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Mr. Andrew McGilvray
Executive Secretary
Foreign-Trade Zones Board
U.S. Department of Commerce
Room 2111
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Proposed Rule; Foreign-Trade Zones in the United States; Docket Number ITA-2010-0012; RIN 0625-AA81; Rebuttal Comments of Globe Specialty Metals, Inc.

Dear Mr. McGilvray:

This letter provides the rebuttal comments of Globe Specialty Metals, Inc. (“Globe”) on the comments submitted by the National Association of Foreign-Trade Zones (“NAFTZ”), Dow Corning Corporation, Mayer Brown, and others on the proposed regulations published by the Foreign-Trade Zones Board (“Board”) on December 20, 2010.¹

Globe is the largest domestic producer of silicon metal. Globe supplies silicon metal to companies authorized to engage in production activity in FTZs and to other companies that may request such authority. Globe also is a company that has been severely injured by unfair import competition. As a result, Globe is concerned that the FTZ program not be used to undermine antidumping and countervailing duty (“AD/CVD”) orders protecting domestic industries and their workers. Therefore, these rebuttal comments focus on the comments submitted by the NAFTZ and others on provisions of the proposed regulations that concern (1) production activity involving articles subject to AD/CVD duties and (2) the process and standards for obtaining authority to engage in such activity.

I. The Board Should Maintain and Strengthen Its Existing Policy and Practice With Respect to Articles Subject to AD/CVD Orders

The Board’s existing regulations restrict zone manufacturing activity involving items subject to AD/CVD orders.² Specifically, the current regulations (1) broadly provide that zone procedures shall not be used to circumvent AD/CVD actions and (2) require items covered by AD/CVD orders to be placed in privileged foreign status and to be subject to AD/CVD duties upon entry for consumption.³ These provisions reflect the longstanding Board policy of not

¹ *Foreign-Trade Zones in the United States*, 75 Fed. Reg. 82,340 (December 30, 2010) (“Proposed Rule”).

² 15 C.F.R. § 400.33(b).

³ *Id.*

allowing grants of authority to be used to circumvent or undermine trade measures taken to protect domestic industries from unfair import competition. The proposed regulations maintain these existing requirements and thereby continue current Board policy.⁴

The NAFTAZ and others seek to override this longstanding Board policy by advocating adding a new paragraph (3) to proposed subsection 400.14(g), stating that: “The Board will authorize zone activity under the preceding paragraph for export production whenever it finds that U.S. competitiveness will be advanced and that similar activities are authorized in other countries.”

This proposed language would mandate approval of production activity using items subject to AD/CVD orders whenever such circumstances exist, without regard to the public interest implications of granting such authority. The Board should reject this effort to rewrite key provisions of its existing regulations.

As discussed below, the history of Board practice has been to strengthen the procedures and requirements governing the use of items subject to AD/CVD orders in production activity when necessary to ensure that such activity does not undermine AD/CVD orders. In revising its regulations, the Board should maintain and strengthen its existing practice, not reverse or undercut it.

II. The Board Should Maintain the Proposed Advance Approval Requirement

The proposed regulations require advance Board approval for all production activity involving a foreign article that would be subject (upon entry for consumption) to an AD/CVD order (or would otherwise be subject to suspension of liquidation under AD/CVD procedures).⁵ This requirement applies to all requests for new zone or subzone authority and all requests for expanded production activity in existing zones (with manufacturing authority) involving inputs, finished products, or expansions in production capacity not covered by the original application.⁶

The Board should maintain this requirement in the final regulations to address the public interest concerns raised by the use of FTZs to avoid paying AD/CVD duties.

⁴ See 15 C.F.R. § 400.14(g).

⁵ Proposed Rule, 75 Fed. Reg. at 82,350 (§ 400.14(a)).

