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May 25, 2011

Mr. Andrew McGilvray
Executive Secretary
Foreign-Trade Zones Board
International Trade Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW., Room 2111
Washington, DC 20230

Re: Foreign-Trade Zone Board Proposed Rule
75 Federal Register 82340-82362, December 30, 2010
Docket # ITA-2010-0012, RIN 0625-AA8A

Dear Mr. McGilvray,

FTZ Consulting LLC is an FTZ service provider whose clients include grantees, operators, and users throughout the United States. My operators and users include multi-user warehouse operators, large and small scale single user distribution operators and complex and simple manufacturing operators. I am very familiar with all aspects of the FTZ Program from the initial cost benefit analysis through the various application procedures to activation, inventory control development and ongoing operations. This has given me a very wide exposure to the impact that the FTZ Program and by extension, the FTZ Board regulations have on businesses throughout the US. I truly believe that anything that can done to further economic activity within the United States is welcomed and must be pursued.

I am pleased to submit to you my comments on the FTZ Board Proposed Rule published December 30, 2010. I applaud the efforts taken to update the regulations to reflect the current domestic and global trade environment, to take into account the realities of doing business in a global economy, and to capture current FTZ Board practices in the regulations.

In preparing these comments, FTZ Consulting, has carefully reviewed the published proposed regulations, the current regulations and the comprehensive comments submitted on May 4th by the National Association of Foreign-Trade Zones (NAFTZ). And most importantly, FTZ Consulting has taken into consideration its own experiences in working with a wide variety of zone projects and zone participants as they deal with the changing realities of international trade, global competition and their effect on economic activity in the US.

FTZ Consulting, in general, supports the direction and overall tenor of the comments submitted by the NAFTZ. Of particular importance is the identification of prime directives that underlie the NAFTZ's prepared comments and helps set a framework for the evaluation of these regulations.

Specifically, FTZ Consulting agrees that the overriding factor when considering the objective of the FTZ Program and its administration is that the FTZ Program should encourage activity in the United States that could, for Customs reasons, otherwise be done in other countries. As iterated in the 1991 regulations "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" 56 Fed. Reg 50790 (10/18/91). I would suggest that in today's environment of technical innovations causing a decrease in jobs equal to, if not greater than that attributed to movement off shore of jobs, that this public policy objective be updated to 'the creation and maintenance of US economic activity' which encompasses not just employment but investment in operations as well as research and development of new and diverse products by companies located here in the US.

The second directive identified by the NAFTZ is that FTZs can and should promote US exports through expedited approvals of proposed FTZ activity and clarity of requirements to achieve that expedited approval. This approval should not be temporary in nature subject to reversal but permanent and certain. Contracts for exported products are often complex and require a significant amount of negotiation that cannot be based on anything less than a guaranteed outcome.

The NAFTZ's comments draw a clear line between the need for certainty and timeliness when dealing in the global economy and the need for transparency and clarity in the regulations that impact those involved in international trade as either an exporter or an importer. Given the crucial effect that the proposed FTZ regulations will have on a company's decision to seek to improve its global competiveness through participation in the FTZ Program, FTZ Consulting fully supports the suggested reorganization and wording clarifications suggested by the NAFTZ to improve readability, clarity and reduce ambiguities subject to interpretation that can occur as regulations age. FTZ Consulting particularly supports efforts to streamline approval processes whenever possible as current processing timelines often act as a deterrent for companies considering locating business operations in the US vs a location abroad. Likewise, the inclusion of adopted FTZ Board practices such as Alternative Site Framework (ASF) and Temporary/Interim Manufacturing (T/IM) approvals as part of the regulations also adds a degree of certainty and continuity not present when they are simply practices.

Lastly, while FTZ Consulting, does not in principle oppose the imposition of penalties on those who violate their obligation to be in compliance with the FTZ Act and FTZ Board (FTZB) regulations, it is important that those obligations and the consequences of failing to comply are identified. If the obligations and parties responsible are not clearly defined but instead are open ended and nondescript, grantees and operators may opt out of participation in this valuable and vital program rather than risk making a mistake and incurring monetary penalties. Therefore, we support the NAFTZ's efforts to more clearly delineate those actions that could result in the imposition and assessment of penalties against

grantees and operators and to identify a process of voluntary disclosure that can mitigate those penalties. However, in addition to those changes advocated by the NAFTZ, FTZ Consulting would also like to see a requirement be added that if the FTZ Board initiates the process of imposing a penalty on an operator within a zone project, that the grantee also be copied on any correspondence to that effect since the grantee bears the ultimate responsibility for the overall zone project.

