lost revenue. The audited person authorized to conduct self-testing may employ statistical sampling when approved in advance by CBP auditors, subject to the requirements outlined further below. (Note that "self-testing" by a person being audited differs from the situation where a private party uses sampling in its own, independent examination of certain entries/transactions conducted in connection with a prior disclosure claim (discussed immediately below). This private party independent review and sampling occurs outside the context of a CBP 1509 audit.)

#### *E. Private Party Reviews and Use of Sampling in Prior Disclosure Cases*

In some instances, a private party will submit a prior disclosure claim consisting of an independent review of certain entries/transactions and a calculation of lost revenue.<sup>1</sup> (Under the

prior disclosure regulations, 19 U.S.C. 1592(c)(4), 19 U.S.C. 1593a(c)(3), and 19 CFR 162.74, an importer may disclose to CBP, before or without knowledge of the commencement of a formal investigation, all facts regarding its false statements or omissions that resulted in a loss of duties, taxes, and fees or loss of revenue to the government through its violation(s) of 19 U.S.C. 1592 or 1593a.) The private party may employ statistical sampling in this review and calculation. The private party's review and calculation, including the time period and scope of the review, the sampling plan, and the sampling plan's execution, are subject to CBP review and approval.<sup>2</sup> A prior disclosure will only be approved (or considered perfected) when the sampling plan and its execution are approved by CBP.

#### *F. Proposed Amendments Concerning Statistical Sampling*

Statistical sampling is an important tool available to CBP auditors for examining customs entries/transactions (as is traditional entry-by-entry examination of all entries/transactions). Because the CBP regulations do not explicitly provide for the use of statistical sampling in audits, CBP proposes to amend the regulations to set forth the circumstances and requirements for the use of sampling methods by CBP and, where appropriate, audited persons authorized by CBP to conduct self-testing in a CBP 1509 audit or private parties conducting an independent review for prior disclosure purposes.

More specifically, the proposed changes provide the following:

(1) CBP has the sole discretion concerning whether to employ statistical sampling in any given case, authorize a person being audited to perform self-testing and use statistical sampling, or accept the statistical sampling used by a private party conducting an independent review and calculation of lost revenue in a prior disclosure case.

(2) During the audit, at the audit opening conference (or thereafter in

<sup>1</sup> Generally, the terms "lost duties" (or "lost duty") and "lost revenue" are used interchangeably in this document, although CBP notes that 19 U.S.C. 1592, applicable to penalties for false statements made in an entry, pertains explicitly to lost duties, taxes, and fees, 19 U.S.C. 1593a, applicable to penalties for false statements made in a drawback claim, pertains explicitly to lost revenue, and 19 U.S.C. 1509(b)(6)(A), applicable to offsetting, discussed later in this document, pertains explicitly to overpayments of duties and fees and calculations of lost revenue or monetary penalties under 19 U.S.C. 1592, thereby using both terms. In some instances, "lost duties" (with or without the additional "taxes and fees") may be used in reference to 19 U.S.C. 1592 and "lost revenue" may

be used in reference to 19 U.S.C. 1593a. CBP further notes that sampling may be employed in a CBP audit conducted for purposes of either 19 U.S.C. 1592 or 19 U.S.C. 1593, while offsetting under 19 U.S.C. 1509(b)(6) may be applied in a CBP audit only for calculating lost duties (or lost revenue, as set forth in the statute) under 19 U.S.C. 1592. Finally, sampling by a private party is not limited to use in a CBP audit context; offsetting by CBP or a private party, as set forth in this document, is so limited.

<sup>2</sup> The appropriate CBP Fines, Penalties and Forfeitures (FP&F) office may approve the sampling in some circumstances; in others, FP&F may forward the prior disclosure that employs sampling to RA for review and approval of the sampling.

those instances where self-testing is authorized by CBP at some point after the conference), CBP will explain the sampling method and how the sampling results would be applied in determining lost revenue and overpayments (see the following section for discussion of offsets for overpayments). An audited person, including one employing self-testing, who accepts the sampling plan also waives its ability to challenge the validity and methodology of the sampling plan at a later date. Having accepted the sampling plan, the audited person is limited to challenging only alleged computational or clerical errors. Once CBP approves the specifics of the sampling plan, and the person being audited agrees to waive its ability to challenge the validity of the sampling plan at a later date, the audit (or self-testing) may proceed in accordance with that plan. CBP's authority to conduct the audit or to employ sampling is not dependent on the audited person's acceptance of the specifics of the sampling plan.

