

The Rockefeller Group

May 26, 2011

Submitted through Federal eRulemaking Portal at www.Regulations.gov

Mr. Andrew McGilvray
Executive Secretary/Staff Director
Foreign Trade Zones Board
U.S. Department of Commerce
1401 Constitution Ave., NW, Room 2111
Washington, DC 20230

Re: NPRM Docket No. ITA-2010-0012

Dear Mr. McGilvray:

Thank you for the opportunity to comment on the U.S. Foreign-Trade Zones Board ("Board") Notice of Proposed Rulemaking published December 30, 2010. The Rockefeller Group is pleased to present these comments based on more than thirty years of experience in the Foreign-Trade Zone ("FTZ") program. We have participated in the FTZ program in various roles throughout the country including as: Developer/Property Owner, Administrator, Operator and Consultant. Our involvement in the FTZ program began with a public-private partnership with the State of New Jersey in 1978 (FTZ 44), which continues today. We are very proud of that history and the sustained economic development that has resulted from one of the first and consistently most successful inland FTZs in the United States.

Background

The importance of public-private partnership in the FTZ program has been the cornerstone of many successful FTZ projects including FTZ 44. Regardless of our role or our participation in any particular zone project, it is recognized and respected that the local economic development objectives, as represented by the Grantee, must be served in order for the public interest to be materialized and the objectives of the FTZ program to be met.

Accordingly, our comments seek to balance the need for flexibility in the program in order for public-private partnerships to thrive while recognizing the need for transparency and public interest representation. In our experience, the recipe for long

term successful FTZ projects requires private investment as well as public support. Private investment seeks predictability, consistency and certainty as much as possible. Our comments reflect these sentiments as a company that has directly invested over **\$300 million** to date in FTZ 44 alone and as a company working directly with importers and exporters that must also make significant investments to participate in the FTZ program.

Comments

In general, The Rockefeller Group agrees with the technical comments submitted by the National Association of Foreign-Trade Zones (“NAFTZ”). The changes proposed by the NAFTZ in the Definitions, Scope and Authority sections will facilitate FTZ understanding, usage and compliance. The issues specifically discussed herein are intended to supplement the NAFTZ’s comments based on our own experiences.

Preamble

The preamble to the 1991 Board regulations contained an essential sentence about the policy objectives of the FTZ program. The sentence was removed and should be reinstated in the current proposed regulations. The objective of assisting U.S. exporters and manufacturers has never been more important or relevant as evidenced by the President’s National Export Initiative (“NEI”) and the country’s need for employment and economic recovery.

The subject sentence is the second sentence below: [Emphasis added.]

“Zones have as their public policy objective the creation and maintenance of employment through the encouragement of operations in the United States which, for customs reasons, might otherwise have been carried on abroad. *The objective is furthered particularly when zones assist exporters and reexporters, and usually when goods arrive from abroad in an unfinished condition for processing here rather than overseas.*”

In addition to re-inserting the omitted sentence, it is our belief that every decision made by the Board involving production activity should be guided by this principal theme. The fact that there may be competing federal priorities or opposition in specific cases should not automatically result in restrictions or denials. The importance of preserving and expanding overall U.S.-based production and exports should be at the forefront of case analysis. The Board has the unique responsibility of prioritizing the interests of U.S.-based companies so that they may compete on a level playing field with foreign producers in order to maintain and attract investment and employment in the United States. No other agency has this mandate or authority with respect to U.S. tariff policy and that mandate should not be subordinate to other interests unless net economic detriment is found at the national level.

Sec. 400.7 – CBP Port Director as Board Representative.

We agree with the NAFTZ comment creating this new section. Customs & Border Protection (“CBP”) has an important role to play in implementing the decisions of

the Board and carrying out the policies of the Board in a consistent manner. This section is necessary to ensure that FTZ Program improvements, which are designed to provide faster access to FTZ benefits in response to the needs of U.S. businesses, are consistently supported by CBP's actions. In order to achieve the desired effect on the economy, it is imperative that CBP prioritize resources to timely concur on FTZ applications and to activate qualified operators.

Sec. 400.8 – Export Promotion.

