



October 29, 2014

Richard Tucker  
Executive Director  
Huntsville-Madison County Airport Authority  
1000 Glenn Hearn Blvd.  
Box 20008  
Huntsville, AL 35824

Dear Mr. Tucker:

I am writing in response to your e-mail of October 1, 2014, which included the following statements regarding the “start-up reviews (Element 7) and compliance reviews (Element 9)” that FTZ 83 engages FTZ Corporation to perform:

*[S]ound practice demands that the Airport Authority as the Zone Grantee should choose the party that conducts any verification that Operators are in compliance with Customs regulations...*

*Whether it be in FTZ compliance or air passenger safety, the nature of our business is such that closing our eyes to possible problems, then pointing the finger at someone else if problems do occur, is not a viable choice for us... Due diligence is essential to the trust that we have built. Review of proposed and ongoing FTZ processes is nothing more than the exercise of that due diligence...*

*I believe that Zone grantees have a right to confirm for themselves – by in-house means or, alternatively, “be free to select the expert consultant of their choice” – to confirm that the proposed or existing practices of Zone participants meet the requirements of “participating in a federal program.” (Emphases added)*

In September 2013, FTZ 83 had submitted to the FTZ Board an application for a waiver for FTZ Corporation pursuant to 15 CFR 400.43(f). Regarding whether FTZ Corporation would undertake the specific key function of “[o]verseeing zone participants' operations on behalf of [the] grantee<sup>1</sup>,” FTZ 83’s waiver application stated “No.”<sup>2</sup> However, the above-quoted language in your October 1, 2014 e-mail indicates that FTZ Corporation’s actions under Business Model Elements 7 and 9 involve, for example, “verification that Operators are in

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<sup>1</sup> 15 CFR 400.43(d)(1)(iii)

<sup>2</sup> FTZ 83’s waiver application only proposed that FTZ Corporation undertake one other key function, namely to be a party to the zone’s agreements with zone participants.

compliance with Customs regulations” and/or “[r]eview of proposed and ongoing FTZ processes.” Those actions appear to constitute performance of the key function of “[o]verseeing zone participants' operations on behalf of [the] grantee.”

Pursuant to 15 CFR 400.43(d), a firm that offers/provides zone-related products/services to zone participants in a zone may not undertake a “key function” on behalf of the zone’s grantee absent a waiver from the FTZ Board specific to the performance of the key function in question. Currently, FTZ 83 has not requested any waiver pertaining to FTZ Corporation “[o]verseeing zone participants' operations on behalf of [the] grantee.”

In your e-mail of October 1, 2014, you also raised Business Model Elements other than numbers 7 and 9. Your e-mail messages (including attachments) of August 1 and October 1, 2014 have indicated that zone participants are not charged – either directly or indirectly – for Business Model Elements other than 7 and 9. If that is the case then there would be no concern about those Business Model Elements relative to the FTZ Board’s public utility regulation (15 CFR 400.42).

If you have additional questions in this regard or if there is additional information that you would like to present for consideration, please let us know.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrew McGilvray', with a long horizontal flourish extending to the right.

Andrew McGilvray  
Executive Secretary/Staff Director

Attachment

## Andrew McGilvray

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**From:** Rick Tucker <Rick@hsvairport.org>  
**Sent:** Wednesday, October 01, 2014 5:37 PM  
**To:** Andrew McGilvray  
**Cc:** 'Alan Hanson (Alan\_Hanson@shelby.senate.gov)'; 'Hines, Shannon (Appropriations)'; 'Rathburn, Kolo (Appropriations)'; 'Dunn, Jay (Shelby)'; Elizabeth Whiteman; Camille Evans; 'Ronnie Flippo'; 'Vicki Wallace'; 'Greg Jones'  
**Subject:** FTZ No. 83 Business Model Elements

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

Dear Andrew:

Thank you for your letter of September 12, 2014. I believe it represents significant progress in our attempts to reach a mutual understanding of the manner in which our Zone project aims to comply with your new regulations. I am sure that your review of the FTZ No. 83 Business Model Elements required significant time and attention on your part; and, although we have yet to reach full accord on the compliance of each Element with your new regulations, I am appreciative of your attention and response.

As I believe you are aware by now, the Huntsville-Madison County Airport Authority has, for decades, developed an array of physical and service infrastructure that serves as an economic development engine for the Tennessee Valley region. In doing so, we have taken great care in serving the public, and in complying with numerous local, state, and federal laws and regulations. In doing so, we strive to be as thorough and exact as possible.

I am happy that we have whittled the number of Business Model Elements that you believe are not in compliance down to a total of two; however, in addition to addressing those two Elements (Nos. 7 and 9), I would also like to put your mind at ease regarding several more about which you may yet have some reservations. All of these are important to us.