(3) The same waiver provision applies to a situation involving a private party conducting an independent review and lost revenue calculation for purposes of prior disclosure, where CBP elects to conduct a CBP audit after submission of the prior disclosure claim. In this instance, before commencing the audit, CBP will explain the specifics of the audit, as above in paragraph (2), and the waiver provision applies.

(4) CBP reserves the right in any case to conduct a full entry-by-entry audit if it deems such an audit appropriate.

#### **IV. Proposed Amendments Concerning Offsetting Overpayments and Over-Declarations Identified by CBP Auditors for Purposes of Lost Revenue or Monetary Penalty Calculations Under 19 U.S.C. 1592**

##### *A. The Trade Act of 2002*

CBP is updating the regulations to reflect an amendment to section 1509(b) (section 1509(b)) made by Section 382 of the Trade Act of 2002 (the Act; Pub. L. 107-210, 116 Stat. 933 (2002)). Section 382 of the 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.

(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 explanation of the amendment to section 1509(b) made by Section 382 of the Trade Act of 2002 (the Act; Pub. L. 107-210, 116 Stat. 933 (2002)) is contained in House Report 107-320. The House Report states:

##### *Explanation of the provision*

This provision would require that when conducting an audit, Customs [now CBP] must recognize and offset overpayments and over-declarations of duties, quantities and values against underpayments and under-declarations. As an example, if during an audit Customs [CBP] finds that an importer has underpaid duties associated with one entry of merchandise by \$100 but has also overpaid duties from another entry of merchandise by \$25, then any assessment by Customs [CBP] must be the difference of \$75.

CBP notes that the above explanation is qualified by the statute's explicit limitation on offsetting to identified overpayments/over-declarations and under-payments/under-declarations that are within the time period and scope of the audit as defined by CBP.

##### *B. Offsetting Prior to the Trade Act of 2002*

Prior to the Act's amendment of section 1509(b), the "finality of liquidation" rule (19 U.S.C. 1514) precluded offsetting (also called netting) when CBP issued a claim for lost duties, taxes, and fees under 19 U.S.C. 1592(d).<sup>3</sup> Thus, prior to the Act, once a liquidation had become final with respect to an entry that was overpaid, CBP was bound by the liquidation and could not offset an overpayment against the underpayments that formed the basis of the penalty action. (*See United States v. Snuggles, Inc.*, 20 C.I.T. 1057, 937 F. Supp. 923 (C.I.T. 1996).) In contrast, imposition of a penalty and/or a demand for lost duties, taxes, or fees relative to violative entries identified and included in a penalty case is authorized under section 1592 notwithstanding the provisions of 19 U.S.C. 1514.

##### *C. Offsetting After the Trade Act of 2002*

The reason for the offsetting amendment to section 1509(b) made by

<sup>3</sup> Pursuant to the "finality of liquidation" rule, with respect to liquidation of an entry (as opposed to other CBP decisions), a CBP decision on liquidation is final and conclusive (binding) on all parties unless timely protested under 19 U.S.C. 1514 within 180 days of the liquidation.

Section 382 of the Trade Act of 2002 (the Act; Pub. L. 107-210, 116 Stat. 933 (2002)) is contained in House Report 107-320. The House Report states:

##### *Reason for change*

A government audit should be an even-handed and neutral evaluation of a person's compliance with the law. The government should treat overpayments/over-declarations and underpayments/under-declarations equally, and if both are found during an audit, they should be used to offset each other. 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.

CBP notes that this quoted language from the House Report clearly indicates that offsetting is limited to identified overpayments/over-declarations and underpayments/under-declarations that fall within the time period and scope of the audit as defined by CBP.

As a result of the Act's amendment to section 1509(b) permitting offsetting, CBP is now authorized under the statute to account for overpayments of duties and fees and over-declarations of quantities or values when calculating loss of duties, taxes, or fees (referred to as "loss of revenue" in the statute) and monetary penalties levied under section 1592, if:

(1) The overpayments or over-declarations are identified by CBP during an audit (review or examination) conducted by CBP under section 1509(b);

(2) The audit was completed on or after August 6, 2002, the effective date of the Act;

(3) The overpayments or over-declarations relate to liquidated entries;

(4) The overpayments or over-declarations are identified by CBP as having been made within the time period and scope of the audit as defined by CBP; and

(5) The overpayments or over-declarations are determined by CBP not to have been made for the purpose of violating any provision of law, including the customs laws and laws enforced by other agencies, including but not limited to, the Internal Revenue Service.

