

*What Every Member of the  
Trade Community Should Know:*

## Prior Disclosure

# An Informed Compliance Publication

August 2017



U.S. Customs and  
Border Protection

## NOTICE

This publication is intended to provide guidance and information to the trade community. It reflects the position on or interpretation of the applicable laws or regulations by U.S. Customs and Border Protection (CBP) as of the date of publication, which is shown on the front cover. It does not in any way replace or supersede those laws or regulations. Only the latest official version of the laws or regulations is authoritative.

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## PRINTING NOTE

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## PREFACE

On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), also known as the Customs Modernization or “Mod” Act, became effective. These provisions amended many sections of the Tariff Act of 1930 and related laws.

Two concepts that emerged from the Mod Act are “**informed compliance**” and “**shared responsibility**,” which are premised on the idea that in order to maximize voluntary compliance with the laws and regulations of U.S. Customs and Border Protection (CBP), the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s rights and responsibilities under customs regulations and related laws. In addition, both the trade and CBP share responsibility for carrying out these requirements. For example, under Section 484 of the Tariff Act, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. CBP is then responsible for fixing the final classification and value of the merchandise. An importer of record’s failure to exercise reasonable care may delay release of the merchandise and, in some cases, may result in the imposition of penalties.

The Office of Trade (OT), Regulations and Rulings (RR) plays a major role in meeting the informed compliance responsibilities of CBP. In order to provide information to the public, CBP has issued a series of informed compliance publications (ICPs).

This ICP, prepared by OT, RR, Penalties Branch, is entitled “The ABC’s of Prior Disclosure” and is part of a series of ICPs advising the public of customs regulations and procedures. We hope that this material, together with seminars and increased access to CBP ruling letters, will help the trade community to improve voluntary compliance with customs laws and understand the relevant administrative processes.

The material in this publication is provided for general information purposes only. Because many complicated factors can be involved in customs issues, an importer may wish to obtain a ruling letter pursuant to 19 CFR Part 177, or advice from an expert who specializes in customs matters, such as a licensed customs broker, attorney or consultant.

Comments and suggestions are welcomed and should be addressed to the Executive Director, Office of Trade, Regulations and Rulings, U.S. Customs and Border Protection, 90 K Street, N.E., 10<sup>th</sup> Floor, Washington, D.C. 20229-1177.

Alice A. Kipel  
Executive Director  
Regulations and Rulings

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**THE ABC'S OF PRIOR DISCLOSURE**  
**Pursuant to 19 U.S.C. § 1592**  
**(Section 592, Tariff Act of 1930, as amended)**

**INTRODUCTION**

The following information is provided by CBP to help you understand the basics of prior disclosure. In this updated ICP, CBP's Office of Trade, Regulatory Audit (OT, RA) has included specific information relating to the use of statistical sampling methodologies and duty offsets when calculating the loss of duties associated with a prior disclosure, including the information that must be provided to CBP when submitting a disclosure that uses statistical sampling. While not specifically addressed in this ICP, it should be noted that Title 19, United States Code (U.S.C.) Sections 1592(c)(5) through (c)(13) (19 U.S.C. § 1592(c)(5) – (c)(13)) set forth the various free trade agreements (FTAs) that contain specific prior disclosure provisions. A person making a prior disclosure with respect to a specific FTA (i.e., United States-Chile Free Trade Agreement, etc.) should verify that its claimed prior disclosure meets the requirements set forth in the applicable FTA and corresponding regulatory provisions (*See* Title 19, Code of Federal Regulations (CFR) Part 10 (19 CFR Part 10)).

The prior disclosure provision contained in 19 U.S.C. § 1592 provides reduced penalties to a person who notifies CBP of the circumstances of a violation of the customs laws and regulations, before CBP or U.S. Immigration and Customs Enforcement (ICE)/Homeland Security Investigations (HSI) discovers the possible violation and notifies the party of the discovery of the possible violation. In certain cases, a valid prior disclosure may result in either substantial mitigation or cancellation of a penalty in full. Valid prior disclosures can save a person time and money, but all parties (including CBP) must be aware of the prior disclosure requirements in order to realize the benefits of this provision of law. The official CBP policy is to encourage the submission of valid prior disclosures.

It is important to remember that this ICP only involves prior disclosures submitted pursuant to 19 U.S.C. § 1592.

In the following pages, we will discuss the “who, what, why, where, when and how” of prior disclosures, followed by a list of frequently asked questions (FAQs) related to prior disclosures. In addition, for those parties contemplating the submission of a prior disclosure, we have included a checklist following the FAQs section which may be helpful in completing the submission of the disclosure. We have also included a list of specific information to be provided to CBP when submitting a prior disclosure that uses a statistical sampling methodology. Lastly, we have included a copy of the CBP Regulations (19 CFR §§ 162.74 and 163.11) governing prior disclosures for your information.

## WHO MAY SUBMIT A PRIOR DISCLOSURE TO U.S. CUSTOMS AND BORDER PROTECTION?

Answer: *Any* party involved in the business of importing into the United States may file a prior disclosure with CBP for any violation it believes it has committed with respect to 19 U.S.C. § 1592. The parties who may file a prior disclosure include, but are not limited to, importers, customs brokers, exporters, shippers, and foreign suppliers/manufacturers.

## WHAT IS A PRIOR DISCLOSURE?

Answer: A *valid* prior disclosure discloses the circumstances of a violation of 19 U.S.C. § 1592 to CBP before, or without knowledge of, the commencement of a formal investigation of that violation by CBP, and includes a tender of any actual loss of duties associated with the violation. Pursuant to 19 U.S.C. § 1592, CBP can assess monetary penalties against parties who make material false statements, acts or omissions in connection with their importations. The material false statements, acts or omissions must result from the parties' negligence, gross negligence or fraudulent conduct. Some typical examples of such violations include undervaluation, misdescription of merchandise, misclassification, overvaluation, evasion of an antidumping/countervailing duty (AD/CVD) order, improper country of origin declarations or markings, or improper claims for preferential tariff treatment under a free trade agreement or other duty preference program.