The FTZ program may be better utilized as an economic development tool if closer coordination exists at the federal level between the Board and other departments with complimentary mandates. Therefore, we agree with the addition of this section as proposed in the NAFTAZ's comments.

Sec. 400.9 – Federal Agency Uniform Procedures on FTZ Compliance.

We agree with the addition of this provision as proposed by the NAFTAZ. The use of FTZs has grown and so has the number of agencies and rules involved in international trade regulation. It is critical for the concept of informed compliance to permeate all applicable federal agencies as their policies relate to FTZs. An integral part of the development of uniform procedures must also include the necessary automation to provide for electronic reporting in compliance with those rules. Many federal agencies have their current rules and reporting configurations tied to entries for consumption, which occurs when product leaves a FTZ for transfer into the United States. In those situations where vetting is needed prior to entry for consumption for public health or safety reasons, reporting should be tied to FTZ admission (understanding that all FTZ shipments are subject to security and manifest reviews prior to release from the port of arrival). In other situations where vetting is not necessary for products that will be admitted and exported from a FTZ, associated rules and reporting should exist to promote such U.S.-based activity for export without unnecessary restrictions or burdensome procedures that discourage economic activity and limit the utility of FTZs.

Sec. 400.11 Number and location of zones.

We strongly support the changes recommended by the NAFTAZ to this section, particularly those dealing with adjacency requirements. Some of the highest unemployment areas and targeted economic recovery initiatives are found in rural, inland communities. Many emerging exporters, especially small and medium-sized businesses, are located in rural areas. The Board, CBP, Grantees and Zone Participants can and should work together to provide the farthest reach possible for the FTZ program's positive economic impact. The use of modern tools and strategies including Importer Security Filings, C-TPAT, and electronic reporting should lessen the importance of the physical distance between zone activities and CBP Ports of Entry locations.

Zone Applications – Various Sections

The application requirements for all types of zones should be included in the regulations for transparency, predictability and consistency purposes. Posting current requirements to the Board's website alone does not provide opportunity for public notice and comment on changes prior to implementation and may impact applications in process requiring additional cost, time, and resources while creating uncertainty.

We agree with the comments of the NAFTAZ that the requirements and distinctions of the Alternative Site Framework ("ASF") as compared to the Traditional Site Framework ("TSF") should be explicitly included in the Board's regulations. The Board should maintain both frameworks and should not require ASF to become mandatory. The success of FTZ 44, as well as other zones, has been predicated upon a model of targeted marketing that draws operators/users to a limited number of FTZ sites. Such FTZs have successfully served the needs of their communities through the TSF model including use of minor boundary modifications, expansions and subzones as needed. In our experience, a successful model for FTZ development exists when public and private interests in the community come together and commit to sustained FTZ designation and marketing of carefully selected sites that reflect long term economic development objectives. The certainty of site designation associated with the TSF positions the community to attract and maintain the long term investments required to proactively drive local economic success as contrasted by the ASF model that is primarily designed to position a Grantee to react quickly to business requests. Both models can be effective depending on the economic development plans and resources of the Grantee.

The Board should also make it clear that there is no operational difference between subzones and general-purpose zone usage driven sites. Due to the separate site identities associated with usage driven sites, CBP field offices may question whether a single company with facilities in multiple usage driven sites within the same zone can operate as a single zone in the same manner as single operators within a subzone containing multiple sites. The Board should clarify that no difference was intended under ASF. Otherwise, companies may feel the need to continue pursuing subzones in lieu of usage-driven sites where available.

All NAFTAZ recommendations for faster review and approval periods are strongly supported to advance the use of the FTZ program as an effective tool for maintenance and attraction of U.S. investment.