⁶ *Id.* (§§ 400.14(c), (e)(1)). In addition, with respect to production operations previously approved by the Board, advance approval is required for production activity involving a foreign article that would be subject to AD/CVD duties or suspension of liquidation under an order that was not in effect at the time of the prior approval of the production operation. *Id.* (§ 400.14(a)(4)(ii)).

III. The Proposed Procedural Requirements Should Be Maintained and Strengthened

A. The Board Should Not Allow the Advance Approval Requirement to Be Undermined by Proposed Procedural Changes

Under the proposed regulations, the required advance approval for production activity involving articles subject to AD/CVD orders must be obtained through a formal application and review process.⁷ The required process applies to all requests for new zone or subzone authority, and to all applications for expanded production activity in an existing zone (with manufacturing authority) involving new inputs, new finished products, or expansions in production capacity.⁸

The proposed regulations require applicants to provide specific information regarding the proposed production activity, including the products, materials, and components involved, and to disclose whether each material/component is subject to any AD/CVD proceeding.⁹ The proposed regulations also mandate publication of a notice of initiation of the review,¹⁰ providing the name of the applicant, a description of the zone project, and an invitation for public comment.¹¹ Finally, they provide that directly affected parties showing good cause may request a hearing on the application.¹²

The NAFTAZ is advocating changes that would weaken these proposed requirements by focusing the application process on “intermediate/finished” products, “not detailed listings of materials/components.”¹³ Most significantly, the NAFTAZ is asking the Board to change the scope of approval of production authority. The proposed regulations limit the scope of approval to the specific “inputs, finished products, and production capacity presented in the approved application” for a particular production operation.¹⁴ The NAFTAZ proposes instead that the scope of approval cover the intermediate/finished products identified in the application, including all production inputs that are used in making these intermediate/finished products.¹⁵

⁷ *Id.* at 82,350 (§§ 400.14(a), (c)) and 82,352 (§ 400.22 (a)).

⁸ *Id.*

⁹ *Id.* at 82,352 (§ 400.22 (a)(3)).

¹⁰ *Id.* at 82,354 (§ 400.32(a)(2)).

¹¹ *Id.*

¹² *Id.* at 82,359 (§ 400.52(b)(1)).

¹³ NAFTAZ Comments at 41 (May 4, 2011).

¹⁴ Proposed Rule, 75 Fed. Reg. at 82,350 (§ 400.14(c)).

¹⁵ NAFTAZ Comments at 30 (§ 400.14(c)).

The Board has recognized that the avoidance of AD/CVD duties on production inputs raises public interest concerns.¹⁶ Intermediate or finished products that are the result of production activity in an FTZ do not raise the same concerns. By shifting the focus of the application process and the scope of approval to intermediate/finished products, rather than the specific inputs/components to be used in zone manufacturing, the changes proposed by the NAFTAZ would defeat the purpose and undermine the effectiveness of the advance approval requirement.

For these reasons, it is very important that the Board retain (and strengthen) the disclosure and notice requirements for obtaining zone production authority and maintain the proposed scope of approval of such authority.

B. The Regulations Should Provide Adequate Time for Board Consideration of Requests for Production Authority

1. The Existing Time Frames Should Be Maintained

The proposed regulations establish reasonable time periods for the application review process. They maintain the same standard time frames as provided in the existing regulations: one year for applications involving production activity and ten months for applications not involving such activity.¹⁷ In addition, in cases involving production activity, the proposed regulations provide that the examiner generally is to develop recommendations to the Board (and a report to the Executive Secretary) within 150 days of the close of the comment period.¹⁸

The NAFTAZ proposes to cut these time frames in half.¹⁹ This proposal is unreasonable, particularly considering that at the same time, the NAFTAZ is proposing that applicants and affected zone participants be given extensions of time (essentially upon request) to respond to unfavorable preliminary recommendations.²⁰ Similarly, the NAFTAZ is proposing that applicants and affected zone participants be given extensions of time (essentially upon request) to rebut comments submitted by other parties on new information contained in responses to unfavorable preliminary recommendations.