Title 19 U.S.C. §1592(c)(4) provides for prior disclosure treatment. It should be noted that parties are not required to make a prior disclosure, but can *elect* to submit a disclosure. If a party elects to make a prior disclosure of a violation, *before or without knowledge* of a formal CBP or ICE/HSI investigation of the violation, then the party will receive reduced penalties (See 19 U.S.C. § 1592(c)(4)(A) and (B)). The penalty amount is zero if the importations involve unliquidated (i.e., open) customs entries and no fraud is involved. If the entries are liquidated (i.e., closed or finalized) and no fraud is involved, the penalty is equal to the interest on the actual loss of duties computed from the date of liquidation to the date of the party's tender of the loss of duty resulting from the violation. If a fraudulent violation is disclosed, the penalty is reduced from the normal assessment of the domestic value of the merchandise to 100 percent of the duty loss, or if the violation involves no duty loss, the penalty is reduced to 10 percent of the dutiable value of the merchandise.

In all cases involving liquidated entries and duty loss violations, the party must tender the duty loss to CBP in order for the prior disclosure to be considered valid. The disclosing party may choose to make the tender either at the time of the claimed disclosure or within 30 days after CBP notifies the party in writing of CBP's calculation of the actual duty loss. (See "When" section below regarding the timing of this tender.) Upon receipt of a prior disclosure, CBP will review the submission and notify the disclosing party as to whether the prior disclosure is valid. If the prior disclosure is determined to be valid, CBP will issue a request for payment of the reduced penalty amount, if applicable. If the prior disclosure is determined to be invalid on the basis that CBP had commenced a formal investigation of the disclosed violation, CBP will commence penalty proceedings under 19 U.S.C. § 1592 and must attach a copy of the "writing" evidencing the commencement of

the investigation to the prepenalty notice.

The specific rules governing prior disclosures are set forth in the CBP Regulations at 19 CFR §§ 162.74 and 163.11. These regulatory provisions are provided in Appendix C of this ICP for your information. By following these rules carefully, you can avoid common mistakes if you elect to submit a prior disclosure.

## **WHY SHOULD I ELECT TO MAKE A PRIOR DISCLOSURE?**

Answer: The obvious reason to submit a prior disclosure is to receive reduced penalties in connection with a violation of 19 U.S.C. § 1592. In some cases, parties have saved millions of dollars in potential penalties by submitting a valid prior disclosure. However, there are other benefits that often accrue to the disclosing party. Conducting periodic self-assessment of your importing activities and availing yourself of this provision of law may allow you to detect and correct errors, as well as ensure future compliance with customs laws and regulations. The submission of a prior disclosure may also result in additional time and money savings in the form of reduced legal expenses and/or the elimination of lengthy CBP penalty proceedings. The Government also benefits when a party submits a prior disclosure by eliminating or reducing expenditures of valuable resources and manpower involved in investigating a violation.

## **WHEN SHOULD I SUBMIT A PRIOR DISCLOSURE TO U.S. CUSTOMS AND BORDER PROTECTION?**

Answer: The question of when to submit a prior disclosure to CBP involves a judgment call that depends on your particular circumstances. As a general rule, if you can identify the import transactions that violate 19 U.S.C. § 1592, and you wish to submit a prior disclosure, you should do so as soon as possible. If you delay the submission of a prior disclosure, you run the risk that CBP may discover the violation, commence a formal investigation, and notify you of the commencement of a formal investigation, thereby cutting off your right to make a prior disclosure.

Certain factors may exist which will influence your decision regarding when to submit a prior disclosure. If CBP has already contacted you regarding the violation, you may decide to forgo a prior disclosure (but see FAQs below concerning the availability in such cases of additional relief). In addition, if you have not yet assembled all the correct information involving the transactions which are in violation of 19 U.S.C. § 1592, this may influence your decision to submit the prior disclosure. Under these circumstances, the CBP regulations allow you to initiate the prior disclosure while affording you 30 days after you have initiated the disclosure to assemble any additional information or data unknown at the time of the disclosure. You may also ask the concerned Fines Penalties and Forfeitures Officer (FPFO) for extensions of time beyond the 30 days to submit the necessary information or data.

CBP officers are frequently asked about the appropriate time to submit duties that are due involving the disclosed violation. CBP regulations state that a disclosing party should tender any loss of duties involving liquidated entries covered by its disclosure at the time

of the submission of the claimed prior disclosure. If you are granted an extension(s) by CBP to assemble the aforementioned information and to calculate the loss of duties, the tender should be submitted with the “perfected” prior disclosure. However, if you are not sure of the amount of the actual duty loss, you may wish to wait until CBP notifies you of its calculation. If you choose this latter option, the regulations (*See* 19 CFR § 162.74(c) in Appendix C below) provide that the disclosing party may tender the amount calculated by CBP within 30 days of CBP notification. We note that the regulations provide for limited CBP Headquarters Review of local customs duty loss calculations, but parties who qualify for this limited review must still deposit the loss of duties determined by the local CBP office to obtain such review. Headquarters review is limited to those cases where the actual loss of duties, taxes or fees determined by CBP exceeds \$100,000 and is deposited with CBP, more than one year remains on the statute of limitations, and the disclosing party has complied with all other prior disclosure regulatory provisions. Headquarters review of the loss of duties under this provision is limited to determining issues of correct tariff classification, correct rate of duty, elements of dutiable value, and correct application of any special rules (e.g., GSP, CBI, HTS 9802, etc.). Headquarters review decisions are final and not subject to appeal. Disclosing parties who request and obtain such a review by Headquarters waive their right to contest either administratively or judicially the actual loss of duties finally calculated by CBP under this procedure. (*See* 19 CFR 162.74(c)).

## **WHERE DO I SUBMIT A PRIOR DISCLOSURE?**

Answer: You may submit a prior disclosure to the appropriate Center of Excellence and Expertise (Center) or any port of entry where the disclosed violation occurred. If violations occurred at a number of CBP ports, you should list all of the concerned ports in the disclosure. This will facilitate CBP’s consolidation of the multi-port prior disclosure at a single port or Center.

