U.S. Customs and Border Protection

19 CFR PART 111

CBP DEC. 09–38
Customs Broker License Examination Appeals

AGENCY: Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: This final rule amends part 111 of the U.S. Customs and Border Protection (CBP) regulations, which govern the licensing and conduct of customs brokers. The rule specifies the proper CBP official who is authorized to decide the final administrative appeal of a failing grade on the customs broker written examination. The current regulations provide that the final administrative appeal on a failing grade on the broker's exam should be sent in writing to the Secretary of Homeland Security, or her designee. This final rule amends the CBP regulations to specify that examinees should submit final administrative appeals to the Assistant Commissioner, Office of International Trade.

DATES: This final rule is effective on October 13, 2009.

FOR FURTHER INFORMATION CONTACT: Russell Morris, Broker Compliance Branch, Trade Policy and Programs, Office of International Trade, (202) 863–6543.

SUPPLEMENTARY INFORMATION:

Background

Section 641 of the Tariff Act of 1930 (Tariff Act), as amended (19 U.S.C. 1641) authorizes the Secretary of the Treasury to prescribe rules and regulations relating to the customs business of brokers as necessary to protect importers and the revenue of the United States. Specifically, section 641, provides that a person (an individual, corporation, association, or partnership) must hold a valid customs broker's license and permit in order to transact customs business on behalf of others. In the case of an applicant for an individual broker's

license, section 641 states that the Secretary of the Treasury may conduct an examination to determine an applicant's qualifications for a license.

The Homeland Security Act of 2002 (Homeland Security Act) generally transferred the functions of the U.S. Customs Service from the Treasury Department to the Secretary of Homeland Security. 6 U.S.C. 101 *et. seq*. Section 412 of the Homeland Security Act (6 U.S.C. 212) provides that the Secretary of the Treasury retains customs revenue functions unless the Secretary of the Treasury delegates the authority to the Secretary of Homeland Security. The regulation of customs brokers is encompassed within the customs revenue functions set forth in section 412 of the Homeland Security Act. On May 15, 2003, the Secretary of the Treasury delegated authority related to the customs revenue functions to the Secretary of Homeland Security subject to certain exceptions. *See* Treasury Order No. 100–16 (Appendix to 19 CFR Part 0). Since the authority to prescribe the rules and regulations related to customs brokers is not listed as one of the exceptions, this authority now resides with the Secretary of Homeland Security.

Pursuant to section 641 of the Tariff Act, part 111 of title 19 of the Code of Federal Regulations sets forth the conduct and licensing requirements for customs brokers. Section 111.11 sets forth the basic requirements for obtaining a broker's license, including the requirement that the applicant must obtain a passing grade on the written examination within a 3-year period before submitting the application for a broker's license. 19 CFR 111.11.

Section 111.13(f) provides that an examinee can appeal a failing grade on the written examination by first filing a written appeal with Trade Policy and Programs, Office of International Trade, U.S. Customs and Border Protection (CBP), within 60 calendar days after the date of the written notice of the examination results. 19 CFR 111.13(f). After reviewing the submission, CBP provides the examinee with a written notice setting forth the decision on the appeal. If CBP's decision on the appeal reaffirms the result of the examination, the examinee may subsequently request review of CBP's decision on the appeal by writing to the Secretary of Homeland Security, or her designee, within 60 calendar days after the date of the notice from CBP.

Explanation of Amendment

As noted above, the Secretary of the Treasury delegated to the Secretary of Homeland Security the authority to prescribe rules and

regulations relating to customs brokers. The Secretary of Homeland Security, in turn, delegated some of this authority to the Commissioner of CBP including the authority to regulate brokers. *See* Delegation Number 7010.3, dated May 11, 2006.

On October 19, 2007, CBP published a final rule in the **Federal Register**, at 72 FR 59166, setting forth technical corrections to the CBP regulations to reflect changes in CBP's organizational structure. Among the many technical changes in that document, consistent with the Homeland Security Act and Treasury Delegation 100–16, CBP amended 19 CFR 111.13(f) to remove the Secretary of the Treasury as the official with the authority to issue the final administrative appeal on a failing grade on the broker's exam and gave the Secretary of Homeland Security or her designee that authority.

Since the publication of the final rule regarding this particular technical amendment, CBP has determined that the Assistant Commissioner in CBP's Office of International Trade is the most appropriate official to issue the final administrative appeal on a failing grade on the written customs broker's exam. This designation is consistent with DHS Delegation Number 7010.3, which delegates the authority to regulate customs brokers to the Commissioner of CBP. In addition, CBP notes that the Office of International Trade is staffed with examination subject matter experts and is uniquely positioned to independently and expeditiously review examination appeals. Accordingly, § 111.13(f) is being amended in this document by removing "Secretary of Homeland Security, or his designee" and adding, in its place, "Assistant Commissioner, Office of International Trade, U.S. Customs and Border Protection."

Administrative Procedure Act

Since this rule pertains to matters relating to rules of agency organization, procedure, or practice, this rule is not a substantive rule and is exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act. *See* 5 U.S.C. 553(b)(A). In addition, the delayed effective date requirement of 5 U.S.C. 553(d) does not apply to this rule for these same reasons.

Regulatory Flexibility Act

Because this rule is not subject to the notice and public comment procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Executive Order 12866

These amendments do not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866. Therefore, the Office of Management and Budget (OMB) has not reviewed this rule.

Signing Authority

This document is being issued by CBP in accordance with § 0.1(b)(1) of the CBP regulations (19 CFR 0.1(b)(1)).

List of Subjects in 19 CFR Part 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Imports, Licensing, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

For the reasons set forth above, part 111 of title 19 of the Code of Federal Regulations (19 CFR part 111) is amended as follows:

PART 111 — CUSTOMS BROKERS

1. The general authority citation for Part 111 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 1641.

2. In § 111.13, paragraph (f) is revised to read as follows:

§ 111.13 Written examination for individual license.

* * * * *

(f) *Appeal of failing grade on examination.* If an examinee fails to attain a passing grade on the examination taken under this section, the examinee may challenge that result by filing a written appeal with Trade Policy and Programs, Office of International Trade, U.S. Customs and Border Protection, Washington, DC 20005 within 60 calendar days after the date of the written notice provided for in paragraph (e) of this section. CBP will provide to the examinee written notice of the decision on the appeal. If the CBP decision on the appeal affirms the result of the examination, the examinee may request review of the decision on the appeal by writing to the Assistant Commissioner, Office of International Trade, U.S. Customs and Border Protection, within 60 calendar days after the date of the notice on that decision.

Dated: September 21, 2009

JANET NAPOLITANO,
Secretary.

[Published for the Federal Register, October 13, 2009 (74 FR 52400)]

19 CFR PARTS 4, 122, 123, AND 192

CBP DEC. 09–39
Technical Correction to Remove Obsolete Compliance Date Provisions from Electronic Cargo Information Regulations

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule; technical correction.

SUMMARY: This final rule removes the compliance date provisions of various sections of the CBP regulations pertaining to mandatory advance electronic transmission of in-bound and out-bound cargo information. As all the provisions requiring advance electronic transmission of cargo information are now in effect because the various dates or events described in the compliance date paragraphs triggering the compliance date have occurred, the compliance date paragraphs are now obsolete.

DATES: The rule is effective on October 14, 2009.

FOR FURTHER INFORMATION CONTACT: Gregory Olsavsky, Director, Cargo Control Division, Office of Field Operations, 202–344–1049.

SUPPLEMENTARY INFORMATION:

Background

As circumstances warrant, CBP sometimes publishes a regulation (a final or interim final rule) that delays its compliance date, or the compliance date for one or more of its provisions, until a future date and/or the occurrence of one or more specified events. When the condition or conditions precedent has been met, the provision becomes out of date and obsolete. This final rule removes several obsolete compliance date provisions from several sections of the CBP regulations.