Regarding item (1) above (the requirement that offsetting applies only where the audit is conducted under section 1509(b)), where overpayments or over-declarations are identified through a process other than an audit conducted under the statute, *e.g.*, a process conducted by an agent, import specialist, or inspection officer in the performance of his/her duties, offsets

will not be allowed. CBP may allow offsetting when an audited person conducts self-testing under the purview of a section 1509(b) audit, provided that other requirements are met. In this instance, the private party's self-testing, and any offsetting applied, occurs within the context of a section 1509(b) audit and is subject to the CBP auditor's review and approval.

Regarding item (4) above (concerning time period and scope of the audit), CBP has the sole discretion to define the time period and scope of an audit conducted pursuant to section 1509. This includes defining the time period and scope of an audited person's self-testing conducted under CBP supervision as part of a CBP audit.

CBP emphasizes that for offsetting purposes, where statistical sampling is employed in the audit (selecting a smaller number of entries/transactions to represent a greater universe of entries/transactions), identification of underpayments and overpayments is limited to the entries/transactions actually examined (*i.e.*, viewed) by CBP auditors. It is only from these examined entries/transactions that CBP "identifies" overpayments or over-declarations, as required by section 1509(b)(6). (*See* "Offsetting and statistical sampling" section further below.)

Regarding item (5) above (concerning the restriction on offsetting relative to an overpayment or over-declaration made for the purpose of violating any law), CBP will disallow offsetting where it determines that an overpayment or over-declaration was made for the purpose of violating any law, whether or not CBP is charged with enforcing such law. Any specific intentionally made overpayment/over-declaration identified for offsetting will be disallowed. Similarly, offsetting will not be allowed to reduce underpayments made fraudulently. Thus, CBP will disallow offsetting entirely where any underpayments/under-declarations identified for offsetting were made knowingly and intentionally (*i.e.* derived from a knowing and intentional act).

The Regulatory Audit, Office of International Trade (RA) field office conducting the audit will refer all matters regarding disallowance to the appropriate FP&F office for determination. If a determination to disallow offsets is made, and a penalty notice is issued under section 1592(a) and (c), the determination to disallow offsets will be subject to review by the CBP official having the delegated authority to decide a petition for relief filed pursuant to section 1592(b) and 19

U.S.C. 1618. If a penalty notice is not issued but a demand for lost duties is issued pursuant to section 1592(d), the same determination, upon request, may be reviewed pursuant to 19 CFR 162.79b (a means by which an importer may seek Headquarters review of a demand for lost duties under 19 U.S.C. 1592 (or 19 U.S.C. 1593a which is not relevant to offsetting)).

CBP notes that offsetting may be permitted where the overpayments or over-declarations, within the time period and scope of the audit, were not made by the same acts, statements, or omissions that caused the underpayments or under-declarations; nor are such overpayments or over-declarations limited to having occurred on the same entry or entries that evidence the underpayments or under-declarations. Offsets, however, will not be allowed for duties paid on goods for which a duty allowance or preference was not timely claimed or established at the time of entry, or within the time allowed after entry, under applicable law or regulation. This payment of duties is not an overpayment within the meaning of the offset provision in this circumstance because it results from the failure to timely meet the allowance or preference qualification requirement. Where the offset provision is applied during an audit, CBP will set forth in the audit report the pertinent facts developed concerning the nature of the overpayments or over-declarations in a given case.