## **HOW DOES U.S. CUSTOMS AND BORDER PROTECTION DECIDE IF THE PRIOR DISCLOSURE I SUBMIT IS VALID?**

Answer: CBP will first verify that you have disclosed all of the circumstances of the violation in accordance with the regulations (*See* 19 CFR § 162.74(b) in Appendix C below). An incomplete disclosure of the circumstances of the violation is a common error associated with prior disclosures, yet is easily avoidable by following the requirements set forth in the regulations. Once CBP determines that you have disclosed the circumstances of the violation, the agency will then verify whether CBP or ICE/HSI has commenced a formal investigation of the disclosed violation, and whether CBP or ICE/HSI communicated to you the existence of that investigation. If no open formal investigation exists, or CBP determines that you have no knowledge of a formal investigation, CBP will notify you that your disclosure is valid, assuming, of course, that the information you provided is verified as accurate and any actual loss of duties has been tendered. If, upon a thorough review of the facts relating to the prior disclosure, CBP determines that there was no violation of 19 U.S.C. § 1592, it is CBP’s policy to refund the actual loss of duties on liquidated entries tendered with the prior disclosure.

## FREQUENTLY ASKED QUESTIONS

### **1. Who in CBP decides whether my prior disclosure is valid?**

Answer: In most cases, the FPFO at the port of entry or at the Center where the admitted violation(s) took place – will decide whether the prior disclosure is valid (*See* 19 CFR § 162.74(a)(2)).

### **2. I have never been contacted by a CBP officer regarding the violation I wish to disclose. Does that mean I qualify for prior disclosure benefits if I fully disclose the circumstances of the violation and tender any duty loss associated with the violation?**

Answer: Ordinarily in such cases where there has been no CBP or ICE/HSI contact, you will receive prior disclosure benefits, assuming that you satisfy all of the requirements set forth in 19 CFR § 162.74 and 19 U.S.C. § 1592(c)(4). You should be aware, however, that CBP or ICE/HSI may have already commenced a formal investigation of the circumstances regarding the violation *before* you submitted the disclosure. In all cases, before submitting any prior disclosure, you should review the provisions in 19 CFR § 162.74(i) to ensure that none of the events listed in that section has taken place. The events listed in 19 CFR § 162.74(i) can give rise to a presumption that a disclosing party had knowledge of the commencement of a formal CBP and/or ICE/HSI investigation. You should remember that the disclosing party has the burden to prove lack of knowledge of the commencement of a formal investigation.

### **3. I have reviewed my import transactions and have discovered a mistake on my entry documents relating to the value of the merchandise. Although the value I reported was too low, I have not been contacted by CBP or ICE/HSI and I know that this was not an intentional error. Should I submit a prior disclosure?**

Answer: We recommend that you submit a prior disclosure. If you submit a prior disclosure and CBP determines that no violation took place, there are no penalty consequences under 19 U.S.C. § 1592 and, therefore, no record of the disclosure is made. On the other hand, if you submit the prior disclosure and CBP determines that a 19 U.S.C. § 1592 violation did occur, you will be accorded the full benefits of prior disclosure treatment for that violation, assuming of course that you fully disclosed the circumstances of the violation before or without knowledge of the commencement of a formal investigation of what was disclosed, and tendered any loss of duties on liquidated entries.

### **4. How do I fully disclose the circumstances of a violation?**

Answer: You should follow the requirements set forth in 19 CFR § 162.74(b). These four rather straightforward requirements involve the specifics of the import transactions involved (e.g., class or kind of merchandise, details of the violation, customs entries involved, etc.) and the correct information or data that should have been provided to CBP in the entry documents.

### **5. I have discovered certain undeclared importation costs which CBP may consider**

**dutiable. Do the prior disclosure rules permit me to obtain a CBP decision or review on the dutiability issue before I submit the disclosure and tender any duties which might be due?**

Answer: First, it is important to remember that the importer is responsible for submitting true and accurate information to CBP, including all dutiable elements of the transaction. If you have determined that required costs have not been reported to CBP, we recommend that you consider submitting a prior disclosure. You will be notified by CBP whether any duty tender you submitted was insufficient and given an opportunity to increase your tender to the amount requested by CBP. In cases where CBP determines the actual loss or duties, taxes or fees exceeds \$100,000, you may be eligible for CBP Headquarters review of the basis for determining the duty calculation prior to the decision on the validity of the disclosure, but such appeals require the deposit of the disputed amount, are limited in scope, and the Headquarters decision is final. In all other cases, if CBP denies the validity of the disclosure because you failed to tender the correct loss of duties (i.e., failed to acknowledge the dutiability of certain costs), you will be able to challenge such determination if CBP commences a subsequent 19 U.S.C. § 1592(a) penalty proceeding.

#### **6. Must I submit my disclosure in writing?**

Answer: A party may submit an oral prior disclosure; however, CBP recommends that all prior disclosures be submitted in writing. By submitting a disclosure in writing, the scope and details of the disclosure are documented and the credibility of any oral disclosure does not become an issue. Also, although an oral disclosure is permissible, the regulations require that oral disclosures be followed up in writing within 10 days to a CBP or ICE/HSI officer. The problems associated with oral disclosures become clear in those cases involving hundreds of import transactions, particularly where different types of merchandise are involved.

#### **7. How far back in time should I go in reviewing my transactions and deciding the scope of my prior disclosure?**

Answer: It is essential to remember that *you* determine the scope of the prior disclosure. For example, if you make a valid disclosure of 2015 violations and CBP, during its disclosure verification proceedings discovers violations that occurred in 2014, you only get prior disclosure treatment for the 2015 violations. A good rule of thumb to follow in defining the scope of your disclosure is to cover those violations not barred by the statute of limitations, i.e., five years from the date of discovery for fraud, and five years from the date of entry for those violations involving gross negligence or negligence. It should also be remembered that the scope issue affects CBP as well. For example, if CBP or ICE/HSI has an open investigation involving alleged false country of origin violations covering only your 2015 widget imports, you may be able to obtain prior disclosure treatment for violations that you disclose which occurred before 2015.

#### **8. What is a formal investigation and how does it affect prior disclosure?**

Answer: The prior disclosure regulations provide that a formal investigation of a 19 U.S.C.