Beyond the support of the prime directives outlined by the NAFTZ as a framework for suggested changes to the proposed regulations, FTZ Consulting also has the following comments on specific provisions within the proposed regulations that can impact its zone project and the ease of its administration and oversight of the zone project.

FTZ Consulting agrees with the merging of processing and manufacturing into the single definition of production activity. Having two standards to essentially define the transformation of inputs into finished goods or intermediate products was confusing at best. I also agree with the NAFTZ recommendation that the requirements for applying for production authority need to be separate and distinct from the requirements for the designation of a site as an FTZ site either as a usage driven site, a subzone site or a general purpose zone site.

FTZ Consulting would like to suggest that proposed Section 400.6 Board Headquarters be changed to state that the current address of the Board Headquarters will be maintained on the FTZ Board's website. The FTZ Board offices have frequently been moved in the past and this regulation as written could be very easily be out of date before they are even finalized. On a similar note, there are several references to Customs and Border Protection as CBP throughout the proposed regulations. This acronym could also be outdated very quickly. I would recommend using the broader term US Customs which is a bit more generic than an actual acronym.

FTZ Consulting supports the NAFTZ comments that the language related to proposed Section 400.16 reflect the language of the FTZ Act itself. Although not intentional, the proposed language could be interpreted to be more restrictive that the language of the Act itself and affect state or local legislation already enacted regarding zone merchandise and exemptions from ad valorem taxation of tangible personal property.

In its review of both the proposed regulations for Subpart C-Applications To Establish and Modify Authority and the NAFTZ comments, FTZ Consulting appreciates the efforts to make the types of applications that can be submitted and their respective requirements more straightforward and understandable. However, with the evolution of business parks being designated as general purpose zone sites which inherently have single user operations being conducted therein, the ability to designate usage driven sites under ASF within a service area and the increased possibility of manufacturing occurring in any or all designated FTZ sites, FTZ Consulting would like to recommend that the regulations be changed to eliminate the terms 'general purpose zone' and 'subzone' in favor of 'multi-user' and 'single user' sites. Recognizing that in the past, a zone project has been established by the designation of a general purpose zone site with subzones as adjuncts, a new zone project could be established under

ASF with a magnet site or under the traditional framework with either a multi-user or single user site. In determining whether a zone site is 'adjacent' to a port of entry, FTZ Consulting would like to suggest that a multi-user facility should fall within the current 60 miles/90 minutes driving time of the outermost limits of a port of entry and a single user site would use the adjacency definition currently used for subzones. This would address the Customs and Border Protection concern that a multi-user site could have unspecified merchandise from unknown users being admitted to a zone without adequate opportunity for CBP oversight. However, it would allow single user sites, whether distribution or manufacturing, to establish CBP oversight through electronic monitoring of activity premised on the idea that merchandise would be predictable and limited in nature under the responsibility of a single user. If zone sites were established in this fashion, it would allow a grantee to be more flexible even under the traditional framework to do a boundary modification to move the designation for a single user site to another location without the need to attempt to come up with a pseudo-multi user site when there really is only one user who could benefit from participation in the FTZ Program. If a single user site is to be distribution only the user would include a general description of the products that would be admitted and shipped from the zone site as part of its description of current and planned activities associated with the site. FTZ Consulting then proposes that a request for manufacturing authority be a completely stand alone application that would be the same whether the manufacturing authority was to take place in a multi-user site or a single user site. This approach would achieve the separation between the application for designation of a physical site and the potential production activity that would take place at a zone site and minimize the confusion as a grantee today tries to determine if a proposed zone site is a subzone or a single user site within the context of a general purpose area.

FTZ Consulting would also like the FTZB to give consideration to maintaining the business confidentiality of the information required for the application. The NAFTZ comments addressed this issue in regards to the Annual Report in NAFTZ Section 400.54. However, it is also a concern with the current practice of the public posting of the applications themselves. This has made it much simpler for competitors to get specific details about a company's employment numbers and trends, sourcing plans, future product introductions and manufacturing processes. While the specifics of this information are critical to the FTZB's analysis, a zone applicant should at a minimum be able to submit a summarized application for posting on the FTZB website and at best this information should be eliminated from the public version. FTZ Consulting would also like to suggest that the Federal Register notice should only include the name of the actual applicant, the zone grantee, and omit the name of the proposed zone user itself. This would keep the focus on the production activity proposed as opposed to who is requesting the activity. Ultimately, it is irrelevant whether the zone applicant requesting authority for a new end product is Ford, Kia or BMW since it is the activity that is being evaluated. Inclusion of the potential zone user encourages comments on an application simply because someone has an issue with the company itself which is entirely unrelated to the proposed zone activity. The submission of these non-related comments has had the detrimental effect of extending the review process timeline leading to costly delays in approvals.