¹⁶ Proposed Rule, 75 Fed. Reg. at 82,343 (“Section 400.14(a) . . . focuses . . . on the types of production activity that have raised public interest concerns in certain circumstances in the past, or that appear to have significant potential to raise such concerns in the future (e.g., . . . avoidance of antidumping or countervailing duties . . .).”)

¹⁷ *Id.* at 82,354 ((§ 400.31(a)).

¹⁸ *Id.* at 82,355 (§ 400.34(a)(5)(iv)).

¹⁹ NAFTAZ Comments at 49 (§ 400.31(a)), 54 (§ 400.34(a)(5)(iv)).

²⁰ *Id.* at 55 (§ 400.34(a)(5)(iv)(A)).

Fundamental principles of due process and fairness require that the Board have sufficient time to develop an appropriate factual record, to consider the comments and hearing presentations of all interested parties, and to perform a thorough evaluation of applications for production authority. It is particularly important to provide adequate time where the proposed production activity involves articles subject to AD/CVD orders, which the Board has recognized raises public interest concerns.

For these reasons, the Board should maintain the current time frames for the review of applications requesting production authority.

2. Decisions on Applications for Production Activity Involving AD/CVD Items Should Not Be Made Using an Expedited Process

The proposed regulations do not authorize expedited approval of applications for production authority. The NAFTAZ advocates adding such a provision – specifically, that the Executive Secretary be given the power to approve production activity that “is the same, in terms of intermediate/finished products involved, to activity recently approved by the Board and similar in circumstances.”²¹ The NAFTAZ proposes that in such cases, approval be granted on an expedited basis, with docketing and approval of the application to occur within 30 days of the submission of the request.²² This power would extend to all such applications for production authority, including applications involving articles subject to AD/CVD orders.

Under this proposed process, there would be no notice of the filing/docketing of a request for expedited approval. There would be no opportunity for comment and no hearing. There also would be no Board evaluation of the merits of the application, because the NAFTAZ proposal requires such applications to be docketed and approved with 30 days.²³ Thus, the proposed expedited approval process would eliminate all of the procedural safeguards in the proposed regulations.

As explained above, the Board has recognized that production activity involving articles subject to AD/CVD orders raises public interest concerns. For this reason, the NAFTAZ’s proposal for expedited approval of production activity involving such articles should be rejected.²⁴

²¹ *Id.* at 30 (§ 400.14(d))

²² *Id.*

²³ Dow Corning goes even further, arguing for “a blanket Board Order authorizing manufacturing in zones for export as long as all imported components are placed in privileged foreign status.” Dow Corning Comments (May 26, 2011) at 4.

²⁴ The NAFTAZ comments also suggest that production activity involving articles subject to AD/CVD could be authorized on an interim basis and that the necessary decision be delegated to the Board’s Executive Secretary. NAFTAZ Comments at 29 (§ 400.14(b)). In view of the public

IV. The Board Comment and Hearing Process Should Not Be Skewed in Favor of Applicants To Engage in Production Activity

The NAFTAZ advocates an array of changes in the proposed process for authorizing production activity that would skew that process in favor of applicants for such authority, including parties proposing to engage in activity involving items subject to AD/CVD orders.

These changes include changes in the process and standards to be applied in evaluating proposed production activity. For example, the NAFTAZ suggests adding as an evaluation criterion the “ability to conduct proposed activity outside of the U.S. with the same tariff impact.”²⁵ With respect to the burden of proof, the NAFTAZ proposes that the Board delete the word “significant” from the requirement that applicants demonstrate that significant public benefit(s) would result from the proposed activity.²⁶ At the same time, the NAFTAZ suggests restricting who may oppose applications by requiring that they “demonstrate standing.”²⁷ Dow Corning suggests that “[w]here 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”²⁸