§ 1592 violation is considered to be commenced on the date recorded in writing by CBP as the date on which facts and circumstances were discovered or information was received that caused CBP to believe that a possibility of a violation existed. (*See* 19 CFR § 162.74(g) in Appendix C for complete definition). If CBP has commenced a formal investigation and the disclosing party is aware of the CBP investigation, then it may be precluded from filing a prior disclosure for the entries at issue. However, if an Import Specialist, CBP Officer or auditor merely asks you to provide samples and/or product literature, the request for additional information alone will not constitute the commencement of a formal investigation.

If an auditor, Import Specialist, or CBP Officer has reason to believe that you may have committed a 19 U.S.C. § 1592 violation, creates a “writing” memorializing the date on which facts and circumstances were discovered or information was received which caused CBP to believe that a possibility of a violation of 19 U.S.C. § 1592 existed, and asks you specific questions regarding the suspected violation, a formal investigation may be deemed to have commenced. Depending on the types of questions the CBP Officer asks, you may be charged with having knowledge that a formal investigation has commenced. If you then try to make a prior disclosure, it may be denied. A notice of commencement of an investigation can take the form of a formal letter issued by CBP, a CBP Form 29 or its electronic equivalent, or an email articulating the facts of a possible 19 U.S.C. § 1592 violation.

If you submit a clearly labeled prior disclosure and CBP later denies prior disclosure treatment on the basis that CBP or ICE/HSI had commenced a formal investigation of the disclosed violation, CBP is required to provide you with a copy of the “writing” evidencing the commencement of a formal investigation in a subsequent penalty proceeding. If you can demonstrate that you had no knowledge of the commencement of a formal CBP or ICE/HSI investigation at the time of your disclosure, you may still be afforded prior disclosure benefits (*See* 19 CFR 162.74(i) in Appendix C).

**9. I know that CBP or ICE/HSI has commenced a formal investigation of my 2015 imports involving undeclared royalties I paid my supplier. May I get disclosure benefits if I disclose a misdescription involving the same shipments?**

Answer: Yes, you may receive prior disclosure benefits for the misdescription of the merchandise provided that the CBP or ICE/HSI investigation only related to the royalty violations and you fully disclose the circumstances of the violations involving the misdescription (including tendering any actual loss of duties). In other words, a party may obtain prior disclosure benefits for additional violations of 19 U.S.C. § 1592 that were not covered by the scope of a CBP or ICE/HSI investigation.

**10. If I submit a valid prior disclosure of a violation of 19 U.S.C. § 1592, can I be criminally prosecuted based on the information I disclose?**

Answer: If you submit a prior disclosure containing information which gives CBP reason to believe that a criminal violation has occurred, CBP and ICE/HSI are legally obligated to refer that information to the appropriate U.S. Attorney’s office. The U.S. Attorney’s office

then is responsible for making a decision whether to prosecute the alleged criminal violation. In general, based on CBP's experience, a valid prior disclosure of a non-fraudulent violation is rarely prosecuted by the U.S. Attorney's office. However, it should be reiterated that the U.S. Attorney's office makes the decision on whether or not to prosecute a criminal violation.

**11. I have been notified that the Office of Trade, Regulatory Audit will be conducting an audit of my 2015 widget importations in 2 months. What should I do before the team arrives?**

Answer: CBP recommends that you utilize this 2-month period to conduct a self-assessment of your importations. By doing so, if you discover potential violations of 19 U.S.C. § 1592, you may obtain prior disclosure benefits if you fully disclose the circumstances of the violations before the audit team arrives.

**12. Does the fact that CBP or ICE/HSI may commence a formal investigation of a potential violation, and possibly preclude a prior disclosure, chill or inhibit a free and frank exchange of information between importers and CBP officials?**

Answer: There is no simple answer to this question. CBP has adopted a policy that encourages the submission of prior disclosures. On the one hand, CBP and ICE/HSI are law enforcement agencies and are required to enforce the law when they have reason to believe that a violation has occurred. On the other hand, CBP is also responsible for the facilitation of lawful international commerce. Striking a balance between these objectives requires both CBP and the trade to exercise shared responsibilities, which is one of the principal tenets of the Customs Modernization Act. If you are an importer and have exercised reasonable care to file your entries, you should not feel constrained to discuss your importations with CBP. An importer is responsible for exercising reasonable care in entering merchandise, by providing sufficient information as is necessary to enable CBP to determine whether the imported product can be released from CBP custody, and to determine whether all other requirements of governing laws are met. CBP considers that an importer who exercises reasonable care in filing its entries is not negligent and, therefore, does not violate 19 U.S.C. § 1592. Even if CBP has commenced a formal investigation of a violation this would not automatically preclude a prior disclosure provided that the disclosing party has no knowledge of the commencement of a formal CBP or ICE/HSI investigation.

An important point to remember about prior disclosures is that they are rooted in fairness to both the Government and the trade community. For example, if a party submits a valid prior disclosure, the party may receive the benefits of significantly reduced penalties that the law provides. On the other hand, where there is no prior disclosure and CBP or ICE/HSI first discovers the violation (and the violator has knowledge of the commencement of an investigation), prior disclosure treatment will *not* be afforded to the violator.

**13. How am I notified by CBP that my prior disclosure is valid or invalid?**

Answer: If a prior disclosure is determined to be valid, CBP will notify you by means of a

19 U.S.C. § 1592 prepenalty notice and set forth the amount of the reduced penalty assessment in its notice, in accordance with 19 U.S.C. §1592(c)(4)(A) and (B). This notice will provide instructions regarding payment of any reduced penalty and also serves as the CBP record of the disclosed violation. If the interest owed is less than \$1,000, the FPFO shall exercise discretion in determining whether to initiate a penalty action. If a violation involves a non-duty loss violation or unliquidated entries, no penalty should be assessed and any unliquidated duties should be collected by a rate advance. In these cases, the FPFO should advise the disclosing party in writing that the disclosure is valid and that no penalty will be assessed. If a prior disclosure does not meet the requirements of 19 CFR § 162.74, the FPFO will proceed with a penalty under 19 U.S.C. § 1592 at the prescribed statutory penalty amounts.

