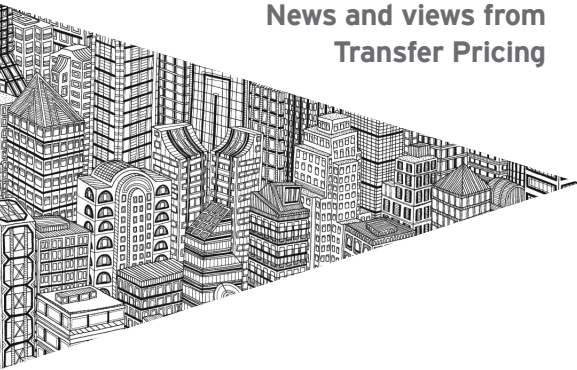


# International Tax Alert

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Transfer Pricing



## US Customs solicits comments on new policy related to affect of post- importation transfer pricing adjustments on transaction value

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### Executive summary

In a significant development in customs valuation and transfer pricing, the US Customs and Border Protection (“CBP”) is considering a change regarding the impact of post-importation price adjustments on transaction value. CBP recently posted a notice regarding this matter on its website, and has requested comments by 22 October 2011.

### Background

Many importations into the United States involve related party transactions which require that the transfer price meets the arm’s length standard for income tax purposes. These transactions often involve formal intercompany agreements that call for adjustments to be made to the transfer price after importation. These agreements have raised the issue of whether transaction value<sup>1</sup> is the proper basis for customs valuation in circumstances where a post-importation adjustment has been made.

In a deviation from its past position, CBP is proposing that even though the parties are related and certain costs may be within the control of the parties, if the transfer pricing policy is set before importation, the transfer pricing policy may be considered an objective formula, allowing the use of transaction value. Moreover, when prices are adjusted downwards pursuant to the transfer pricing policy, CBP is considering that these adjustments may allow importers to obtain a refund of previously overpaid customs duties. Previously, CBP has often considered a decrease in the transfer price to be a post-importation rebate or decrease which is disregarded for customs purposes.

In the past, CBP has allowed some adjustments, but not under the transaction value method. CBP had determined that transaction value did not apply because the price was not considered to be

fixed or determinable pursuant to an objective formula prior to importation because at least one of the elements for determining the price was within the control of the buyer and/or the seller. Adjustments made pursuant to other methods of customs valuation have proven difficult to manage and apply.

CBP notes that as with any other transaction, companies must be prepared to demonstrate that the transaction value is arm's length based on customs regulations. Also under the proposed new policy, for companies to claim post-importations adjustments under transaction value, CBP is contemplating that importers must use the US Customs Reconciliation Program to properly apply adjustments (under this program, adjustments can be filed up to 21 months from the customs entry summary date).

A copy of the notice can be found on the agency's website, and any advance comments are due by 22 October 2011. Send comments to [EarlyInputMailbox@dhs.gov](mailto:EarlyInputMailbox@dhs.gov) and put "Transfer Pricing" in the subject line.

### Implications

If this policy is adopted, importers will have specific guidance on how to report post-importation transfer pricing adjustments. Importers following the new procedure should be able to use the US Customs Reconciliation Program to report both upward and downward transfer pricing adjustments, make necessary additional duty payments, and request refunds of previously overpaid duties.

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### Endnote

1. Transaction value is the preferred method of customs valuation. Recent estimates are that it is used by approximately 86% of importers (USITC Dec. 2009 Report - "Use of the First Sale Rule for Customs Valuation of US Imports").

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