In addition, the NAFTAZ proposes language that would allow applicants to submit rebuttal to comments opposing an application, without giving opposing parties the same opportunity.²⁹ Similarly, with respect to hearings, the NAFTAZ suggests that applicants be given the opportunity to present rebuttal, without providing the same opportunity to opposing parties.³⁰

Finally, the NAFTAZ advocates adding language to the proposed regulations to give applicants (and affected zone participants) essentially “guaranteed” extensions of time to submit certain responses or comments to the Board without giving other parties the same right. For example, where the examiner’s preliminary recommendation is unfavorable to the applicant, the NAFTAZ advocates adding the following language to the provision allowing the applicant to submit a response within a prescribed time: “subject to extensions upon request by the applicant

interest concerns raised by production activity involving articles subject to AD/CVD, it would not be appropriate to authorize such activity on an interim basis or to delegate such authority to the Executive Secretary.

²⁵ *Id.* at 43-44.

²⁶ *Id.* at 47.

²⁷ *Id.* at 48.

²⁸ Dow Corning Comments at 5.

²⁹ NAFTAZ Comments at 48.

³⁰ *Id.* at 73.

or affected Zone Participant, which shall not be unreasonably withheld.”³¹ The NAFTAZ does not propose any parallel language providing extensions for parties opposing an application.

Thus, the NAFTAZ is making one-sided proposals, favoring applicants (and zone participants). These proposed changes fail to recognize that authority to engage in production activity in a zone is a privilege, not a right.³² In addition, as the Board has recognized, “{i}n the case of subzones, the application burden is greater” because

“{s}ubzones are single-user facilities, which are not structured to serve the public. It is their activity that has a public effect, and case law has recognized that the Board has broad authority to evaluate that effect in terms of the public interest.”³³

To ensure that the public interest requirements of the statute and Board practice are met, the Board should reject the NAFTAZ’s suggested changes in the proposed regulations that would skew the application process in favor of applicants for production authority.

V. The Board Should Maintain Strong and Credible Penalty Provisions

The NAFTAZ also suggests numerous changes in the penalty and voluntary disclosure provisions of the proposed regulations that would limit the Board’s ability to impose fines for violations of the regulations and would broaden the availability of the prior disclosure process. For example, the NAFTAZ advocates that fines be assessed only for each business day (not calendar day) during which a violation continues and that no penalty be assessed if the violation has been rectified (and there has been no finding of fraud), regardless of how long the violation continued.³⁴ This proposal is contrary to the statute, which provides that: “Each day during which a violation continues shall constitute a separate offense.”³⁵

With respect to voluntary disclosures, the NAFTAZ proposes that the mitigating effects of a prior disclosure be available for disclosures that are made orally.³⁶ In addition, by proposing that an investigation not be considered to have been commenced until the Executive Secretary has prepared a written report that has been filed with the Assistant Secretary for Import

³¹ *Id.* at 55.

³² *Foreign Trade Zones in the United States*, 56 Fed. Reg. 50,790, 50,793 (October 8, 1991).

³³ *Id.* (citations omitted).

³⁴ NAFTAZ Comments at 77.

³⁵ The FTZ Act, § 19, 19 U.S.C. § 81s.

³⁶ NAFTAZ Comments at 83.

Administration, the NAFTAZ proposes to extend unreasonably the time period during which a prior disclosure may be made and to limit inappropriately the imposition of penalties.³⁷

The Board should not water down the penalty provisions of the proposed regulations. Strong and credible penalty provisions are necessary to ensure compliance with the proposed regulations, including the advance approval requirement for production activity involving articles subject to AD/CVD duties and the requirement that the proposed use of such articles in zone production be disclosed. Meaningful and effective penalty provisions are needed to allow the Board to ensure compliance with its regulations.