Within the requirements for an application for production activity as described in proposed section 400.22 (NAFTZ revised section 400.23), XYZ Company has several concerns which tie back directly to the primary directive identified by the NAFTZ 'that the FTZ Program should encourage activity in the United States that could, for Customs reasons, otherwise be done in other countries'. FTZ Consulting recognizes that in evaluating requests for production activity that the FTZB must take into consideration competing interests between the applicant requesting authority for the proposed production activity, the US suppliers of components and US government agency policies related to international trade. To make that evaluation there has to be a clear presentation of exactly what the proposed production activity is and the benefits that will accrue to the zone user if approved. FTZ Consulting strongly believes that as suggested by the NAFTZ, the primary focus of the analysis must be on the end product that results from the production activity. Given the US objective of increasing economic activity within the US, it is difficult to identify an instance where a request for production authority is denied solely on the basis of the nature of the end product.

Because almost inevitably an end product in and of itself would be approved, FTZ Consulting questions the retention and relevance of several requirements for an application for production activity related to the end product that have been brought forward from the 1991 regulations. First, FTZ Consulting questions the requirement to identify current and proposed production capacity. The purpose of the FTZ Program is to increase economic activity within the US. Given that, under what circumstances would a request for production authority be denied because the zone participant was manufacturing too much in the US? If anything the FTZB should be encouraging increased production activity of approved end products rather than penalizing a zone participant for being successful. FTZ Consulting therefore suggests that production capacity be eliminated as part of the scope of authority for production activity. The second requirement that appears to be extraneous is the requirement to provide information as to whether alternative procedures have been considered as a means of obtaining the benefits sought. This seems to imply that the FTZ Program is a program of last resort and that the FTZB wants to know what other means have been sought and ruled out. It would seem that the only purpose this requirement serves is to allow the applicant to definitively state that the proposed production activity can be conducted under other Customs procedures (such as within a manufacturing bonded warehouse) and therefore should be eligible for expedited treatment. If that is its purpose the requirement should be restated as a positive requirement rather than the implied negative or eliminated.

In the 1991 regulations the definition of manufacturing/processing became entwined with the Customs practice of defining production/manufacturing as a change from one tariff classification to another. This has led to a scope of authority for production activity being rigidly defined based on the tariff numbers of end products and the tariff numbers of inputs as they were established at the time of the initial zone application. The problem with the scope of production activity being so intrinsically tied to the initial Harmonized Tariff Numbers is that HTS numbers can be changed (and potentially its duty rate) with absolutely no actual change to the item as classified (either an end product or input). This can occur through a reclassification of an item by Customs or by the zone participant itself as part of a CBP

compliance effort or at worst through the addition and deletion of HTS numbers within the Harmonized Tariff System itself. Suddenly, through no fault of its own, a zone participant finds itself out of scope when what it is doing has not been altered at all. FTZ Consulting strongly urges the FTZB to use general descriptions of finished products and materials/components used as inputs when defining the scope of authority. The current HTS numbers should be used solely as guidelines and for the initial determination as to whether a production activity results in an inverted tariff situation which must be evaluated against the threshold factors outlined in proposed section 400.25 and NAFTZ Section 400.24.

In the FTZB proposed regulations, in the section outlining the information required for an application for production authority there appears to be a greater focus placed on the input of materials or components subject to ADD/CVD duties/proceedings or a Section 337 proceeding. While FTZ Consulting recognizes that there is a heightened sensitivity to these types of inputs, in reality the existing regulation that requires a zone user to admit any such materials or components to a zone in privileged foreign status has ensured and will continue to ensure that all punitive duties assessed against these products would be applied for any such products entering the commerce of the US. While this requirement actually is an example where production activity occurring within a US FTZ continues at a disadvantage compared to its foreign competition, it does ensure that the FTZ Program is not used to circumvent US trade policy – a key threshold factor. Therefore FTZ Consulting concurs with the identification requirement for inputs subject to these proceedings in the initial application so long as that identification does not become the basis for denial of a request for production authority within a zone.