Each compliance date provision being amended in this technical correction involves a final rule that was promulgated pursuant to

section 343(a) of the Trade Act of 2002, as amended by the Maritime Security Act (19 U.S.C. 2071 note) (hereafter, section 343(a) of the Act). The final rule was published in the **Federal Register** (68 FR 68140) on December 5, 2003. Section 343(a) of the Act mandates the collection of cargo information through a CBP-approved electronic data interchange system before cargo is brought into or departs from the United States by any mode of commercial transportation (sea, air, rail, truck). This requirement spawned new sections of the regulations (19 CFR 122.48a, 123.91, 123.92, and 192.14) and required amendment of an existing section (19 CFR 4.7) to implement the law. Four of the five sections pertain to the advance electronic transmission requirement for cargo arriving in the United States by vessel carrier, air carrier, rail carrier, and truck carrier, and the fifth section pertains to this requirement for cargo departing from the United States onboard all modes of transportation. Because some carriers were not yet automated (with systems capable of electronic transmission through the appropriate CBP-approved data interchange system) or CBP had to upgrade its system, the new and amended regulations were drafted to contain a compliance date provision that delayed the date the carriers would be required to comply with the mandatory electronic transmission requirements. Over time, the compliance dates for these five sections of the CBP regulations have taken effect, rendering these provisions obsolete.

Changes Made in this Final Rule

This final rule amends the following five sections of the CBP regulations to remove from each an obsolete compliance date provision:

19 CFR 4.7

Under 19 CFR 4.7, applicable to commercial vessels transporting cargo to the United States, CBP must receive the CBP-approved electronic equivalent of the vessel's cargo declaration 24 hours before the cargo is laden aboard the vessel at the foreign port (19 CFR 4.7(b)(2)). This section also sets forth other requirements, such as information to be transmitted, and a compliance date. Under 19 CFR 4.7(b)(5), vessel carriers (and non-vessel operating common carriers electing to participate) must comply with the requirement to make electronic transmissions under paragraph (b)(2) within 90 days of December 5, 2003 (the date the implementing final rule was published) at all ports of entry in the United States.

Inasmuch as the compliance date has passed, this final rule removes paragraph (b)(5) from this section and makes a conforming change to paragraph (b)(2).

19 CFR 122.48a

Under 19 CFR 122.48a, applicable to commercial air carriers transporting cargo to the United States, CBP must electronically receive from an inbound air carrier (or from another party authorized under paragraph (c)(1) of this section) certain information concerning incoming cargo. In the case of flights departing directly to the United States from any port or place in North America, CBP must receive the information no later than the aircraft's departure and, for flights departing from any other foreign port or place, no later than 4 hours prior to the aircraft's arrival in the United States. Section 122.48a sets forth other requirements, including the information to be transmitted and a compliance date.

Under 19 CFR 122.48a(e)(1), air carriers must comply with the requirement to transmit cargo information to CBP electronically on and after March 4, 2004. Under 19 CFR 122.48a(e)(2), CBP may delay the compliance date set forth in paragraph (e)(1) of this section in certain circumstances (that need not be specified here). Under this paragraph (e)(2), CBP would announce any such delays in the **Federal Register**. As the March 4, 2004, compliance date was not delayed, no announcements of delay were published.

Inasmuch as the compliance date for all air carriers has passed, this final rule removes paragraph (e) from this section and makes a conforming change to paragraph (a).

19 CFR 123.91

Under 19 CFR 123.91, applicable to U.S. bound railroad trains with commercial cargo aboard, CBP must electronically receive from the rail carrier certain information concerning the incoming cargo. CBP must receive the information no later than 2 hours prior to the cargo's arrival at the first port of arrival in the United States (19 CFR 123.91(a)). This section also sets forth other requirements, including exceptions, the information to be submitted, and a compliance date. Under 19 CFR 123.91(e), carriers are required to comply with the section's electronic transmission requirements 90 days from the date that CBP publishes notice in the **Federal Register** informing carriers that the electronic data interchange system for transmission of cargo information is operational at the affected port(s).

On April 12, 2004, CBP published a notice in the **Federal Register** (69 FR 19207) providing a schedule of dates by which the electronic data interchange system would be implemented, in three phases, at the various affected ports of entry. Phase one was for implementation at the ports that were already system-operational, and subsequent phases would follow at other ports, as set forth in the 2004 notice. Accordingly, the carriers commenced advance electronic transmissions at those ports by the specified dates, each of which was set at least 90 days after publication of the 2004 notice. The implementation

was complete at all ports in 2004, rendering 19 CFR 123.91(e) obsolete. Therefore, this final rule amends 19 CFR 123.91 by removing paragraph (e) and making a conforming change to paragraph (a).

19 CFR 123.92

Under 19 CFR 123.92, applicable to U.S. bound trucks with commercial cargo aboard, CBP must electronically receive from the truck carrier certain information concerning the incoming cargo. CBP must receive the information, depending on the electronic system employed by the carrier, no later than 30 minutes or one hour, or a lesser authorized period, prior to the cargo's arrival at the first port of arrival in the United States (19 CFR 123.92(a)). This section also sets forth other requirements, including exceptions, the information to be submitted, and a compliance date. Under 19 CFR 123.92(e), carriers are required to comply with these electronic transmission requirements on and after 90 days from the date that CBP publishes a notice in the **Federal Register** announcing the operability of the electronic interchange system at the affected port(s) and that the carriers must commence presenting the required cargo information through that system.

CBP published a series of notices (cited below) in the **Federal Register** announcing the operability of the electronic system at the various affected ports and the dates by which carriers were to commence electronic transmissions at those ports, each date being at least 90 days from publication of the notice. All such ports have been system operational, and all carriers have been complying with the regulation's requirements, since February 11, 2008. As all the compliance dates have taken effect, CBP is amending 19 CFR 123.92 to remove the obsolete compliance date provision of paragraph (e) and making a conforming change to paragraph (a). (*See* 69 FR 51007, August 17, 2004; 71 FR 62922, October 27, 2006; 72 FR 2435, January 19, 2007; 72 FR 8109, February 23, 2007; 72 FR 18574, April 13, 2007; 72 FR 25965, May 8, 2007; 72 FR 63805, November 3, 2007.)

19 CFR 192.14

Under 19 CFR 192.14, applicable to all carrier modes departing the United States transporting commercial cargo, carriers are required to file export cargo information electronically through the Automated Export System (AES) prior to departure, as follows: 24 hours prior to departure for vessel carriers, 2 hours prior to departure for air carriers, one hour before arrival at the border for truck carriers, and two hours before arrival at the border for rail carriers. Section 192.14(e), provides that these mandatory electronic (AES) filing requirements are to be implemented concurrent with the completion of the redesign of CBP's AES commodity module and the effective date of a Depart-

ment of Commerce (DOC) rulemaking pertaining to mandatory electronic filing of export cargo information. Section 192.14(e) also requires CBP to publish a notice in the **Federal Register** announcing the compliance date.

CBP completed the design of the AES module in 2004, and, on June 2, 2008, the DOC published in the **Federal Register** (73 FR 31548) U.S. Census Bureau regulations pertaining to mandatory electronic transmission of export cargo information, with an effective date of July 2, 2008, and an implementation date of September 30, 2008. Thus, on June 9, 2008, CBP published a general notice in the **Federal Register** (73 FR 32466) announcing a September 30, 2008 compliance date for the electronic transmission requirements of 19 CFR 192.14. This rendered the compliance date provision of 19 CFR 192.14(e) obsolete. Accordingly, this final rule amends 19 CFR 192.14 by removing paragraph (e) and making a conforming change to paragraph (a).

Inapplicability of Notice and Comment and Delayed Effective Date

Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), CBP has determined that it would be impracticable, unnecessary, and contrary to the public interest to delay publication of this rule in final form, pending an opportunity for public comment, and that there is good cause for this final rule to become effective immediately upon publication. The technical corrections in this rule merely remove from five sections of the regulations compliance date provisions that have become obsolete for the reason that the date or event that triggers the compliance date in each section has passed.

The Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Also, this amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Signing Authority

The signing authority for this final rule document falls under 19 CFR 0.2(a) pertaining to the authority of the Secretary of Homeland Security (or his or her delegate) to prescribe regulations not related to customs revenue functions.

List of Subjects

19 CFR Part 4

Customs duties and inspection, Freight, Maritime carriers, Reporting and recordkeeping requirements, Vessels.

19 CFR Part 122

Air carriers, Aircraft, Customs duties and inspection, Freight, Reporting and recordkeeping requirements, Security measures.

19 CFR Part 123

Customs duties and inspection, Freight, Motor carriers, Railroads, Reporting and recordkeeping requirements.

19 CFR Part 192

Aircraft, Exports, Motor vehicles, Reporting and recordkeeping requirements, Vessels.

Amendments to the Regulations

For the reasons set forth in the preamble, parts 4, 122, 123 and 192 of title 19, Code of Federal Regulations (19 CFR parts 4, 122, 123, and 192) are amended as follows:

PART 4 — VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 and the specific authority citation for section 4.7 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 60105.

* * * * *

Section 4.7 also issued under 19 U.S.C. 1581(a);

* * * * *

§ 4.7 [Amended]

2. Amend § 4.7 by removing from the first sentence of paragraph (b)(2) the words "subject to the effective date provided in paragraph (b)(5) of this section," and removing paragraph (b)(5).

PART 122 — AIR COMMERCE REGULATIONS

3. The general authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

* * * * *

§ 122.48a [Amended]

4. Amend § 122.48a by removing from the first sentence of paragraph (a) the words "and subject to paragraph (e) of this section," and removing paragraph (e).

PART 123 — CUSTOMS RELATIONS WITH CANADA AND MEXICO

5. The general authority citation for part 123 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i)), Harmonized Tariff Schedule of the United States (HTSUS), 1431, 1433, 1436, 1448, 1624, 1646c, 2071 note.

* * * * *

§ 123.91 [Amended]

6. Amend § 123.91 by removing from the first sentence of paragraph (a) the words "and subject to paragraph (e) of this section," and removing paragraph (e).

§ 123.92 [Amended]

7. Amend § 123.92 by removing from the first sentence of paragraph (a) the words "and subject to paragraph (e) of this section," and removing paragraph (e).

PART 192 — EXPORT CONTROL

8. The general authority citation for part 192 continues to read as follows:

Authority: 19 U.S.C. 66, 1624, 1646c. Subpart A also issued under 19 U.S.C. 1627a, 1646a, 1646b; subpart B also issued under 13 U.S.C. 303; 19 U.S.C. 2071 note; 46 U.S.C. 91.

* * * * *

§ 192.14 [Amended]

9. Amend § 192.14 by removing from the first sentence of paragraph (a) the words "and subject to paragraph (e) of this section," and removing paragraph (e).

Dated: October 8, 2009

JAYSON P. AHERN
Acting Commissioner
Customs and Border Protection

[Published for the Federal Register, October 14, 2009 (74 FR 52675)]

DEPARTMENT OF THE TREASURY

19 CFR PART 4

CBP DEC. 09–40

RIN 1505–AB71
Foreign Repairs To American Vessels

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

ACTION: Final rule.

SUMMARY: This document amends the Customs and Border Protection (CBP) regulations in title 19 of the Code of Federal Regulations (19 CFR) to update provisions relating to the declaration, entry, and dutiable status of repair expenditures made abroad for certain vessels. The principal changes set forth in this document involve: conforming the regulations to statutory changes that provide an exemption from vessel repair duties for the cost of certain equipment, repair parts, and materials; and adding a provision to advise that certain free trade agreements between the United States and other countries may limit the duties due on vessel repair expenditures made in foreign countries that are parties to those agreements.

DATES: Final rule effective October 20, 2009.

FOR FURTHER INFORMATION CONTACT: Glen Vereb, Regulations and Rulings, Office of International Trade, (202) 325–0212.

SUPPLEMENTARY INFORMATION:

Background

Under section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), purchases for or repairs made to certain vessels while they are outside the United States are subject to declaration, entry and payment of ad valorem duty. These requirements are effective upon the first arrival of affected vessels in the United States or Puerto Rico. The vessels subject to these requirements include those documented under U.S. law for the foreign or coastwise trades, as well as those which were previously documented under the laws of some foreign nation or are undocumented at the time that foreign shipyard repairs are performed, but which exhibit an intent to engage in those trades

under CBP interpretations. The regulations implementing 19 U.S.C. 1466 are found in § 4.14 of the CBP regulations (19 CFR 4.14).

Explanation of Amendments

Section 4.14(a), CBP regulations, states that, under 19 U.S.C. 1466, "purchases for or repairs made to certain vessels while they are outside the United States, including repairs made while those vessels are on the high seas, are subject to declaration, entry, and payment of duty." However, section 1554 of the Miscellaneous Trade and Technical Corrections Act of 2004 (Pub. L. 108–429, 118 Stat. 2434) amended 19 U.S.C. 1466(h) by adding a new paragraph (4) providing for an exemption from the declaration, entry, and duty requirements of the statute for the cost of equipment, repair parts, and materials that are installed on certain vessels by members of the regular crew of such vessels while the vessels are on the high seas. As this amendment exempted most repairs performed while vessels are on the high seas from the assessment of vessel repair duties, CBP is amending the first sentence of § 4.14(a) to remove the words "including repairs made while those vessels are on the high seas".

Section 1631 of the Pension Protection Act of 2006 (Pub. L. 109–280, 120 Stat. 1164) amended 19 U.S.C. 1466(h)(4) to expand the exemption created by the 2004 amendment discussed above by also including the cost of equipment, repair parts, and materials that are installed on certain vessels by members of the regular crew of such vessels while the vessels are in foreign waters or in a foreign port, provided the installation does not involve foreign shipyard repairs by foreign labor. CBP is further amending § 4.14(a) of the CBP regulations in this document to add a provision reflecting the above 2004 and 2006 statutory changes.

Section 4.14(a) also provides that certain expenditures for vessel repairs and purchases made in Israel, Canada, and Mexico (countries that are parties to free trade agreements with the United States) are not subject to vessel repair duties, although they must be declared and entered. CBP believes it would be useful for the CBP regulations to indicate that other free trade agreements may also limit the duties due on vessel repair expenditures made in foreign countries that are parties to those agreements. Accordingly, this document amends § 4.14(a) by adding a sentence to that effect.

For purposes of clarity and transparency, CBP is making the above-discussed changes to § 4.14(a) as part of an overall reorganization of that paragraph. Specifically, CBP is dividing §4.14(a) into three separate subparagraphs that are headed "General", "Expenditures not

subject to declaration, entry, or duty", and "Expenditures subject to declaration and entry but not duty".

CBP also is amending § 4.14 by replacing the word "Customs" with the term "CBP" each place that it appears to reflect the change in the agency name and by replacing an incorrect reference to "office" in paragraph (f) with the correct word "agency".

Inapplicability of Notice and Delayed Effective Date Requirements

The amendments set forth in this final rule document merely implement statutory changes and reorganize the CBP regulations relating to vessel repairs. Therefore, pursuant to 5 U.S.C. 553(b)(B) and (d)(3), CBP has determined that it would be unnecessary to delay publication of this rule in final form pending an opportunity for public comment and that there is good cause for this final rule to become effective immediately upon publication.

Regulatory Flexibility Act and Executive Order 12866

Because a notice of proposed rulemaking is not required, the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*), do not apply to this rulemaking. This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Signing Authority

This document is being issued in accordance with § 0.1(a)(1) of the CBP regulations (19 CFR 0.1(a)(1)), pertaining to the authority of the Secretary of the Treasury (or his/her delegate) to approve regulations related to certain CBP revenue functions.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, Entry procedures, Repairs, Reporting and recordkeeping requirements, Vessels.