Finally, in accordance with section 1509(b)(6)(B), while offsetting is allowed in certain circumstances despite the finality of liquidation, where the offsetting results in a net overpayment of duties, CBP will not issue a refund unless, with respect to a given overpayment (or overpayments), a refund is otherwise authorized under 19 U.S.C. 1520 (section 1520). Section 1520 pertains to CBP's authority to refund overpaid amounts in various specified circumstances and to reliquidate an entry when an importer makes a post-entry NAFTA claim within a year of importation (19 U.S.C. 1520(d)). Also, at the time the offsetting law was enacted, section 1520(c)(1) provided for reliquidation of an entry to correct a clerical error, mistake of fact, or other inadvertence. That provision was repealed in 2004 and now resides in 19 U.S.C. 1514(a). Congress intended its reference to refunds under section 1520 in the offsetting statute enacted in 2002 (section 1509(b)(6)(B)) to include the provision for clerical error, mistake of fact, and other inadvertence. Therefore, CBP proposes to include reference to clerical error, mistake of fact, and other

inadvertence under 19 U.S.C. 1514(a) in the proposed regulation as a possible basis for refunds along with section 1520.<sup>4</sup>

By limiting refunds to section 1520, Congress indicated that the offsetting provision of section 1509(b)(6) was not intended to, by itself, authorize a refund or alter the existing statutory scheme regarding the issuance of refunds. Therefore, overpayments properly identified in a CBP audit will be offset against properly identified underpayments, and refunds relative to overpayments will not be made under section 1509(b)(6)(B) within the audit process. Where CBP auditors identify an overpayment entry/transaction in a CBP audit that is eligible for a refund under section 1520 (an unlikely prospect but not inconceivable under section 1520(d) because of the one-year after importation filing period) or section 1514(a), as set forth above, CBP will advise the audited person to file a section 1520 claim or section 1514 protest at the appropriate CBP port office and will not include the entry/transaction's overpayment in the audit's calculation of offsetting.

*Illustration:* Where underpayments identified in a CBP audit amount to \$1,200 and overpayments amount to \$1,000, the audited person would be responsible for payment of only \$200 (not \$1,200) in lost revenue. If, during the course of the audit, a properly identified overpayment entry/transaction was recognized as possibly refund-eligible under either 19 U.S.C. 1514 or 19 U.S.C. 1520, as above, the audited person would be advised to file for reliquidation under the appropriate process relative to that overpayment. Thus, where underpayments identified in a CBP audit total \$1,000 and identified overpayments approved for offsetting total \$1,200 (not including any overpayments that are eligible for reliquidation (and refund) under sections 1514 or 1520), the audited person would not be responsible for payment of any lost revenue because the overpayments exceed the underpayments, and a refund of the net overpayment of \$200 will not be paid. The audited person would be advised to seek reliquidation and a refund under

<sup>4</sup> Under the former section 1520(c)(1) (repealed under Pub. L. 108-429, Title II, Sec. 2105, Dec. 3, 2004), an importer could file a petition for reliquidation to correct a clerical error, mistake of fact, or other inadvertence up to one year from the date of importation. Under current section 1514(a), an importer has 180 days from the date of liquidation to file a protest to correct these errors. For this reason, it is unlikely that a CBP audit of liquidated entries will uncover an entry/transaction that is eligible for a refund under section 1514.

either 19 U.S.C. 1514 or 1520 for any overpayments eligible for such relief.

#### *D. Offsetting and Statistical Sampling*

In accordance with the previous discussion of sampling, where sampling is employed in an audit that involves offsetting, identified overpayments and over-declarations will be extrapolated from the smaller number of entries/transactions actually examined (the sample transactions/entries) over the larger universe of entries/transactions encompassed within the time period and scope of the audit in the same way that underpayments and under-declarations, *i.e.*, violative entries/transactions, will be extrapolated. (This extrapolation exercise is also referred to as “projecting” the sample results over the universe of entries/transactions.) However, as explained previously, where a sampling method is employed, CBP will not offset for, and therefore will not extrapolate for, a specific overpayment that is outside of the sample examined (*i.e.*, the entries/transactions actually viewed by CBP auditors), even if the overpayment otherwise falls within the time period and scope of the audit and thus within the universe of entries/transactions. To do otherwise would undermine the representative purpose inherent in the statistical sampling (extrapolation/projection) approach, just as would going outside the entries/transactions actually examined to identify another violative entry/transaction (underpayment/under-declaration) for purposes of the audit.