VI. The Legal and Procedural Arguments Made by Mayer Brown Are Erroneous and Should Be Rejected

A. Mayer Brown's Legal Arguments Are Erroneous

Mayer Brown, in comments submitted on behalf of MPM Silicones, LLC, claims that the policy that zones shall not be used to circumvent AD/CVD orders "only applies to goods that ultimately enter U.S. customs territory."³⁸

Contrary to this claim, the Board has a broad, longstanding policy of not allowing grants of authority to circumvent or undermine trade relief. In 1983, the Board published proposed regulations containing specific criteria for evaluating applications for manufacturing authority. The proposed regulations provided that when good cause was found, the Board would investigate whether the proposed zone activity would be detrimental to the public interest, health or safety.³⁹ In determining whether good cause existed, the Board was to give special consideration to "import sensitive industries."⁴⁰ In addition, in determining whether the proposed activity was in the public interest, the Board was to consider "[w]hether zone activity will undermine a remedial action or program in effect because of an unfair trade practice, or materially or substantially harm an existing domestic industry."⁴¹ Thus, the Board's concern was not limited to precluding circumvention in the form of consumption entries escaping payment of AD/CVD duties. Instead, the Board sought to ensure broadly that the proposed zone would not "undermine a

³⁷ *Id.*

³⁸ Mayer Brown Comments at 4 (May 26, 2011) (emphasis added). Mayer Brown asserts that "[a]ny other reading of the regulation is wholly improper and fails to take account of the FTZB's regulatory framework." *Id.*

³⁹ *Foreign-Trade Zones in the United States*, 48 Fed. Reg. 7,188, 7,196 (February 18, 1983).

⁴⁰ *Id.*

⁴¹ *Id.*

remedial action or program in effect because of an unfair trade practice,” particularly if the practice affected an import-sensitive industry.

In 1989, Congress conducted a review of the FTZ program. As part of that review, the Government Accounting Office prepared a report. In describing the Board’s approach to evaluating applications, the report states that: “The Board follows a clear policy of not allowing grants of authority to circumvent or undermine trade policy measures taken to protect domestic industries, based on the premise that such circumvention would not be in the public interest.”⁴² Thus, the Board policy was not limited to precluding the use of zones to circumvent AD/CVD orders in a narrow, technical sense. The policy was not to allow grants of authority to circumvent or undermine trade measures taken to protect domestic industries.

Consistent with this existing policy, in 1990 the Board published proposed regulations that included the broad statement of policy that zone procedures shall not be used to circumvent AD/CVD actions.⁴³ The final regulations published in 1991 (and currently in effect today) contain the same language with virtually no change.⁴⁴ The proposed and final regulations also contain the privileged foreign status requirement.⁴⁵ Thus, over time, the Board has maintained and strengthened its broad policy that zones shall not be used to circumvent or undermine remedial measures protecting domestic industries from unfair trade practices.

Mayer Brown’s claim to the contrary is based on a misreading of the Board’s regulations. As Mayer Brown recognizes, section 400.33(a) of the regulations gives the Board “broad authority to adopt restrictions to ‘protect the public interest.’”⁴⁶ Section 400.33(b)(1) sets forth the Board policy that zones shall not be used to circumvent AD/CVD actions. Section

⁴² United States General Accounting Office, Report to the Chairman, Committee on Ways and Means, House of Representatives, International Trade, Foreign-Trade Zones Program Needs Clarified Criteria, GAO/NSIAD-89-85 at 29 (February 7, 1989).

⁴³ *Foreign-Trade Zones in the United States; Proposed Rule*, 55 Fed. Reg. 2,760, 2,768 (§ 400.33(b)(1)) (January 26, 1990).

⁴⁴ 15 C.F.R. § 400.33(b)(1).