Amendments to the Regulations

Accordingly, for the reasons set forth above, CBP is amending Part 4 of the CBP regulations (19 CFR Part 4) as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 and the specific authority citation for § 4.14 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

* * * * *

Section 4.14 also issued under 19 U.S.C. 1466, 1498;

* * * * *

1. In § 4.14:

a. Paragraph (a) is revised;

b. Paragraph (d) is amended by removing the word "Customs" each place it appears and adding, in its place, the term "CBP";

d. Paragraph (e) is amended by removing the word "Customs" in the first sentence and adding, in its place, the term "CBP";

e. Paragraph (f) is amended by removing the word "office" in the tenth sentence and adding, in its place, the word "agency";

f. Paragraph (h) is amended by removing the word "Customs" in the first sentence of the introductory text and adding, in its place, the term "CBP"; and

g. Paragraph (j)(1) is amended by removing the word "Customs" in the last sentence and adding, in its place, the term "CBP".

Revised paragraph (a) reads as follows:

§ 4.14 Foreign equipment purchases by, and repairs to, American vessels.

(a) *General provisions and applicability.*

(1) *General*. Under section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), purchases for or repairs made to certain vessels while they are outside the United States are subject to declaration, entry, and payment of ad valorem duty. These requirements are effective upon the first arrival of affected vessels in the United States or Puerto Rico. The vessels subject to these requirements include those documented under the U.S. law for the foreign or coastwise trades, as well as those which were previously documented under the laws of some foreign nation or are undocumented at the time that foreign shipyard repairs are performed, but which exhibit an intent to engage in those trades under CBP interpretations. Duty is based on actual foreign cost. This includes the original foreign purchase price of articles that have been imported into the United States and are later sent abroad for use.

(2) *Expenditures not subject to declaration, entry, or duty*. The following vessel repair expenditures are not subject to declaration, entry, or duty:

(i) Expenditures made in American Samoa, the Guantanamo Bay Naval Station, Guam, Puerto Rico, or the U.S. Virgin Islands because they are considered to have been made in the United States;

(ii) Reimbursements paid to members of the regular crew of a vessel for labor expended in making repairs to vessels; and

(iii) The cost of equipment, repair parts, and materials that are installed on a vessel documented under the laws of the United States and engaged in the foreign or coasting trade, if the installation is done by members of the regular crew of such vessel while the vessel is on the high seas, in foreign waters, or in a foreign port, and does not involve foreign shipyard repairs by foreign labor.

(3) *Expenditures subject to declaration and entry but not duty*. Under separate provisions of law, the cost of labor performed, and of parts and materials produced and purchased in Israel are not subject to duty under the vessel repair statute. Additionally, expenditures made in Canada or in Mexico are not subject to any vessel repair duties. Furthermore, certain free trade agreements between the United States and other countries also may reduce the duties on vessel repair expenditures made in foreign countries that are parties to those agreements, although the final duty amount may depend on each agreement's schedule for phasing in those reductions. In these situations and others where there is no liability for duty, it is still required, except as otherwise required by law, that all repairs and purchases be declared and entered.

* * * * *

Dated: October 15, 2009

JAYSON P. AHERN
Acting Commissioner
Customs and Border Protection

Timothy E. Skud

Deputy Assistant Secretary of the Treasury

[Published for the Federal Register, October 20, 2009 (74 FR 53651)]

19 CFR PART 122

[CBP DEC. 09–41]

Technical Amendments to List of User Fee Airports: Removal of User Fee Status for Roswell Industrial Air Center, Roswell, New Mexico and March Inland Port Airport, Riverside, California and Name Change for Capital City Airport, Lansing, Michigan.

AGENCY: Customs and Border Protection, DHS.

ACTION: Final rule; technical amendments.

SUMMARY: This document amends the Customs and Border Protection (CBP) Regulations by revising the list of user fee airports to reflect the removal of the user fee designations for the Roswell Industrial Air Center in Roswell, New Mexico and the March Inland Port Airport in Riverside, California, as well as indicating that the Capital City Airport in Lansing, Michigan has changed its name to the Capital Region International Airport. User fee airports are those airports which, while not qualifying for designation as international or landing rights airports, have been approved by the Commissioner of CBP to receive, for a fee, the services of CBP officers for the processing of aircraft entering the United States, and the passengers and cargo of those aircraft.

DATES: October 21, 2009

FOR FURTHER INFORMATION CONTACT: Wendy M. Cooper, Office of Field Operations, 202–344–2057.

SUPPLEMENTARY INFORMATION:

Background

Title 19, Part 122, Code of Federal Regulations (CFR), sets forth regulations relating to the entry and clearance of aircraft in international commerce and the transportation of persons and cargo by aircraft in international commerce.

Generally, a civil aircraft arriving from a place outside of the United States is required to land at an airport designated as an international airport. Alternatively, the pilot of a civil aircraft may request permission to land at a specific airport, and, if landing rights are granted, the civil aircraft may land at that landing rights airport.

Section 236 of Pub. L. 98–573 (the Trade and Tariff Act of 1984), codified at 19 U.S.C. 58b, created an option for civil aircraft desiring to land at an airport other than an international airport or a landing rights airport. A civil aircraft arriving from a place outside of the United States may ask for permission to land at an airport designated by the Secretary of Homeland Security[1] as a user fee airport.

Pursuant to 19 U.S.C. 58b, an airport may be designated as a user fee airport if the Commissioner of CBP as delegated by the Secretary of Homeland Security determines that the volume of business at the

[1] Sections 403(1) and 411 of the Homeland Security Act of 2002 ("the Act," Pub. L. 107–296) transferred the United States Customs Service and its functions from the Department of the Treasury to the Department of Homeland Security; pursuant to section 1502 of the Act, the President renamed the "Customs Service" as the "Bureau of Customs and Border Protection." Effective on March 31, 2007, DHS changed the name of "Bureau of Customs and Border Protection" to "U.S. Customs and Border Protection (CBP)" (*See* 72 FR 20131, April 23, 2007).

airport is insufficient to justify customs services at the airport and the governor of the state in which the airport is located approves the designation. Generally, the type of airport that would seek designation as a user fee airport would be one at which a company, such as an air courier service, has a specialized interest in regularly landing.

As the volume of business anticipated at this type of airport is insufficient to justify its designation as an international or landing rights airport, the availability of customs services is not paid for out of appropriations from the general treasury of the United States. Instead, customs services are provided on a fully reimbursable basis to be paid for by the user fee airport on behalf of the recipients of the services.

Pursuant to 19 U.S.C. 58b, the fees which are to be charged at user fee airports shall be paid by each person using the customs services at the airport and shall be in the amount equal to the expenses incurred by the Commissioner of CBP in providing customs services which are rendered to such person at such airport, including the salary and expenses of those employed by the Commissioner of CBP to provide the customs services. To implement this provision, the airport seeking the designation as a user fee airport or that airport's authority generally agrees to pay a flat fee for which the users of the airport are to reimburse the airport/airport authority. The airport/airport authority agrees to set and periodically review the charges to ensure that they are in accord with the airport's expenses.

The Commissioner of CBP designates airports as user fee airports pursuant to 19 U.S.C. 58b. *See* 19 CFR 122.15. If the Commissioner decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is executed between the Commissioner of CBP and the local responsible official signing on behalf of the state, city or municipality in which the airport is located. In this manner, user fee airports are designated on a case-by-case basis. Periodically, CBP updates the list of user fee airports at 19 CFR 122.15(b) to reflect changes in the status of user fee airports.

Recent Changes Requiring Updates to the List of User Fee Airports

Section 19 CFR 122.15(c)(1) provides that the designation as a user fee airport shall be withdrawn if either CBP or the airport authority gives 120 days written notice of termination to the other party. On January 15, 2009, CBP gave written notice to the Roswell Industrial Air Center in Roswell, New Mexico terminating their status as a user fee facility, in accordance with 19 CFR 122.15(c)(1). On November 6,

2008, the March Inland Port Airport Authority gave written notice terminating their MOA with CBP, in accordance with 19 CFR 122.15(c)(1).