*Illustration:* CBP initially sets forth the time period and subject matter scope of the audit and thereby identifies the universe of transactions as consisting of 5,000 entries/transactions. In accordance with generally accepted statistical sampling concepts and techniques, CBP determines the entries/transactions to be examined and selects 500 entries/transactions for examination by CBP auditors. Of the 500 entries/transactions examined, CBP auditors identify 50 underpayment entries/transactions and 10 overpayment entries/transactions. These are the total representative underpayments and overpayments “identified” for offsetting under the statute. The relevant information obtained from these underpayment and overpayment entries/transactions is projected over the universe of 5,000 entries/transactions to extrapolate total underpayments of \$8,000 and total overpayments of \$2,000. The total underpayments will be offset by the total overpayments, resulting in total loss of duty in the amount of \$6,000. Should the audited

person point to any specific overpayments outside the 500 entries/transactions examined (even those within the time period and subject matter scope of the audit and thus within the universe of entries/transactions), such overpayments will be considered outside the sampling plan’s targeted set of entries/transactions and will not be considered in the projection. (Of course, any entries/transactions outside the time period and/or scope (subject matter) of the audit also will not be considered.)

#### *E. Proposed Amendments Concerning Offsetting*

Because the CBP regulations do not reflect the change in the law made by section 382 of the Act (concerning offsets), CBP is proposing to amend the regulations pertaining to CBP audits to reflect the existing offsetting provision of section 1509(b)(6). CBP notes that the offsetting provision of the Act is self-effectuating and has had legal effect since the effective date of the Act, August 6, 2002. Thus, while the offsetting regulatory amendment is put forward as a part of this proposed regulation, the offsetting provision of 19 U.S.C. 1509(b) is already legally effective.

#### **V. Amendment to Prior Disclosure Regulations**

As discussed previously, where a private party submits a prior disclosure claim consisting of an independent review of certain entries/transactions and a loss of revenue calculation, the private party may use statistical sampling to calculate lost revenue. The sampling used is subject to the requirements of proposed § 163.11(c) (see proposed regulatory text and Section III of this document pertaining to sampling). Since the changes proposed in this rule regarding sampling impact the prior disclosure process to some extent, a corresponding amendment is proposed to the prior disclosure regulations, 19 CFR 162.74, to reference the sampling provision of § 163.11(c) and make clear that any sampling method used to calculate lost revenue is subject to CBP approval. If the sampling method is rejected as flawed, the prior disclosure claim will not be approved.

#### **VI. Other Changes**

As compliance assessments are no longer the central focus of CBP’s auditing program, the proposed amendments include a proposal to remove from pertinent regulations references to compliance assessments. In this regard, “audit” is the preferred

term, but references to a “review” or “examination” have the same meaning, provided that the action is conducted under section 1509 in furtherance of the statute’s purposes.

Also, as the former Office of Investigations of the U.S. Customs Service is now part of Immigration and Customs Enforcement (ICE), CBP is proposing to add a reference to ICE in the regulation (19 CFR 163.11(f)) concerning formal investigations.

#### **VII. Statutory and Regulatory Reviews**

##### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires Federal agencies to examine the impact a rule would have on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The entities affected by this proposed 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 proposed 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 proposed amendments, if adopted as final, would bring the regulations concerning audit procedures 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 CBP and private entities, thus making the process less burdensome for both parties. Also, if adopted, the proposed amendments would bring 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 proposed 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 welcome comments on this conclusion. If we do not receive any comments contradicting our findings, we may certify that this rule will not have a significant economic impact on a substantial number of small entities at the final rule stage.

#### B. Executive Order 12866

The proposed rule, if adopted as a final rule, would not impose additional requirements or procedural burdens on persons affected and would not have an economic impact on them except in certain penalty cases in which the persons 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. Thus, the rule would not have 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. There is no identifiable relationship between what the rule requires, permits, or accomplishes and the procedures, obligations, or responsibilities of other agencies or the obligations of affected persons to other agencies. Thus, the rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule would not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, as the rule's provisions have nothing to do with these matters. Also, the rule would not raise novel legal policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. Thus, the proposed amendments of this rule do not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

#### 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 proposed rule does not involve a change to 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 proposed 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.

#### Proposed Amendments to the Regulations

Accordingly, parts 162 and 163 of the CBP regulations (19 CFR Parts 162 and 163) are proposed to be 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 three criteria in 19 CFR 163.11 (c)(2). When 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, including the sampling plan, are subject to CBP review and approval. The private party submitting a prior disclosure that employs sampling under this paragraph may not contest the validity of the sampling plan or its methodology at a later date and will be limited to challenging computational and clerical errors.

(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.