**14. Should I make a prior disclosure of my CBP violations if I know that such violations are under formal investigation by CBP?**

Answer: This is a judgment call which you must make based on your particular circumstances. Some parties choose to disclose circumstances of a violation in cases where they have knowledge of the commencement of a formal investigation of such violation in order to obtain additional mitigation in subsequent penalty proceedings under 19 U.S.C. § 1592. In such a case, by providing the details of the violation to CBP and by exhibiting extraordinary cooperation beyond that expected from a person under investigation for a CBP violation, a person may be eligible for mitigation in the form of significantly reduced penalties under the mitigation guidelines for 19 U.S.C. § 1592 penalties, even though they do not qualify for prior disclosure treatment. Further details regarding such extraordinary relief may be found in Appendix B to Part 171 of the CBP Regulations.

**15. Can I use statistical sampling in calculating the loss of duties identified in a claimed prior disclosure?**

Answer: Yes, a private party conducting an independent review of certain transactions and a calculation of lost duties, taxes, and fees or lost duties for prior disclosure purposes may use statistical sampling provided that: (1) review of 100 percent of the transactions is impossible or impractical; (2) the sampling plan is prepared in accordance with generally recognized sampling procedures; and (3) the sampling procedure is executed in accordance with that plan (*See* 19 CFR § 163.11(c)(3)). You should submit with your disclosure an explanation of the sampling plan and methodology employed and the execution and results of the review. The time period, scope, sampling plan employed, execution, and results are subject to CBP review and approval.

Note that the use of statistical sampling requires knowledge of probability and statistical theories and its use in a prior disclosure claim may require consultation with and compilation by an expert. (See Appendix B below which details the type of information you or your expert should provide to CBP.)

**16. Will CBP review and approve my sampling plan prior to execution?**

Answer: You may request to discuss a proposed sampling plan and methodology with CBP

to ensure the proposed methodology is acceptable and to remedy any defects prior to committing the resources to executing the plan. However, the actual execution of the sampling plan and the resulting projections are still subject to CBP review and approval regardless of whether you discussed the proposed sampling plan with CBP beforehand. If additional information affecting the suitability of the original sampling plan's design comes to CBP's attention, CBP may reconsider and reject the sample results or require the importer to remedy any defects.

**17. During my evaluation of the entries in preparing my prior disclosure claim, I identified overpayments of duties, taxes, and fees on a number of entries. Will I be allowed to offset these overpayments with any underpayments?**

Answer: Yes, under 19 CFR § 163.11(d), the overpayments of duties, taxes, and fees may be offset against underpayments of duties, taxes, and fees in prior disclosure claims where the requirements are satisfied. Offsetting will be allowed only on finally liquidated entries within the time period and scope of the prior disclosure claim provided that: (1) the identified overpayments or over-declarations were not made for the purpose of violating any provision of law, including laws other than customs laws; (2) the identified underpayments or under-declarations were not made knowingly and intentionally; and (3) all other requirements of 19 CFR § 163.11(d) are met. After the applicable FPFO has reviewed the disclosure and determined it to be valid, the Office of Trade, RA will review and evaluate all such prior disclosures and determine whether the application of offsetting may be approved.

**18. Is offsetting permitted across different types of duties, taxes, and fees? For instance, can overpayments in duty be offset against underpayments of harbor maintenance fees?**

Answer: Yes, offsetting is permitted regardless of the type of duties, taxes, and fees involved as long as the entries are finally liquidated and the requirements of 19 CFR § 163.11(d) are satisfied. However, offsetting involving AD/CVD will only be permitted where CBP has received final liquidation instructions from the Department of Commerce for all affected cases and those liquidation instructions have not been overruled or enjoined by the U.S. Court of International Trade.

**19. While calculating the loss of revenue, I found more overpayments than underpayments on "finally liquidated" entries. Can I request a refund?**

Answer: No, once liquidation is final, then no refund is available to you.

**20. I forgot to claim a duty allowance or preference at the time of entry and now the entries have finally liquidated. Can I use offsetting to make the claim in a prior disclosure?**

Answer: No, offsetting is not allowed with respect to overpayments or over-declarations resulting from a failure to timely claim or establish a duty allowance or preference at the time of entry (e.g., failure to claim eligibility for a Free Trade Agreement or preferential

trade legislation program, failure to claim drawback before the drawback period expired, or failure to claim U.S. Goods Returned or allowance for U.S. made components in headings 9801 and 9802 of the tariff schedule).

**21. I used statistical sampling to prepare my prior disclosure claim and I identified both underpayments and overpayments. Will I be allowed to project both the underpayments and overpayments in calculating the loss of revenue?**

Answer: It depends on the liquidation status of the entries. Offsetting is only permitted where the entries have finally liquidated. If the universe is composed of finally liquidated entries, both the underpayments and overpayments can be projected. If you are using a universe of entries with mixed liquidation statuses, there is a risk of not being able to project any overpayments that occur on entries that are not finally liquidated or having to redesign and re-execute the sampling plan.

Appendix A – Prior Disclosure Checklist

Appendix B – Information to be Provided to CBP When Submitting a Prior Disclosure Employing Statistical Sampling

Appendix C – CBP Prior Disclosure Regulations (19 CFR § 162.74 and 19 CFR § 163.11)

## **APPENDIX A: PRIOR DISCLOSURE CHECKLIST (19 U.S.C. § 1592)**

The following checklist may prove helpful if you have made the decision to submit a prior disclosure to CBP. Answering all of the questions below may assist you in completing your prior disclosure submission.