On January 26, 2009, Capital City Airport notified CBP that it had officially changed its name to the Capital Region International Airport.

This document updates the list of user fee airports by deleting the Roswell Industrial Air Center in Roswell, New Mexico and the March Inland Port Airport in Riverside, California, and changing the name of the Capital City Airport in Lansing, Michigan to the Capital Region International Airport.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely updates the list of user fee airports to reflect a name change and to remove airports already approved for withdrawal by the Commissioner of CBP in accordance with 19 C.F.R. 122.15(c)(1) and neither imposes additional burdens on, nor takes away any existing rights or privileges from, the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

The Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Signing Authority

This document is limited to technical corrections of CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b).

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

Amendments to Regulations

Part 122, Code of Federal Regulations (19 CFR part 122) is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

2. The listing of user fee airports in section 122.15(b) is amended as follows: by deleting, in the "Location" column, "Roswell, New Mexico" and by deleting on the same line, in the "Name" column, "Roswell Air Industrial Center."; by deleting, in the "Location" column, "Riverside, California" and by deleting on the same line, in the "Name" column, "March Inland Port Airport."; and, by replacing, in the "Name" column, "Capital City Airport" with "Capital Region International Airport."

Dated: October 15, 2009

JAYSON P. AHERN
Acting Commissioner
Customs and Border Protection

[Published for the Federal Register, October 21, 2009 (74 FR 53882)]

19 CFR PART 122

CBP DEC. 09–42

Technical Amendment to List of User Fee Airports: Termination of User Fee Status of Santa Maria Public Airport, Santa Maria, California

AGENCY: Customs and Border Protection, DHS.

ACTION: Final rule; technical amendment

SUMMARY: This document amends the Customs and Border Protection (CBP) Regulations by revising the list of user fee airports to reflect the withdrawal of the user fee airport designation for Santa Maria Public Airport, Santa Maria, California. User fee airports are those airports which, while not qualifying for designation as international or landing rights airports, have been approved by the Commissioner of CBP to receive, for a fee, the services of CBP officers for the processing of aircraft entering the United States, and the passengers and cargo of those aircraft.

DATES: October 21, 2009

FOR FURTHER INFORMATION CONTACT: Simon Stella, Office of Field Operations, 202–344–2771.

SUPPLEMENTARY INFORMATION:

Background

Title 19, Code of Federal Regulations (CFR), sets forth at Part 122 regulations relating to the entry and clearance of aircraft in international commerce and the transportation of persons and cargo by aircraft in international commerce.

Generally, a civil aircraft arriving from a place outside of the United States is required to land at an airport designated as an international airport. Alternatively, the pilot of a civil aircraft may request permission to land at a specific airport, and, if landing rights are granted, the civil aircraft may land at that landing rights airport.

Section 236 of Pub. L. 98–573 (the Trade and Tariff Act of 1984), codified at 19 U.S.C. 58b, created an option for civil aircraft desiring to land at an airport other than an international airport or a landing rights airport. A civil aircraft arriving from a place outside of the United States may ask for permission to land at an airport designated by the Secretary of Homeland Security[1] as a user fee airport.

Pursuant to 19 U.S.C. 58b, an airport may be designated as a user fee airport if the Commissioner of CBP, as delegated by the Secretary of Homeland Security, determines that the volume of business at the airport is insufficient to justify the availability of customs services at the airport and the governor of the state in which the airport is located approves the designation. Generally, the type of airport that would seek designation as a user fee airport would be one at which a company, such as an air courier service, has a specialized interest in regularly landing.

As the volume of business anticipated at this type of airport is insufficient to justify its designation as an international or landing rights airport, the availability of customs services is not paid for out of appropriations from the general treasury of the United States. Instead, customs services are provided on a fully reimbursable basis to be paid for by the user fee airport on behalf of the recipients of the services.

Pursuant to 19 U.S.C. 58b, the fees which are to be charged at user fee airports shall be paid by each person using the customs services at the airport and shall be in the amount equal to the expenses incurred

[1] Sections 403(1) and 411 of the Homeland Security Act of 2002 ("the Act," Pub. L. 107–296, 6 U.S.C. 203(1), 211) transferred the United States Customs Service and its functions from the Department of the Treasury to the Department of Homeland Security. Pursuant to section 1502 of the Act (6 U.S.C. 542 and note), the President renamed the "Customs Service" as the "Bureau of Customs and Border Protection." Effective March 31, 2007, DHS changed the name of "Bureau of Customs and Border Protection" to "U.S. Customs and Border Protection," also referred to as "CBP" (72 FR 20131, April 23, 2007).

by the Commissioner of CBP in providing customs services which are rendered to such person at such airport, including the salary and expenses of those employed by the Commissioner of CBP to provide the customs services. To implement this provision, generally, the airport seeking the designation as a user fee airport or that airport's authority agrees to pay a flat fee for which the users of the airport are to reimburse the airport/airport authority. The airport/airport authority agrees to set and periodically review the charges to ensure that they are in accord with the airport's expenses.

The Commissioner of CBP designates airports as user fee airports in accordance with 19 U.S.C. 58b and pursuant to 19 CFR 122.15. If the Commissioner decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is executed between the Commissioner of CBP and the local responsible official signing on behalf of the state, city or municipality in which the airport is located. In this manner, user fee airports are designated on a case-by-case basis. Section 122.15 of CBP Regulations (19 CFR 122.15) also sets forth the grounds for withdrawal of a user fee designation and sets forth the list of designated user fee airports.

Periodically, CBP updates the list of user fee airports at 19 CFR 122.15(b) to reflect those that have been currently designated by the Commissioner. This document updates that list of user fee airports by removing Santa Maria Public Airport, Santa Maria, California from the list. On July 8, 2009, the Acting Commissioner approved the withdrawal of user fee status for Santa Maria Public Airport. The airport had requested that the User Fee Airport status be terminated.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this amendment merely updates and corrects the list of user fee airports already designated by the Commissioner of CBP in accordance with 19 U.S.C. 58b and neither imposes additional burdens on, nor takes away any existing rights or privileges from, the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Signing Authority

This document is limited to a technical correction of CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b).

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

Amendments to Regulations

Part 122, Code of Federal Regulations (19 CFR part 122) is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

2. The listing of user fee airports in section 122.15(b) is amended by removing from the "Location" column, "Santa Maria, California," and by removing on the same line, from the "Name" column, "Santa Maria Public Airport."

Dated: October 15, 2009

JAYSON P. AHERN
Acting Commissioner
U.S. Customs and Border Protection

[Published for the Federal Register, October 21, 2009 (74 FR 53881)]

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 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, N.W. (Mint Annex), Washington, D.C. 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, D.C. 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 Krimski, Regulatory Audit, Office of International Trade, (202) 863–6004.

SUPPLEMENTARY INFORMATION:

This proposed rule is organized as follows:

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.[1] (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.[2] 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:

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[1] 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.

[2] 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.

(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 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 overdeclarations 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).[3] 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

[3] 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.

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 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/overdeclarations and underpayments/ underdeclarations 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 inadvert-

ence under 19 U.S.C. 1514(a) in the proposed regulation as a possible basis for refunds along with section 1520.[4]

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 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

[4] 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.

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 by revising paragraph (c) to read as follows:

§ 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 163.1 is amended by removing paragraph (e), and redesignating existing paragraphs (f) through (l) as paragraphs (e) through (k).

7. 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.

8. Section 163.7 is amended by removing the words "or compliance assessment" in paragraph (a), first sentence.

9. 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, D.C. 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.