Due Process – Various Sections

In general, prospective zone operators/users for FTZs should be provided ample opportunities for due process during the application phase and post approval related to reviews of ongoing operations. Prospective zone Operators/Users that have received Grantee sponsorship have been determined to be in the public interest at the local economic development level. This is a meaningful step in the process evidencing local community support and need for associated economic development. Prospective Operators/Users (especially manufacturers) should not be disapproved or later denied

benefits by the Board unless substantial economic detriment is demonstrated on the record that would result in a net economic loss to the nation. Prospective applicants must have a level of predictability in the FTZ process in order to inspire use of U.S. FTZs as a viable alternative to moving offshore. In the event of opposition, negative comments should not inherently negate public interest findings. Only U.S.-based companies can take advantage of the U.S. FTZ program. Therefore, any opposition should be supported by evidence of significant and material detrimental impact upon a directly affected person that results in net negative economic effects. Otherwise, the ability of the FTZ program to positively impact the U.S. economy will be limited by those that oppose importing as a matter of principle or posture opposition as a way to reduce competition and/or increase prices. This is a particularly salient point for downstream manufactures that must have equal access to key raw materials and intermediates, which are often in short supply in the U.S. and available at significantly lower prices overseas. U.S. producers must have equal access to foreign raw materials for exports in order to compete for global sales. This point relates directly to the need for policy balance between antidumping/countervailing duty ("AD/CVD") policy and the FTZ program. AD/CVD policy can be applied uniformly to U.S. producers for U.S. sales. AD/CVD policy does not apply evenly to U.S. and foreign producers selling in the global marketplace. The current privileged foreign status requirement of the Board's regulations for AD/CVD strikes the correct balance to protect U.S. suppliers in the U.S. market while promoting global sales by U.S. producers. The opportunities represented by this manufacturing activity for export will not otherwise take place in the U.S. at all so no U.S. supplier is truly disadvantaged. The Board should preserve this historical balance and prioritize U.S. manufacturing for export along with protecting U.S. suppliers for sales into the U.S. consumption market where the playing field can be leveled.

Sec. 400.14 Production--activity requiring approval or reporting; restrictions.

In our experience, companies want the reliance of a formal government ruling in order to reduce or eliminate U.S. duty through production in a zone. Therefore, while the objective of expediting access to FTZ benefits for exporters is meritorious, there still needs to be a documented permission for FTZ producers to justify investments and reduce the risk of loss of benefits. Interim authority presents challenges for the same reason but may be appropriate after the public comment period is closed and reasonable assurances exist through precedence that approval will be forthcoming.

Another approach to expedited export production authority that would provide certainty is a blanket Board Order authorizing manufacturing in zones for export as long as all imported components are placed in privileged foreign status. As an administrative matter, individual companies must be able to request and receive a written confirmation of benefits from the Board for CBP or other purposes.

Equally important, normal changes in the course of business including growth in capacity and new components must be managed efficiently within the FTZ program. Therefore, we agree with the comments submitted by the NAFTAZ on this section. The NAFTAZ's proposed approach is to include in the Board scope of authority all inputs used

to make the intermediate or finished products approved by the Board unless certain product categories are specifically exempted by the Board on public interest grounds as requiring advance approval. Such lists must be maintained and made publicly available on the Board's website so Operators/Users can monitor and comply accordingly. Capacity can be monitored by the Board through the Annual Report and should not require separate reporting or scope of authority updates. With respect to new components or components that become subject to AD/CVD, the privileged foreign status requirement is sufficient for ongoing activity. When production applications are filed involving components subject to AD/CVD, the Board should uphold the privileged foreign status requirement and authorize zone activity for export production whenever it finds that U.S. competitiveness will be advanced and that similar activities are authorized in other countries.

Sec. 400.24 Criteria for evaluation of production activity.

The criteria for evaluation of production activity in U.S. FTZs needs to reflect global realities if the FTZ program is going to be a tangible tool to maintain and attract manufacturing in and exports from the U.S. If proposed U.S. FTZ activity can be conducted in another country and result in the same U.S. tariff impact, the Board should equalize U.S. producers and remove the tariff incentive of moving outside the U.S. While each case before the Board is analyzed individually for public interest impacts, the Board must be extremely careful not to place direct U.S. competitors at a disadvantage to one another by providing benefits to one and denying the exact same benefits to another. If companies cannot accurately gauge their likelihood of obtaining FTZ benefits as a measure of precedence on previous recent Board decisions in the same industry, they will simply disregard the FTZ program as a competitive relief mechanism against foreign producers and become foreign producers themselves. U.S.-based manufacturing and exports are inherently in the public interest and should be treated as such in the absence of direct evidence of net negative economic effects. For these reasons, we agree with the NAFTAZ's comments on this section.