FTZ Consulting concurs with the NAFTZ's suggestion that the Board continue to maintain a readily accessible data base of previously approved end products and inputs. While the HTS numbers should be included as guidelines, they should not be an exclusionary factor for the expedited approval of proposed products and inputs that are similar in nature. In addition, it would seem that if an input is approved for one end product, FTZ Consulting believes that should be viewed as a favorable factor for expedited treatment when reviewing its use in a new end product since it is anticipated that the impact on the domestic industry has already been analyzed and documented during the review process for the initial end product.

I also support the additional language offered by the NAFTZ heightening the standard for those submitting comments or requests for review of approved zone sites and activity to be equal to the standard required of the applicant or approved zone participant. It is important that those filing comments, particularly those of a negative nature, be an affected party who can provide evidence of information that is 'probative and substantial value' that demonstrates a direct impact on the submitting party. Too often, an otherwise well prepared and complete application or even worse, an existing zone operation, has been held hostage by random and unrelated comments by those who object to either the very existence of the FTZ Program or otherwise have an unrelated issue with the applicant/zone operator. This causes unwarranted delays in the initiation of a zone project/operation costing inordinate amounts of potential zone savings and at worst, the withdrawal of the zone application as the applicant's operation becomes no longer viable in the US and moves offshore or simply shuts down.

Of particular concern to FTZ Consulting are Sections 400.14 and 400.37 which seek to expand the ongoing oversight by the FTZB of ongoing production activity, particularly in regards to production capacity and foreign inputs subject to inverted tariffs, ADD/CVD duties, and Section 337 orders issued after production activity has been approved for a zone operation. As stated above the approval for production activity needs to be centered principally on the end product itself. FTZ Consulting agrees that if a zone participant introduces a new end product that a new application for production activity should be required including defining the inputs using a general description with the HTS numbers as guidelines. However, the requirement for a prenotification of the use of every new input as described in proposed section 400.14 using the procedure described in proposed section 400.37 is problematic and unmanageable. (Note: Proposed Section 400.14 would seem to be more appropriately included in Subpart E: Operation of Zones and Adminstrative Requirements.) The use of new foreign inputs in a production activity can occur for a variety of reasons such as the addition of a new feature to the approved end product (i.e. cameras added to cars to enhance rear views), the loss of a domestic supplier or a the lack of viability of the existing domestic supplier due to non-sustainable price increases or capacity limitations or the need to have more than a single source for an input. And as noted above, if end products and inputs are defined simply by HTS numbers (even at the 6 digit level), a change to scope can occur simply because a zone participant is required to reclassify either the end product or an input to satisfy Customs requirements. As with the original application there also is the increased emphasis in the proposed regulations on prenotifications of inputs subject to ADD/CVD or Section 337 proceedings whose assessment and effective dates are outside a zone participant's control. In none of these instances is there a significant change in the actual production activity itself which was approved and it is highly unlikely that a full analysis of this change in end products, inputs or even production capacity will result in the change of the authority for production activity.

FTZ Consulting does recognize that the FTZB needs to be aware of what is occurring within zones in regards to production activity. However, the procedures outlined in 400.14 and 400.37 are too complex, unwieldy, and introduce a constant element of uncertainty into an approved zone process. FTZ Consulting recommends that production capacity be eliminated both from the initial requirements and from the ongoing monitoring activities. As for the monitoring of inputs, FTZ Consulitng would like to suggest that a procedure be implemented that would require the prenotification to the FTZB only if a change or an addition of an input has a significant impact on the production activity and the related zone savings. In essence, establish a de minimis threshold whereby if a change to inputs represents more than a certain percentage of the zone savings that prenotification is required. While the change in inputs is being reviewed, the zone participant would be allowed to admit the new input in privileged foreign status so that the logistical flow of materials to the zone is not disrupted. If the new input has been approved for any other zone's production activity, the review by the FTZB should be handled in an expedited manner since the effect on the domestic industry for that input has already been vetted. If it is an entirely new input, a more robust review would be conducted which could include a public comment period if necessary. Once either an expedited or full review of the new significant input is complete, the zone would implement its handling of the input based on the FTZB's findings. Reporting of those input changes that fall below the de minimis threshold could be noted in the annual report.

FTZ Consulting does not agree with the requirement for notification to the FTZB of previously approved inputs that become subject to ADD/CVD or Section 337 proceedings. The existing regulations that require that inputs subject to these punitive duties must be placed in privileged foreign status is sufficient to ensure compliance with the outcome of such proceedings. If necessary, the annual report could also be used to report these inputs on an ongoing basis.