Dated: October 15, 2009

JAYSON P. AHERN
Acting Commissioner
Customs and Border Protection

Timothy E. Skud

Deputy Assistant Secretary of the Treasury

[Published for the Federal Register, October 21, 2009 (74 FR 53964)]

DEPARTMENT OF THE TREASURY

19 CFR PARTS 113 AND 191

USCBP–2009–0021

RIN 1505–AC18
Drawback of Internal Revenue Excise Tax

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

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend title 19 of the Code of Federal Regulations to preclude situations where imported merchandise subject to Federal excise tax is allowed into the United States, in effect, 99 percent free of that tax through application of a drawback claim. Specifically, the proposed amendments would preclude the filing of a substitution drawback claim for internal revenue excise tax paid on imported merchandise in situations where no excise tax was paid upon the substituted merchandise or where the substituted merchandise is the subject of a different claim for refund or drawback of tax under any provision of the Internal Revenue Code. This document also proposes to amend title 19 by adding a basic importation and entry bond condition to foster compliance with the amended drawback provision. These proposed amendments are necessary to protect the revenue by clarifying the relationship between drawback claims and Federal excise tax liability.

DATES: Comments must be received on or before November 16, 2009.

ADDRESSES: You may submit comments, identified by *USCBP 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–2009–0021.
- Mail: Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, N.W. (Mint Annex), Washington, D.C. 20229–1179.

Instructions: All submissions received must include the agency name and USCBP docket number for this proposed 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, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, N.W., 5th Floor, Washington, D.C. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: William Rosoff, Entry Process and Duty Refunds, Regulations and Rulings, Office of International Trade, (202) 325–0047.

SUPPLEMENTARY INFORMATION:

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. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

This document proposes amendments to title 19 of the Code of Federal Regulations (19 CFR) that would preclude the filing of a substitution drawback claim for internal revenue excise tax paid on imported merchandise in situations where no excise tax was paid upon the substituted merchandise or where the substituted merchandise is the subject of a different claim for refund or drawback of excise tax under any provision of the Internal Revenue Code.

The statutory and regulatory framework giving rise to this situation is explained below.

I. *Excise Taxation Under the Internal Revenue Code of 1986*

The Internal Revenue Code (IRC) of 1986, as amended (IRC), codified as title 26 of the United States Code (26 U.S.C.), is the main body of domestic statutory tax law of the United States and includes, *inter alia*, laws covering Federal excise taxes. Federal excise taxes are imposed on the manufacture and distribution of certain non-essential consumer goods, such as distilled spirits, wines, beer, tobacco products, imported taxable fuel and petroleum products.

Distilled spirits, wines, and beer: imposition of Federal excise tax and exemptions

Chapter 51 of the IRC sets forth excise tax collection and related provisions applicable to distilled spirits, wines, and beer. In general, this chapter provides that a Federal excise tax is imposed on all wines, distilled spirits, and beer produced in or imported into the United States. 26 U.S.C. 5041, 5001, and 5051.

Statutory exceptions to the imposition of Federal excise tax exist; for example, domestically produced wine, distilled spirits, and beer are exempt from the tax if removed from bonded premises for export. 26 U.S.C. 5362(c), 5214(a), 5053. In addition, upon the exportation of domestically-produced wine, distilled spirits, or beer removed from bonded premises with payment of tax, drawback is allowed in an amount equal to the tax paid. 26 U.S.C. 5062, 5055.

Tobacco: imposition of Federal excise tax and exemptions

Under Chapter 52, a Federal excise tax is imposed on all tobacco products and cigarette papers and tubes manufactured in or imported into the United States. 26 U.S.C. 5701. The tax on domestically-produced tobacco products and cigarette papers and tubes is imposed at the time that the product comes into existence, that is, when a product meets one of the definitions under the IRC. The Federal excise tax on imported and domestically-produced tobacco products and cigarette papers and tubes is generally not paid or determined

until the products are released from customs custody or removed from bonded premises. 26 U.S.C. 5702, 5703. Tobacco products and cigarette papers and tubes may be removed from bonded premises, without the payment of Federal excise tax, for export. 26 U.S.C. 5704. In addition, upon exportation of tobacco products and cigarette papers and tubes upon which the tax has been paid, drawback of the tax paid is allowed. 26 U.S.C. 5706.

Other Excise Taxes

Chapter 32 of the IRC imposes various manufacturers excise taxes, including taxes on gasoline, diesel fuel, and kerosene (taxable fuel). The tax on imported taxable fuel is imposed on entry into the United States for consumption, use, or warehousing. If taxable fuel is exported, the IRC provides that the tax paid on the fuel may be refunded to the taxpayer or an amount equal to the tax paid on the fuel may be paid to the person exporting the fuel. Chapter 38 of the IRC also imposes various environmental taxes, including a tax on petroleum products entered into the United States for consumption, use, or warehousing.

Implementing excise tax regulations

Regulations implementing the provisions of chapters 51 and 52 of the IRC are contained in chapter 1 of title 27 of the CFR (27 CFR chapter 1). The Alcohol and Tobacco Tax and Trade Bureau (TTB) within the Department of the Treasury is responsible for the administration of chapter 51 and the regulations promulgated thereunder. Regulations implementing the provisions of chapters 32 and 38 are contained in title 26 of the CFR and are administered by the Internal Revenue Service.

II. *Drawback Under the Tariff Act of 1930*

Section 313 of the Tariff Act of 1930, as amended, (19 U.S.C. 1313), concerns drawback and refunds. Drawback is a refund of certain duties, taxes and fees paid by the importer of record and granted to a drawback claimant upon the exportation, or destruction under CBP supervision, of eligible articles under specified conditions. The purpose of drawback is to place U.S. exporters on equal footing with foreign competitors by refunding most of the duties paid on imports used in domestic manufactures intended for export.

There are several types of drawback. Within section 313, paragraph (j) provides for "unused merchandise drawback," which is intended to permit drawback to be claimed on imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation if such merchandise was exported or was destroyed

under CBP supervision, and was not used within the United States before such exportation or destruction, within the 3-years from the date of importation.

Substitution drawback (19 U.S.C. 1313(j)(2))

Section 313(j)(2) (19 U.S.C. 1313 (j)(2)), hereafter referred to in this document as "(j)(2) substitution drawback," is a type of drawback that permits other merchandise to be substituted for the imported merchandise for purposes of satisfying the exportation or destruction requirement. Specifically, 19 U.S.C. 1313(j)(2) provides for the payment of drawback, not to exceed 99 percent of the duties, taxes, and fees paid on the imported merchandise, based on the exportation or destruction of "any other merchandise (whether imported or domestic)" that is: (1) commercially interchangeable with the imported merchandise on which duties, taxes, and fees were paid; (2) exported or destroyed within 3 years of the date of importation of the imported merchandise; and (3) not used within the United States before such exportation or destruction and is in the possession of the party claiming drawback.

Implementing CBP drawback regulations

Regulations implementing 19 U.S.C. 1313 are set forth in part 191 of title 19 of the Code of Federal Regulations (19 CFR part 191). Within part 191, subpart C sets forth the regulations pertaining to unused merchandise drawback and includes, in § 191.32, standards applicable to (j)(2) drawback claims.

III. *Reasons for Regulatory Change*

Integrity of Federal excise tax system at risk

In recent years, CBP has received and approved a number of (j)(2) substitution drawback claims involving imported bottled and bulk wine and domestically-produced wine. A hypothetical example of this type of transaction follows:

> A domestic winery imports 100 cases of bottled wine, pays Federal excise tax on the wine, and sells the imported wine in the United States. The domestic winery then exports 100 cases of its domestic wine without payment of Federal excise tax. The domestic winery files a (j)(2) drawback claim with CBP on the basis that the 100 cases of domestically-produced wine are commercially interchangeable with the 100 cases of imported wine. The domestic winery receives a refund of 99 percent of the Federal excise taxes that it paid on the 100 cases of imported wine.

In the above hypothetical, imported wine is introduced into the U.S. market, in effect, free of 99 percent of Federal excise tax. As a result, the U.S. Treasury ultimately receives only 1 percent of the Federal excise tax on the imported wine.