1. Is your prior disclosure addressed to the Commissioner of CBP and does your submission indicate your name, address and telephone number? (Note: Although addressed to the Commissioner, the submission must list all of the concerned ports of entry.)
2. Have you identified the class or kind of merchandise involved in the disclosed violation?
3. Have you identified the importation included in the disclosure by customs entry number, or by indicating each concerned CBP port of entry and the approximate dates of entry? (Reminder: The disclosing party defines the scope of the prior disclosure.)
4. Have you provided the specific material false statements, omissions or acts involved in the disclosed violation and how and when they occurred?
5. Have you provided the true and accurate information or data which should have been provided in the entry? (Note: In this regard, remember to specify that you will provide any unknown information or data within 30 days of your initial disclosure – if it is not available at the time of your initial disclosure you may ask the concerned FPFO for extensions of this 30-day time period.)
6. If you used a statistical sampling methodology to calculate the loss of duty, have you described that methodology, including the elements of the sampling plan discussed in Appendix B below?
7. Have you calculated any loss of duty involving liquidated entries covered by the prior disclosure? (Note: This amount includes all duties, taxes and user fees.) And, if so, have you prepared a check in the amount of the duty loss made payable to CBP and submitted it along with your prior disclosure?
8. Have you specifically identified overpayments of duties, taxes, or fees for which you are seeking to offset against any underpayment and did you ensure that all affected entries are “finally liquidated”?
9. Have you identified all of the CBP ports where the disclosed violations occurred? (Remember that the submission must list all the concerned ports of entry.)
10. If you are mailing the prior disclosure, have you considered sending it registered or return receipt requested so that the time of disclosure is the date of mailing? (Reminder: Failure to mail the disclosure in this manner will mean that the time of the

disclosure will be considered the date of receipt by CBP.)

11. If you are sending the prior disclosure electronically to CBP, have you requested a delivery receipt?

## **APPENDIX B. Information to be Provided to CBP When Submitting a Prior Disclosure Employing Statistical Sampling Methodology**

A list of specific sampling elements has not been described in the CBP regulations; however, some general descriptive elements may facilitate the review process of the prior disclosure. The following information should be included in disclosures that use a statistical sampling methodology:

- **Sampling objective:** The question you are trying to answer about the universe which defines the characteristics, occurrences, errors, and/or values to be evaluated.
- **Statistical sampling type (e.g., attribute or variable) and approach (e.g., physical unit, dollar unit, attribute discovery, etc.):** Attribute sampling is used to reach a conclusion on the frequency or occurrence of a particular attribute (e.g., to calculate a rate of compliance). Variable sampling is used to reach a conclusion about errors in terms of erroneous amounts (e.g., dollars in error). Variable sampling is generally more appropriate for determining the monetary impact of any sample error(s). As such, attribute sampling would generally be an uncommon approach to quantifying loss of duties for disclosure purposes. Provide an explanation for your chosen approach.
- **Description of misstatement condition:** Represents the error being measured (i.e., criteria for identifying and reporting errors; defines what will be counted as an error and projected onto the universe/sampling frame).
- **Detailed universe/sampling frame descriptions:** The universe is the population from which you are selecting the sample and the sampling frame is the physical or electronic representation of the universe from which the sample is taken. We recommend you have an electronic version readily available. The description should include the source of the data; specific time period; the scope (e.g., types of entries, specific classifications or manufacturers, etc.); descriptive characteristics (e.g., size and value; mean, medium, and mode of values; standard deviation, etc.), and an explanation for any items excluded from the sampling frame (e.g., individually significant items removed for separate evaluation).
- **Explanation of any stratification methods used (if applicable):** Process of separating a universe into different subgroups for separate selection, review, and evaluation. It is mainly used to group like items together and is generally used for purposes of improving the precision of sample results in a universe with a high amount of variability.
- **Sampling Unit:** The individual items that compose the sampling frame that may be selected for testing (e.g., entries, entry lines, dollars, general ledger transactions, etc.).
- **Sample size and basis for sample size selection:** Describe/identify the parameters (and associated logic) used to determine the sample size (e.g., confidence level, critical error rate, presumed error rate, desired precision, sample sizing guidelines, etc.) and identify

any software and/or guidelines used.

- Sample selection process to select individual sample items: All items in the universe/sampling frame must have an equal chance of selection. Random selection is typically the most suitable approach (e.g., random number generator).
- Evaluation and projection of sample results: Identify the number and nature of the errors found in the sample and the treatment of those errors. Identify the statistical sampling software or formulas used to project the errors. Explain the evaluation of the precision of the sample results including the point estimate (single figure that serves as the “best estimate” of the projection of sample errors to the universe/sampling frame), confidence level (degree of assurance that the true or actual answer is within a specified range; typically 95 or 99 percent), and precision interval (range within which the actual value in the sampling frame should fall at a given confidence level).

This list is not an all-inclusive list. CBP may request the sampling frame files, as well as, the sample evaluation files, so you should be prepared to provide relevant documentation used to select and evaluate the sample selections.

## **APPENDIX C: CBP PRIOR DISCLOSURE REGULATIONS - 19 CFR § § 162.74 and 163.11**

### **162.74 Prior Disclosure**

(a) In general. -- (1) A prior disclosure is made if the person concerned discloses the circumstances of a violation (as defined in paragraph (b) of this section) of 19 U.S.C. § 1592 or 19 U.S.C. § 1593a, either orally or in writing to a Customs officer before, or without knowledge of, the commencement of a formal investigation of that violation, and makes a tender of any actual loss of duties, taxes and fees or actual loss of revenue in accordance with paragraph (c) of this section. A Customs officer who receives such a tender in connection with a prior disclosure shall ensure that the tender is deposited with the concerned local Customs entry officer.

(2) A person shall be accorded the full benefits of prior disclosure treatment if that person provides information orally or in writing to Customs with respect to a violation of 19 U.S.C. § 1592 or 19 U.S.C. § 1593a if the concerned Fines, Penalties and Forfeitures Officer is satisfied the information was provided before, or without knowledge of, the commencement of a formal investigation, and the information provided includes substantially the information specified in paragraph (b) of this section. In the case of an oral disclosure, the disclosing party shall confirm the oral disclosure by providing a written record of the information conveyed to Customs in the oral disclosure to the concerned Fines, Penalties and Forfeitures Officer within 10 days of the date of the oral disclosure. The concerned Fines Penalties and Forfeiture Officer may, upon request of the disclosing party which establishes a showing of good cause, waive the oral disclosure written confirmation requirement. Failure to provide the written confirmation of the oral disclosure or obtain a waiver of the requirement may result in denial of the oral prior disclosure.