The FTZB proposed regulations added a new section 400.42 which adds specificity to the meaning of the vague 'operated pursuant to public utility principles' previously found only in the definition of a foreign-trade zone in section 400.2 of the existing regulations. This new section (retitled 'Operation of a Zone Under Public Utility Principles' in the NAFTZ comments) clearly defines what is intended by operation of a zone project as a public utility. FTZ Consulting agrees with the requirement that an FTZ Project's rates and charges be fair and reasonable and based on the costs incurred by the grantee in the administration of the zone project. It is also important to FTZ Consulting that it be clearly stated that the contractual relationship remain between the grantee (or where applicable, to another public entity with a legal or contractual relationship with the grantee) and the operator and that all fees collected as a result of that grantee-operator contractual relationship be paid directly to the grantee. Inserting an unrelated third party into the grantee-operator relationship, particularly a 'for profit' entity, can lead to a zone operator paying fees or having to accept services from the third party that it deems unnecessary. However, FTZ Consulting does not agree with proposed Section 400.43 (e) which seeks to limit a zone grantee's access to professional advice by the most qualified zone practitioners or service providers. The oversight of a zone project is often a very minor portion of a public entity's ongoing efforts to promote economic activity within a region. There is frequent turnover in the personnel responsible for the oversight of a zone project and having access to a FTZ professional with extensive knowledge of the FTZ Program often provides the only experience and continuity within a zone project. To limit a grantee's options for access to this type of support, particularly in this time of limited budgets and downsizing, would be detrimental to a grantee's oversight of its zone project. Instead, FTZ Consulting believes that the grantee should be able to retain any one it sees fit in an advisory role under a separate contract for services. The fees for such services should not be contingent upon the fees collected by the grantee although they can be considered by the grantee when calculating the costs of managing the zone project and the setting of operator fees. The FTZ professional should not be responsible for determining which requests for zone designation and/or production authority should be deemed acceptable to a grantee and in the event that they themselves are contracted with a potential zone applicant to prepare the actual application should be required to disclose the potential conflict of interest and remove themselves from any role in the decision making process related to the Grantee sponsorship of the project. FTZ Consulting agrees with the extension of a grace period as outlined in the proposed regulations to allow grantees to restructure their professional zone support arrangements to ensure that the grantee-operator relationship remains separate from the grantee-FTZ advisor relationship and that the means for the collection of fees directly by the grantee and separate payment to the FTZ advisor can be implemented.

The FTZB proposed regulations have dedicated a new section 400.45 to the requirements for a grantee's zone schedule. The contents of a zone schedule particularly in regards to the inclusion of fees have been the subject of a great deal of confusion in the past. While this section does add some clarity, some key provisions still cause concern particularly with the more widespread establishment of single user zone sites within the context of a general purpose zone site such as a business or industrial park setting and/or usage driven sites within a service area. The zone schedule should be prepared by the zone grantee and should document the grantee's established processes and procedures including a summary of the contractual provisions contained in its operator's and if required, property owner's agreement. An actual copy of the agreement should not be required to be submitted as part of the zone schedule. The fee structure for the grantee's zone services should be clearly defined in the zone schedule including the amount and the timing of the assessment of the fees. This will ensure that a potential zone participant will clearly understand what is required for a grantee to sponsor a proposed application and what the obligations and associated costs will be. Public warehouse operators and their facilities who offer traditionally warehousing to multiple users should be listed in the grantee's zone schedule. However, the actual fee schedule(s) of the public warehouse operators should not be included in the grantee's zone schedule since these represent proprietary information for those businesses. There is no need to list single user general purpose zone operators since their services and facilities are not available to the general public. FTZ Consulting also does not believe that is necessary or even advisable for a grantee to be required to post their zone schedule on the Internet. That is and should remain a decision to be made by the grantee, based on local business practices and local and state laws regarding the publication of fees by a public entity. The FTZ Board should not post zone schedules since the only purpose it would serve would be to allow a potential zone applicant to use the fee structures of one grantee to file a complaint against the grantee where its proposed zone facility will be located.

FTZ Consulting appreciates this opportunity to provide these comments on the Foreign-Trade Zone Board's proposed regulations and hope that these comments will be viewed as constructive as it is in the best interest of all of us involved in the FTZ Program to have workable, transparent regulations that fulfill the intent of the Program – 'to expedite and encourage foreign commerce'.

Regards,

Principal, FTZ Consulting