Diverse commodities potentially impacted

In addition to the claims processed by CBP involving (j)(2) substitution drawback on wine, given the present statutory and regulatory structure within which these claims are administered, other products that are subject to excise tax under the IRC may also be the subject of such drawback claims where the excise taxes on the good have been refunded, remitted, or not paid (*e.g.*, distilled spirits and beer (IRC chapters 51 and 52; 26 U.S.C. 5001; 5051); tobacco products and cigarette papers and tubes (IRC chapter 52; 26 U.S.C. 5701); imported taxable fuel (IRC chapter 32; 26 U.S.C. 4081); petroleum products (IRC chapter 38; 26 U.S.C. 4611)).

Congressional intent

The allowance of (j)(2) substitution drawback claims in circumstances in which internal revenue taxes have not been paid on the substituted domestic product is incompatible with Congress' intent to levy excise taxes under the IRC and circumvents the intended administration of drawback under the comprehensive framework of section 313.

As part of Congress' extensive review of the drawback statute, effected by the Customs Modernization and Informed Compliance Act (Mod Act), Pub. L. No. 103–182, 632, 107 Stat. 2057 (1993) (enacted as Title VI of the North American Free Trade Agreement Implementation Act), a provision was added to section 313(v) that provides that, "[m]erchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback; except that appropriate credit and deductions for claims covering components or ingredients of such merchandise shall be made in computing drawback payments." Based on the foregoing statutory prohibition against multiple drawback claims, 19 U.S.C. 1313(v) precludes the use of merchandise on which there has been a remission of duties, taxes, and fees from being used to claim drawback of duties, taxes, and fees paid on other merchandise upon its exportation or destruction.

The legislative history of this provision indicates that Congress did not intend to allow multiple drawback claims on the exportation or destruction of goods. As noted in the House Report accompanying the legislation, section 632(a)(7) provides that under the amended statute, "only one drawback claim per exportation or destruction of goods

would be allowed." H.R. Rep. No. 103–361(l), at 130, *reprinted in* 1993 United States Code Congressional and Administrative News (U.S.C. C.A.N.) 2552, 2680.

In the context of amending 19 U.S.C. 1313 as part of the Mod Act, Congress also added language to subsection (u) of section 313 which restricted eligibility for drawback to imported merchandise that had been regularly entered or withdrawn for consumption. This limiting language was added, as described in the legislative history, because it codified "current Customs practice against piggybacking other duty exemption benefits (foreign-trade zones, bonded warehouses and duty-free temporary importation) onto the drawback benefits." H.R. Rep. No. 103–361(I) at 130, *reprinted in* 1993 U.S.C.C.A.N. at 2680. The addition of this limiting language ensured that companies could not claim drawback on the "importation" of goods which had never actually been entered for consumption in the United States, but rather had been physically located in a foreign trade zone and then exported without the payment of duties. The ability to obtain substitution drawback under 19 U.S.C. 1313(j)(2), thus introducing imported wine into the U.S. market nearly free of Federal excise tax, is an example of "piggybacking" a previously existing Federal excise tax exemption benefit (exporting domestically-produced wine without payment of excise tax) onto the drawback benefits.

The IRC is quite specific regarding the circumstances in which internal revenue taxes are, and are not, required to be paid on domestic and imported merchandise. *See* chapters 32, 38, 51, and 52 of the IRC. The fact that a party would be able to avoid the payment of internal revenue taxes on both imported and domestically-produced merchandise by relying on the provisions of two discrete statutory programs administered by different agencies for different purposes is contrary to Congressional intent, as discussed above.

Congress is cognizant of the possibility that the interplay of tariff provisions could lead to a situation where collection of internal revenue tax might be at risk in an import transaction. For example, Congress structured U.S. note 1(b) to subchapter I of Chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS) to avoid this outcome. The subchapter I provisions allow duty-free or reduced-duty treatment for articles exported and returned that were not advanced in value or improved in condition by any process of manufacture or other means while abroad. U.S. note 1(b) was structured to ensure collection of the tax by stating that the provisions of the subchapter (with certain exceptions not relevant here) do not apply to any article "[o]f a kind with respect to the importation of which an internal-revenue tax is imposed at the time such article is

entered, unless such article was subject to an internal-revenue tax imposed upon production or importation at the time of its exportation from the United States and it shall be proved that such tax was paid before exportation and was not refunded." The net effect of U.S. note 1(b) to subchapter I of chapter 98, HTSUS, is to ensure that internal revenue tax is imposed on merchandise that is entered for consumption in the United States. Section 10.3 of title 19 of the CFR (19 CFR 10.3) implements the provisions of U.S. note 1(b) to subchapter I of chapter 98, HTSUS. The amendments proposed in this document would similarly ensure that internal revenue taxes will be paid in cases involving (j)(2) substitution drawback.

Explanation of Proposed Amendments

For the reasons outlined above, this document proposes to amend § 191.32 of title 19 of the CFR (19 CFR 191.32) by adding a new paragraph (b)(4) to preclude drawback of internal revenue tax imposed under the IRC in connection with a (j)(2) substitution drawback claim if no excise tax was paid on the substituted exported merchandise or if that merchandise was subject to a claim for refund or drawback of tax under any provision of the IRC. In addition, this document proposes to amend § 113.62 of title 19 of the CFR (19 CFR 113.62), which sets forth basic importation and entry bond conditions, to add a new condition under which the principal agrees not to file, or transfer the right to file, a substitution drawback claim that would be inconsistent with the terms of new § 191.32(b)(4). The consequences of default specified in newly re-designated paragraph (n) of § 113.62 would apply in the case of a breach of this bond condition.

Conforming regulatory texts are also being published by TTB in this edition of the **Federal Register**.

Executive Order 12866 and the Regulatory Flexibility Act

This proposed rule is not considered to be a significant regulatory action under Executive Order 12866 because it will not have an annual effect on the economy of $100 million and does not raise novel policy concerns. The Office of Management and Budget has not reviewed this regulatory evaluation under that Order.

Regarding the impact of the proposed rule on small entities as required by the Regulatory Flexibility Act (5 U.S.C. 604), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, 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).

As stated above, these changes are intended to preclude the filing of (j)(2) substitution drawback claims in circumstances in which internal revenue taxes have not been paid on the substituted domestic product, or where that merchandise is subject to a different claim for refund or drawback of IRC taxes. The proposed amendments still allow for the return of 99 percent of the duties, taxes, and fees paid on the imported merchandise upon export, or when IRC taxes have been paid on substituted domestic product and the substituted merchandise is not the subject of a separate claim for refund or drawback of such taxes.

To the extent that small entities have filed (j)(2) substitution drawback claims that would no longer be permitted, this regulation, if finalized as proposed, could have an economic impact on a substantial number of small entities. However, this proposed rule does not restrict import and export activities for any entities, regardless of size; these proposed amendments merely reflect Congress' intent regarding statutory prohibitions against multiple drawback claims and serve to clarify the application of existing statutory provisions. Thus, the impacts of this rule would not rise to the level that would be considered economically significant.

CBP welcomes comments on this assumption. The most helpful comments are those that can give us specific information or examples of a direct impact on small entities. If we do not receive comments that demonstrate that the rule causes small entities to incur significant direct costs, we may, during the process of drafting the final rule, certify that this action does not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

As there are no new collections of information proposed in this document, the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) are inapplicable.

Signing Authority

The amendments contained in this document are being issued by CBP in accordance with § 0.1(a)(1) of title 19 of the CFR (19 CFR 0.1(a)(1)), pertaining to the authority of the Secretary of the Treasury (or his/her delegate) to approve regulations related to certain CBP revenue functions.

List of Subjects

19 CFR Part 113

Bonds, Customs duties and inspection, Exports, Imports, Reporting and recordkeeping requirements.