(b) Disclosure of the circumstances of a violation. The term "discloses the circumstances of a violation" means the act of providing to Customs a statement orally or in writing that:

- (1) Identifies the class or kind of merchandise involved in the violation;
- (2) Identifies the importation or drawback claim included in the disclosure by entry number, drawback claim number, or by indicating each concerned Customs port of entry and the approximate dates of entry or dates of drawback claims;
- (3) Specifies the material false statements, omissions or acts including an explanation as to how and when they occurred; and

(4) Sets forth, to the best of the disclosing party's knowledge, the true and accurate information or data that should have been provided in the entry or drawback claim documents, and states that the disclosing party will provide any information or data unknown at the time of disclosure within 30 days of the initial disclosure date. Extensions of the 30-day period may be requested by the disclosing party from the concerned Fines, Penalties and Forfeitures Officer to enable the party to obtain the information or data.

(c) Tender of actual loss of duties, taxes and fees or actual loss of revenue. A person who discloses the circumstances of the violation shall tender any actual loss of duties, taxes and fees or actual loss of revenue. The disclosing party may choose to make the tender either at the time of the claimed prior disclosure, or within 30 days after CBP notifies the person in writing of CBP calculation of the actual loss of duties, taxes and fees or actual loss of revenue. The Fines, Penalties and Forfeitures Officer may extend the 30-day period if there is good cause to do so. The disclosing party may request that the basis for determining CBP asserted actual loss of duties, taxes or fees be reviewed by Headquarters, provided that the actual loss of duties, taxes or fees determined by CBP exceeds \$100,000, and is deposited with CBP, more than 1 year remains under the statute of limitations involving the shipments covered by the claimed disclosure, and the disclosing party has complied with all other prior disclosure regulatory provisions. A grant of review is within the discretion of CBP Headquarters in consultation with the appropriate field office, and such Headquarters review shall be limited to determining issues of correct tariff classification, correct rate of duty, elements of dutiable value, and correct application of any special rules (GSP, CBI, HTS 9802, etc.). The concerned Fines, Penalties and Forfeitures Officer shall forward appropriate review requests to the Chief, Penalties Branch, Office of International Trade. After Headquarters renders its decision, the concerned Fines, Penalties and Forfeitures Officer will be notified and the concerned Center Director will recalculate the loss, if necessary, and notify the disclosing party of any actual loss of duties, taxes or fees increases. Any increases must be deposited within 30 days, unless the local CBP office authorizes a longer period. Any reductions of the CBP calculated actual loss of duties, or and fees shall be refunded to the disclosing party. Such Headquarters review decisions are final and not subject to appeal. Further, disclosing parties requesting and obtaining such a review waive their right to contest either administratively or judicially the actual loss of duties, taxes and fees or actual loss of revenue finally calculated by CBP under this procedure. Failure to tender the actual loss of duties, taxes and fees or actual loss of revenue finally calculated by CBP shall result in denial of the prior disclosure.

(d) Effective time and date of prior disclosure. -- (1) If the documents that provide the disclosing information are sent by registered or certified mail, return-receipt requested, and are received by Customs, the disclosure shall be deemed to have been made at the time of mailing.

(2) If the documents are sent by other methods, including in-person delivery, the disclosure shall be deemed to have been made at the time of receipt by Customs. If the documents are delivered in person, the person delivering the documents will, upon request, be furnished a receipt from Customs, stating the time and date of receipt.

(3) The provision of information that is not in writing but that qualifies for prior disclosure treatment pursuant to paragraph (a)(2) of this section shall be deemed to have occurred at the time that Customs was provided with information that substantially complies with the requirements set forth in paragraph (b) of this section.

(e) Addressing and filing prior disclosure. -- (1) A written prior disclosure should be addressed to the Commissioner of Customs, have conspicuously printed on the face of the envelope the words "prior disclosure", and be presented to a Customs officer at the Customs port of entry of the disclosed violation.

(2) In the case of a prior disclosure involving violations at multiple ports of entry, the disclosing party may orally disclose or provide copies of the disclosure to all concerned Fines, Penalties and Forfeitures Officers. In accordance with internal Customs procedures, the officers will then seek consolidation of the disposition and handling of the disclosure. In the event that the claimed multi-port disclosure is made to a Customs officer other than the concerned Fines, Penalties and Forfeitures Officer, the disclosing party

must identify all ports involved to enable the concerned Customs officer to refer the disclosure to the concerned Fines, Penalties and Forfeitures Officer for consolidation of the proceedings.

(f) Verification of disclosure. Upon receipt of a prior disclosure, the Customs officer shall notify Customs Office of Investigations of the disclosure. In the event the claimed prior disclosure is made to a Customs officer other than the concerned Fines, Penalties and Forfeitures Officer, it is incumbent upon the Customs officer to provide a copy of the disclosure to the concerned Fines Penalties and Forfeitures Officer. The disclosing party may request, in the oral or written prior disclosure, that the concerned Fines, Penalties and Forfeitures Officer request that the Office of Investigations withhold the initiation of disclosure verification proceedings until after the party has provided the information or data within the time limits specified in paragraph (b)(4) of this section. It is within the discretion of the concerned Fines, Penalties and Forfeitures Officer to grant or deny such requests.

(g) Commencement of a formal investigation. A formal investigation of a violation is considered to be commenced with regard to the disclosing party on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of a violation existed. In the event that a party affirmatively asserts a prior disclosure (*i.e.*, identified or labeled as a prior disclosure) and is denied prior disclosure treatment on the basis that Customs had commenced a formal investigation of the disclosed violation, and Customs initiates a penalty action against the disclosing party involving the disclosed violation, a copy of a "writing" evidencing the commencement of a formal investigation of the disclosed violation shall be attached to any required prepenalty notice issued to the disclosing party pursuant to 19 U.S.C. 1592 or 19 U.S.C. 1593a.

(h) Scope of the disclosure and expansion of a formal investigation. A formal investigation is deemed to have commenced as to additional violations not included or specified by the disclosing party in the party's original prior disclosure on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received that caused the Customs Service to believe that a possibility of such additional violations existed. Additional violations not disclosed or covered within the scope of the party's prior disclosure that are discovered by Customs as a result of an investigation and/or verification of the prior disclosure shall not be entitled to treatment under the prior disclosure provisions.