\* \* \* \* \*

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

5. Section 163.1 is amended as follows:

A. By revising paragraph (c) as set forth below.

B. By removing paragraph (e), and redesignating existing paragraphs (f) through (l) as paragraphs (e) through (k).

#### § 163.1 Definitions.

\* \* \* \* \*

(c) *Audit.* "Audit" means an examination or review 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 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. 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.

\* \* \* \* \*

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.

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) *Conduct of a CBP audit.* 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;

(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 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, to make a determination as to whether full duties, taxes, and fees have been paid or drawback was properly claimed. 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, 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 commencement of the audit that employs sampling. 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 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.

(2) *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.

(3) *Statistical sampling by audited persons under CBP supervision.* 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 three criteria contained in paragraph (c)(2) 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.

(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(b) 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, may 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 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, or the identified underpayments or under-declarations were not made knowingly and intentionally.

(2) *When audited person conducts self-testing under CBP supervision.* Offsetting may apply to self-testing conducted by an audited person under CBP supervision (*i.e.*, during a CBP audit), provided that CBP approves the self-testing in advance and, upon review of the self-testing, including any offsetting applied, approves its execution and results.



(3) *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. An audit employing statistical sampling will be limited to the transactions that the CBP auditors actually examine (*i.e.*, review) during the audit. 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.

(4) *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.

(5) *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.

(6) *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.

(7) *Disallowance determinations referred to FP&F.* 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 and/or demand for lost duties, taxes, and fees where it determines that such action is warranted. Where the FP&F office issues a notice of penalty and/or demand, the audited person may file a petition under 19 CFR part 171.

(8) *Refunds limited.* A net overpayment of duties, taxes, and fees will not be paid as a refund unless the circumstances of the overpayments 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. In that event, the audited person must file a claim under the applicable statute and regulations at the appropriate CBP port office. Any such overpayment(s) will not be included in the audit's offsetting calculation.

(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.* Paragraphs (a)(5), (a)(6), (b), (d)(7), and (d)(8) of this section do not apply once CBP and/or ICE commences an investigation with respect to the issue(s) involved.

**Jayson P. Ahern,**  
*Acting Commissioner, Customs and Border Protection.*

Approved: October 15, 2009.

**Timothy E. Skud,**  
*Deputy Assistant Secretary of the Treasury.*  
[FR Doc. E9-25222 Filed 10-20-09; 8:45 am]  
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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-116-FOR; OSM-2009-0008]

#### West Virginia Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

**SUMMARY:** We are announcing receipt of a proposed amendment to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) that includes both statutory and regulatory revisions.

West Virginia submitted a proposed amendment authorized by Committee Substitute for Senate Bill 153 to revise the West Virginia Code of State Regulations (CSR) concerning the continued oversight by the Secretary of "approved persons" who prepare, sign, or certify mining permit applications and related materials; regarding incidental boundary revisions (IBR) to existing permits, by clarifying that certain types of collateral activities are part of the primary mining operations and therefore subject to the same acreage limitations, while providing more relevant and exacting criteria for the Secretary to consider in evaluating an application for revision; deleting the bonding matrix forms; changing term "Bio-oil" to "Bio fuel"; and clarifying standards in subsection 9.3.f that pertain to areas developed for hayland or pasture use. West Virginia submitted proposed changes as contained in Senate Bill 436 which amends WV Code 22-3-8 by changing references regarding "the commissioner of the Bureau of Employment Programs" and "the executive director of the workers' compensation commissioner" which are considered non-substantive.

West Virginia also submitted proposed changes as contained in Committee Substitute for Senate Bill 600 regarding the Special Reclamation Fund. This bill amends the State's alternative bonding requirements by eliminating the 7 cents per ton additional tax and increasing and extending the special reclamation tax from 7.4 to 14.4 cents per ton of clean coal mined. It also requires the special reclamation tax to be reviewed biannually by the Legislature. This amendment (WV-115-FOR) was announced earlier in the July 22, 2009, **Federal Register** (74 FR 36113-36116) as an interim rule and approved on a temporary basis.

West Virginia also submitted proposed changes as contained in Senate Bill 1011 which amends the WV Code by requiring surface mine reclamation plans to comport with approved master land use plans and authorizing surface mine reclamation plans to contain alternative postmining land uses. Senate Bill 1011 was passed by the Legislature on June 2, 2009, during the 1st extraordinary 2009 session, and approved by the Governor on June 17, 2009.