Sec. 400.27 Burden of proof.

For the same reasons discussed in previous sections, this section should also be strengthened. Where U.S. manufacturing or exports are involved, the burden of proof should shift to opposing commenters to prove that the proposed activity is not in the public interest recognizing that the Grantee, as the local public interest representative has supported the application prior to filing. We agree with the NAFTAZ's proposed improvements to this section and recommend strengthening the section further to recognize a shift in burden of proof as described herein.

Original Section 400.37 – Procedure for notification and review of production changes.

We support the NAFTAZ's recommendation to delete this section. Proposed quarterly reporting and associated public notice and comment is too burdensome for government and industry and creates significant uncertainty.

Sec. 400.40 Monitoring and reviews of zone operations and activity.

We agree with the NAFTAZ that this section is more appropriate under Subpart E and should be distinguished from new proposed activity. The standard for review to remove benefits must be very high or FTZ producers will not consider relief under the FTZ program as a viable alternative to off shoring.

Sec. 400.42 Operation of zone under public utility principles.

We strongly support the NAFTAZ's suggested changes to this section. The changes are necessary to achieve the objectives of the FTZ Act and preserve public-private partnerships.

Sec. 400.43 Uniform treatment.

We strongly support the NAFTAZ's suggested changes to this section. The NAFTAZ's comments take into consideration and address the concerns expressed by the Board while retaining the flexibility necessary for Grantees to successfully carry out their economic development objectives. By defining roles and responsibilities, including Administrators, all involved can contribute to the success of FTZs and be accountable for their actions regardless of their title.

Sec. 400.45 Zone Schedule.

We agree with the NAFTAZ's comments on this section.

Sec. 400.46 Complaints related to public utility and uniform treatment.

We strongly recommend the NAFTAZ's suggested changes to this section as the most appropriate and effective means of dealing with isolated issues when they arise.

Sec. 400.47 Grantee or Administrator liability.

Liability is a serious issue that may dampen participation in the FTZ program by economic development entities if not carefully managed. However, limited liability in specific situations is an appropriate tool to promote compliance. We support the NAFTAZ's comments on this section as striking the right balance.

Sec. 400.48 Retail trade.

We strongly recommend the NAFTAZ's comments on this section, which recognize changes in modern business and ensures clarity and uniformity.

Sec. 400.51 Accounts, records and reports.

We agree with the NAFTAZ's comments on this section.

Sec. 400.52 Notice and hearings.

We agree with the NAFTAZ's comments on this section.

Sec. 400.53 Official record; public access.

We agree with the NAFTAZ's comments on this section.

Sec. 400.54 Information.

We agree with the NAFTAZ's comments on this section.

Sec. 400.61 Revocation of grants of authority.

We agree with the NAFTAZ's comments on this section.

Sec. 400.62 Fines, penalties and instructions to suspend activated status.

The introduction of specific provisions for fines and penalties is appropriate to provide clarity to the existing statutory authority of the Board. However, this section must be very carefully managed so as not to deter participation in the FTZ program by public and private entities concerned about risk as well as the cost of FTZ program participation. We agree with the NAFTAZ comments on this section.

Sec. 400.63 Voluntary disclosure.

This section is critical to promote informed compliance as well as to encourage corrective actions by FTZ program participants upon discovery. Since the purpose of the FTZ program is to increase the competitiveness of U.S.-based companies, it is appropriate to eliminate penalties when companies disclose and rectify mistakes and no fraud is involved. We strongly agree with the NAFTAZ's comments on this section.

Sec. 400.64 Appeals to the Board of decisions of the Assistant Secretary for Import Administration and the Executive Secretary.

We agree with the NAFTAZ's comments on this section.

We are pleased to provide this information to assist the Board staff in better understanding the challenges and concerns facing FTZ program participants. We appreciate the Board's interest in improving the utility of the FTZ program to promote U.S. investment, manufacturing, employment and exports. The recommendations made to further enhance the proposed regulations can positively impact our mutual objectives.

Sincerely,



Brandi Hanback
Managing Director
Rockefeller Group Foreign Trade Zone Services