19 CFR Part 191

Administrative practice and procedure, Bonds, Claims, Commerce, Customs duties and inspection, Drawback, Exports, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

For the reasons set forth in the preamble, CBP proposes to amend 19 CFR parts 113 and 191 as set forth below:

PART 113—CUSTOMS BONDS

1. The general authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

2. Section 113.62 is amended by redesignating paragraph (m) as paragraph (n) and adding a new paragraph (m) to read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * *

(m) *Agreement to comply with CBP regulations applicable to substitution drawback claims*. In the case of imported merchandise that is subject to internal revenue tax imposed under the Internal Revenue Code of 1986, as amended (IRC), the principal agrees not to file, or to transfer to a successor the right to file, a substitution drawback claim involving such tax if the substituted merchandise has been, or will be, the subject of a removal from bonded premises without payment of tax, or the subject of a claim for refund or drawback of tax, under any provision of the IRC.

* * * * *

PART 191—DRAWBACK

3. The general authority citation for part 191 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1313, 1624;

* * * * *

4. Section 191.32 is amended:

(a) At the end of paragraph (b)(2), by removing the word “and”;

(b) At the end of paragraph (b)(3), by removing the period and adding, in its place, “; and”; and

(c) By adding a new paragraph (b)(4) to read as follows:

§ 191.32 Substitution drawback.

* * * * *

(b) * * *

(4) For purposes of drawback of internal revenue tax imposed under Chapters 32, 38, 51, and 52 of the Internal Revenue Code of 1986, as amended (IRC), drawback granted on the export or destruction of substituted merchandise will be limited to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substitute merchandise.

* * * * *

Dated: Approved: October 8, 2009

JAYSON P. AHERN
Acting Commissioner
U.S. Customs and Border Protection

Timothy E. Skud

Deputy Assistant Secretary of the Treasury

[Published for the Federal Register, October 15, 2009 (74 FR 52928)]

DOCKET NO. USCBP–2009–0026
Notice of Meeting of the Advisory Committee on Commercial Operations of Customs and Border Protection (COAC)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security (DHS).

ACTION: Notice of Federal Advisory Committee Meeting.

SUMMARY: The Advisory Committee on Commercial Operations of U.S. Customs and Border Protection (COAC) will meet on November 4, 2009 in Washington, DC. The meeting will be open to the public.

DATES: COAC will meet Wednesday, November 4, 2009 from 9 a.m. to 1 p.m. Please note that the meeting may close early if the committee completes its business. If you plan on attending, please register either online at http://www.cbp.gov/xp/cgov/trade/trade_outreach/coac/, or by e-mail to tradeevents@dhs.gov by close-of-business on Friday, October 30, 2009.

ADDRESSES: The meeting will be held at the Ronald Reagan Building in the **Atrium Hall**, 1300 Pennsylvania Avenue, NW, Washington, DC. Written material, comments, as well as any

requests to have copies of your submitted materials distributed to committee members prior to the meeting should reach the contact person at the address below by October 30, 2009. Comments must be identified by USCBP–2009–0026 and may be submitted by *one* of the following methods:

- **Federal eRulemaking Portal:** http://www.regulations.gov. Follow the instructions for submitting comments.
- **E-mail:** tradeevents@dhs.gov. Include the docket number in the subject line of the message.
- **Fax:** 202–325–4290.
- **Mail:** Ms. Wanda Tate, Office of Trade Relations, U.S. Customs and Border Protection, Department of Homeland Security, 1300 Pennsylvania Avenue, NW, Room 5.2A, Washington, DC 20229.

Instructions: All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at www.regulations.gov, including any personal information provided.

Docket: For access to the docket to read background documents or comments received by COAC, go to http://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Ms. Wanda Tate, Office of Trade Relations, U.S. Customs and Border Protection, Department of Homeland Security, 1300 Pennsylvania Avenue, NW, Room 5.2A, Washington, DC 20229; tradeevents@dhs.gov; telephone 202–344–1440; facsimile 202–325–4290.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (5 U.S.C. § App.), DHS hereby announces the meeting of the Advisory Committee on Commercial Operations of Customs and Border Protection (COAC). COAC is tasked with providing advice to the Secretary of Homeland Security, the Secretary of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within DHS or the Department of Treasury.

The third meeting of the eleventh term of COAC will be held at the date, time and location specified above. A tentative agenda for the meeting is set forth below.

Tentative Agenda

(1) Trade Facilitation Subcommittee.

(2) Importer Security Filing ("10+2").

(3) Intellectual Property Rights Enforcement Subcommittee.

(4) Agriculture Subcommittee.

(5) Air Cargo Security Subcommittee.

(6) Automation Subcommittee.

Procedural

This meeting is open to the public. Please note that the meeting may close early if all business is finished.

Participation in COAC deliberations is limited to committee members, Department of Homeland Security officials, and persons invited to attend the meeting for special presentations.

All visitors to the Ronald Reagan Building will have to go through a security checkpoint to be admitted to the building. Since seating is limited, all persons attending this meeting should provide notice by close-of-business on Friday, October 30, 2009, by registering online at http://www.cbp.gov/xp/cgov/trade/trade_outreach/coac/ or, alternatively, by contacting Ms. Wanda Tate, Office of Trade Relations, U.S. Customs and Border Protection, Department of Homeland Security, 1300 Pennsylvania Avenue, NW, Washington, DC 20229; tradeevents@dhs.gov; telephone 202–344–1440; facsimile 202–325–4290.

Information on Services for Individuals with Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Ms. Wanda Tate as soon as possible.

Dated: October 13, 2009

KIMBERLY MARSHO
Director, Office of Trade Relations
U.S. Customs and Border Protection

[Published for the Federal Register, October 19, 2009 (74 FR 53511)]

AGENCY INFORMATION COLLECTION ACTIVITIES: Aircraft/Vessel Report (Form I–92)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security

ACTION: 60-Day notice and request for comments; Extension of an existing information collection: 1651–0102

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Aircraft/Vessel Report (Form I–92). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 22, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Office of Regulations and Rulings, 799 9th Street, NW, 7th Floor, Washington, DC. 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW, 7th Floor, Washington, DC. 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document the CBP is soliciting comments concerning the following information collection:

Title: Aircraft/Vessel Report

OMB Number: 1651–0102

Form Number: I–92

Abstract: The Form I–92 is part of manifest requirements of Sections 231 and 251 of the Immigration and Nationality Act. This Form is used to collect passenger and crew information from commercial and military airlines and vessels upon arrival in the U.S. at CBP ports of entry. The data collected on Form I–92 is also used by other agencies to develop statistics and trends in international travel, trade, and tourism

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours.

Type of Review: Extension (without change)

Affected Public: Businesses

Estimated Number of Responses: 720,000

Estimated Time Per Respondent: 11 minutes

Estimated Total Annual Burden Hours: 129,600

Dated: October 19, 2009

TRACEY DENNING
Agency Clearance Officer
Customs and Border Protection

[Published for the Federal Register, October 23, 2009 (74 FR 54839)]

AGENCY INFORMATION COLLECTION ACTIVITIES: Passenger List/Crew List (Form I–418)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security

ACTION: 60-Day notice and request for comments; Extension of an existing information collection: 1651–0103

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Passenger List/Crew List (Form I–418). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 22, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Office of Regulations and Rulings, 799 9th Street, NW, 7th Floor, Washington, DC. 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW, 7th Floor, Washington, DC. 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document the CBP is soliciting comments concerning the following information collection:

Title: Passenger List/Crew List

OMB Number: 1651–0103

Form Number: I–418

Abstract: Form I–418 is used by masters or owners of vessels or aircraft in complying with Sections 231 and 251 of the Immigration and Nationality Act. This Form is filled out upon arrival of any person by water or by air at any port within the United States from any place outside the United States. The master or commanding officer of the vessel or aircraft is responsible for providing CBP officers at the port of arrival with lists or manifests of the persons on board such conveyances.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours.

Type of Review: Extension (without change)

Affected Public: Businesses

Estimated Number of Respondents: 95,000

Estimated Time Per Respondent: 1 hour

Estimated Total Annual Burden Hours: 95,000

Dated: October 19, 2009

TRACEY DENNING
Agency Clearance Officer
Customs and Border Protection

[Published for the Federal Register, October 23, 2009 (74 FR 54840)]