(i) Knowledge of the commencement of a formal investigation. -- (1) A disclosing party who claims lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge. A person shall be presumed to have had knowledge of the commencement of a formal investigation of a violation if before the claimed prior disclosure of the violation a formal investigation has been commenced and:

(i) Customs, having reasonable cause to believe that there has been a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a, so informed the person of the type of or circumstances of the disclosed violation; or

(ii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, had, either orally or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or

(iii) A Customs Special Agent, having properly identified himself or herself and the nature of his or her inquiry, requested specific books and/or records of the person relating to the disclosed violation; or

(iv) Customs issues a prepenalty or penalty notice to the disclosing party pursuant to 19 U.S.C. 1592 or 19 U.S.C. 1593a relating to the type of or circumstances of the disclosed violation; or

(v) The merchandise that is the subject of the disclosure was seized; or

(vi) In the case of violations involving merchandise accompanying persons entering the United States or commercial merchandise inspected in connection with entry, the person has received oral or written notification of Customs finding of a violation.

(2) The presumption of knowledge may be rebutted by evidence that, notwithstanding the foregoing notice, inquiry or request, the person did not have knowledge that an investigation had commenced with respect to the disclosed information.

(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.

### 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,(ii) The identified underpayments or under-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.

## **ADDITIONAL INFORMATION**

### **The Internet**

The home page of CBP on the Internet's World Wide Web, provides the trade community with current, relevant information regarding CBP operations and items of special interest. The site posts information -- which includes proposed regulations, news releases, publications and notices, etc. -- that can be searched, read on-line, printed or downloaded to your personal computer. The web site was established as a trade-friendly mechanism to assist the importing and exporting community. The web site also links to the home pages of many other agencies whose importing or exporting regulations CBP helps to enforce. The web site also contains a wealth of information of interest to a broader public than the trade community. For instance, on June 20, 2001, CBP launched the "Know Before You Go" publication and traveler awareness campaign designed to help educate international travelers.

The web address of U.S. Customs and Border Protection is <http://www.cbp.gov>.

### **CBP Regulations**

The current edition of CBP Regulations of the United States is a loose-leaf, subscription publication available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; telephone (202) 512-1800. A bound, 2016 edition of Title 19, Code of Federal Regulations, which incorporates all changes to the Regulations as of April 1, 2016, is also available for sale from the same address. All proposed and final regulations are published in the Federal Register, which is published daily by the Office of the Federal Register, National Archives and Records Administration, and distributed by the Superintendent of Documents. Information about on-line access to the Federal Register may be obtained by calling (202) 512-1530 between 7 a.m. and 5 p.m. Eastern time. These notices are also published in the weekly Customs Bulletin described below.

### **Customs Bulletin**

The Customs Bulletin and Decisions ("Customs Bulletin") is a weekly publication that contains decisions, rulings, regulatory proposals, notices and other information of interest to the trade community. It also contains decisions issued by the U.S. Court of International Trade, as well as customs-related decisions of the U.S. Court of Appeals for the Federal Circuit. Each year, the Government Printing Office publishes bound volumes of the Customs Bulletin. Subscriptions may be purchased from the Superintendent of Documents at the address and phone number listed above.

## **Importing Into the United States**

This publication provides an overview of the importing process and contains general information about import requirements. The November 2006 edition of *Importing Into the United States* contains much new and revised material brought about pursuant to the Customs Modernization Act ("Mod Act"). The Mod Act fundamentally altered the relationship between importers and U.S. Customs and Border Protection by shifting to the importer the legal responsibility for declaring the value, classification, and rate of duty applicable to entered merchandise.

The November 2006 edition contains a section entitled "Informed Compliance." A key component of informed compliance is the shared responsibility between U.S. Customs and Border Protection and the import community, wherein CBP communicates its requirements to the importer, and the importer, in turn, uses reasonable care to assure that CBP is provided accurate and timely data pertaining to his or her importation.

Single copies may be obtained from local offices of U.S. Customs and Border Protection, or from the Office of Public Affairs, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Washington, DC 20229. An on-line version is available at the CBP web site:

<http://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf>.

*Importing Into the United States* is also available for sale, in single copies or bulk orders, from the Superintendent of Documents by calling (202) 512-1800, or by mail from the Superintendent of Documents, Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250-7054.

## **Informed Compliance Publications**

CBP has prepared a number of ICPs in the "What Every Member of the Trade Community Should Know About:..." series. Check the Internet web site <http://www.cbp.gov> for current publications.

## Value Publications

Customs Valuation under the Trade Agreements Act of 1979 is a 96-page book containing a detailed narrative description of the customs valuation system, the customs valuation title of the Trade Agreements Act (§ 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. §1401a)), the Statement of Administrative Action which was sent to the U.S. Congress in conjunction with the TAA, regulations (19 C.F.R. §§152.000-152.108) implementing the valuation system (a few sections of the regulations have been amended subsequent to the publication of the book) and questions and answers concerning the valuation system. A copy may be obtained from U.S. Customs and Border Protection, Regulations and Rulings, Valuation & Special Programs Branch, 90 K Street, N.E., 10<sup>th</sup> Floor, Washington, D.C. 20229-1177.

Customs Valuation Encyclopedia (with updates) is comprised of relevant statutory provisions, CBP Regulations implementing the statute, portions of the Customs Valuation Code, judicial precedent, and administrative rulings involving application of valuation law. This publication is available on the Internet web site <http://www.cbp.gov>.

<p>The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs issues, an importer may wish to obtain a ruling under CBP Regulations, 19 C.F.R. Part 177, or obtain advice from an expert (such as a licensed customs broker, attorney or consultant) who specializes in customs matters. Reliance solely on the general information in this pamphlet may not be considered reasonable care.</p>
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Additional information may also be obtained from CBP ports of entry. Please consult your telephone directory for an office near you. The listing will be found under U.S. Government, Department of Homeland Security.

## **“Your Comments are Important”**

The Small Business and Regulatory Enforcement Ombudsman and 10 regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement activities and rate each agency’s responsiveness to small business. If you wish to comment on the enforcement actions of CBP, call 1-888-REG-FAIR (1-888-734-3247).

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