



U.S. Customs Sets Rules for Statistical Sampling and Offsetting In Audits and Prior Disclosures

On October 25, 2011, U.S. Customs and Border Protection (CBP) issued a [final rule](#) providing for the use of statistical sampling in customs audits and prior disclosure proceedings. The revised regulations, which CBP describes as harmonizing its regulations with the agency's current practices, also implement a 2002 amendment to the statute authorizing CBP audits by specifically allowing overpayments and over-declarations to offset underpayments and under-declarations in calculating any loss of revenue owed to CBP.

In its final form, the rule implements, with some changes, a [proposed rule](#) published in October 2009, amending Parts 162 and 163 of the CBP regulations.

The sampling of transactions, in place of entry-by-entry review, is a means for more expeditiously and reliably assessing the accuracy of a large number of transactions. The new regulations, effective on December 27, 2011, state explicitly that CBP auditors and private parties may use statistical sampling to calculate loss of duties, taxes, fees or revenues and to evaluate compliance with applicable customs laws. This authorization extends to CBP-mandated audits and prior disclosures filed by private parties.

CBP will have the sole discretion to elect to use statistical sampling in audits and private parties seeking to rely upon sampling for prior disclosures of violations of customs laws will be required to include an explanation of the sampling plan and methodology with their disclosures. The time period, scope and sampling plan, in addition to the execution of and results of self-reviews, will be subject to CBP review and approval.

Statistical sampling will not apply in all instances, however. CBP and private parties may only use statistical sampling when:

1. A review of all the suspect transactions is impossible or impractical;
2. The sampling plan is prepared using generally recognized sampling procedures; and
3. The screening is conducted in accordance with the plan.

Written Waivers Will Be Required

Under the new rules, once CBP and a private party agree on a sampling plan and methodology to be employed in an audit, or in a prior disclosure, the private party will be required to waive its ability to object to that plan and methodology. Going forward, that will make an analysis and thorough understanding of the implications of a

contemplated sampling plan and methodology, including how the results will be projected across the relevant universe of transactions, a critical step for companies undergoing an audit and for prior disclosure claimants.

The waiver will have to be signed by both a management official with authority to bind the company in matters under the customs laws and an official of CBP's Office of Regulatory Audit (RA). The new rules also provide for the possibility that a sampling plan or methodology may be subsequently modified, at CBP's discretion, with acceptance of that adjustment also subject to a written waiver requirement. However, in no instance will a waiver preclude an audited entity from challenging either computational or clerical errors, or substantive issues, such as classification or valuation.

Offsetting Will Be Possible

The new regulations also provide that both CBP and private parties may use offsetting to calculate loss of revenue and penalties, regardless of whether an entry-by-entry or sampling methodology is used. However, offsetting is limited to finally liquidated overpayments and over-declarations and will not be not permitted where CBP's Office of Fines, Penalties and Forfeitures determines that the overpayments or over-declarations were made for the purpose of violating any law, or where underpayments or under-declarations were made knowingly and intentionally. Offsetting also will not be allowed for overpayments or over-declarations resulting from a failure to timely claim or establish a duty allowance or preference.

All prior disclosures that include offsetting and are submitted outside the context of an audit will be referred to CBP's RA for review and evaluation, for that office to determine whether offsetting may be applied.

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