⁴⁵ *Id.*, § 400.33(b)(2). While the Board did not extend the privileged foreign status requirement to exported merchandise, it also did not adopt any provision allowing zones to be used to undermine AD/CVD orders when merchandise is exported. To the contrary, at the same time the Board adopted the privileged foreign status requirement, the Board (1) codified its broad policy that zones shall not be used to circumvent AD/CVD orders and (2) adopted the section of its regulations providing that the Board is to deny or restrict authority for proposed activity if the activity is inconsistent with U.S. trade and tariff law, or policy formally adopted by the Executive Branch.

⁴⁶ Mayer Brown Comments at 2.

400.33(b)(2) describes the steps to be taken when merchandise subject to suspension of liquidation under AD/CVD procedures is admitted into a zone or subzone.⁴⁷

Mayer Brown misinterprets section 400.33(b)(2) as a limitation on the general policy set forth in section 400.33(b)(1). In reality, section 400.33(b)(2) implements the policy set forth in section 400.33(b)(1), using a particular means (the privileged foreign status requirement) to address a particular form of circumvention. By adopting this requirement, the Board did not narrow the policy in section 400.33(b)(1), nor did it negate its authority to impose other restrictions when necessary to prevent circumvention and protect the public interest.

B. Mayer Brown's Suggested Change in the Proposed Regulations Should Be Rejected

Mayer Brown suggests adding language to the proposed regulations that would exclude goods used in production for export from the advance approval requirement.⁴⁸ The Board should reject this suggestion. Such an exclusion would be contrary to the Board's longstanding policy of not allowing FTZs to be used to circumvent AD/CVD orders or to undermine trade relief. Zone production for export using dumped or subsidized imports has the same detrimental effect on U.S. producers and workers as the use of such imports to produce merchandise for domestic consumption. Domestic suppliers lose sales volume to the unfairly traded imports and are forced to reduce their prices to compete with the imports, and the sales losses and price reductions cause production cutbacks and ultimately, job losses. The advance approval requirement properly allows the Board to consider such detrimental effects in deciding whether to prohibit or restrict production activity.

C. The Advance Approval Requirement Will Not Create the Burdens and Procedural Complexities Predicted by Mayer Brown

Mayer Brown claims that requiring advance approval of production activity involving articles subject to AD/CVD duties "will create a massive new burden on the [Board], place it in conflict with the duties and authority of other government agencies, and . . . impose substantial costs and complexity on FTZ applicants."⁴⁹

⁴⁷ Section 400.33(b)(2) requires that such merchandise be placed in privileged foreign status and that AD/CVD duties be paid when the merchandise enters the U.S. for consumption.

⁴⁸ Mayer Brown Comments at 5-6.

⁴⁹ *Id.* at 9. Mayer Brown also claims that "[b]y stating that the admission of foreign status goods subject to AD/CVD order has 'significant potential to raise {public interest} concerns in the future,' the FTZB is in effect ensuring that future proceedings will be highly contentious, when they should be non-controversial, and will require the FTZB to develop an extensive factual record to support lengthy written decisions that are capable of withstanding judicial review." *Id.* at 7.

Contrary to these dire predictions, there is no reason to believe that the advance approval requirement will cause the kinds of problems that Mayer Brown imagines. In evaluating applications for production authority, the Board has a long history of taking into account trade policy concerns and is entirely capable of doing so in the future. The Board has extensive experience, developed over the decades that the FTZ program has been in existence, in determining whether proposed zone activity is in the public interest. Furthermore, Board decisions have successfully withstood judicial review. For these reasons, the procedural and jurisdictional claims made by Mayer Brown are without basis.

VI. Conclusion

The requirement of advance Board approval for production activity involving articles subject to AD/CVD orders will strengthen the Board's ability to ensure that activities conducted in FTZs are in the public interest. On behalf of Globe, we urge the Board to reject the changes in the proposed regulations advocated by the NAFTAZ, Dow Corning, Mayer Brown, and others that would undermine the advance approval requirement and, in other ways, impair the Board's ability to carry out its statutory responsibilities in a proper, fair and balanced manner.

Very truly yours,



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⁵⁰ *Id.* at 9.