First, I would like to share with you the policy rationale that underlies start-up reviews (Element 7) and compliance reviews (Element 9).

Both Business Model Elements have the same three aims:

1. Reducing potential Grantee liability
2. Making life easier for all Zone Operators
3. Maintaining the trust of local CBP officials

I am sure that you will agree that it makes good policy sense for those who use the FTZ program to use it properly. Just as your agency has certain monitoring responsibilities on behalf of the Foreign-Trade Zones Board, our agency also has certain monitoring responsibilities on behalf of its Board of Directors. As I mentioned in our meeting of March 12, "Trust, but verify," describes our monitoring of both internally managed and contracted Airport Authority functions. Obviously, we have the choice of monitoring these functions ourselves, or, alternatively, having contracted parties do so. In instances of monitoring by contracted parties, sound practice demands that the Airport Authority should choose

the party that reviews any given activity; the choice of reviewer should not belong to the party whose activity is being reviewed. Given your own monitoring functions, I hope this makes sense to you.

Before I address the public comments to which you refer in your letter, I would like to help you make a couple of important distinctions. The activities associated with activation and compliance verification are distinct from consulting services to Zone participants in a couple of different ways.

First, as you may note in our Zone Schedule, our Start-up fee is charged for the, “Review (emphasis added) of Foreign-Trade Zone inventory control system, systems and procedures manual, and activation application to U.S. Customs and Border Protection.” This function is separate and distinct from the services that FTZ Corporation provides to its clients (e.g. development of FTZ procedures and procedures manuals, integration of Zone-related procedures and systems into companies’ existing operations) in helping them activate. In contrast, the Start-up fee is charged for the work involved in checking the work of others. It is for this reason that we adopted the practice of waiving the Start-up fee for Zone Operators who had chosen to use the Huntsville FTZ Corporation or the FTZ Corporation as a consultant for their start-up and activation; doing so would have required the Zone Operator to pay the Huntsville FTZ Corporation for essentially checking its own work. We did not think this to be fair. It is only because this policy of waiving the Start-up fee has been specifically prohibited under your new regulations that we have been obliged to abandon it.

With regard to compliance reviews, I believe it is important for you to understand that they are performed for the Grantee’s benefit. This brings me to the whys and wherefores of this function. Again, the three imperatives served by compliance reviews are:

1. Reducing potential Grantee liability;
2. Making life easier for all Zone Operators;
3. Maintaining the trust of local CBP officials.

With regard to reducing potential Grantee liability, I realize that there has been much discussion since our FTZ grant of authority was issued in 1983 and the current Customs regulations governing Zone procedures were promulgated in 1986.

Our grant of authority specifically requires the Grantee organization to make sure that the revenue of the United States is protected. As I stated in our March 12 meeting, we have two means at our disposal: Indemnification, and Disaster Prevention. The former is addressed by specific terms in our Operator Agreements. Compliance reviews are aimed at the latter. As I mentioned above, the Airport Authority has the option of directly engaging in this function. Alternatively, it can contract for that function; however, in any case, sound practice demands that the Airport Authority as the Zone Grantee should choose the party that conducts any verification that Operators are in compliance with Customs regulations. I understand that more recent FTZ Board Orders do not contain some of the specific language regarding Customs and personal liability that is in our grant of authority. If there has been any corresponding change to the policy of U.S. Customs toward Grantee liability since the promulgation of T.D. 86-16, I am not aware of it. However, even if there is, there are other principal considerations of which you should be aware.

As I believe you are now aware, we want our FTZ User to succeed. We do not want them to fail due to non-compliance, or due to the imposition of Zone procedures that do not make business sense. As you can imagine, non-compliance by one Zone User can give Customs the impression that FTZs are a problem; and that makes all other FTZ Users’ lives harder. What may consequently be imposed on one Zone User may then be imposed on others – some of whom may find the imposition unpalatable

if not unworkable. This statement is not theoretical. I have seen firsthand the way in which certain requirements imposed by U.S. Customs on one Zone user can affect the operations of others. This is why we want to assist in resolving VF's issues with Customs before GE and other Zone potential users (e.g. Toyota and possibly Remington) are ready to activate.

I also want to make it clear to you the importance of maintaining the good name of the Airport Authority with U.S. Customs and with the community as a whole. As you know, the Airport Authority's relationship with Customs extends beyond the Foreign-Trade Zone. It includes the operation of our Air Cargo Center, our International Intermodal Center, and the Airport itself. You can believe that Customs is aware that our FTZ grant of authority specifically addresses our responsibility for the protection of the revenue of the United States. However, of even greater importance is our demonstration that we are exercising prudence and due diligence in doing so. Whether it be in FTZ compliance or air passenger safety, the nature of our business is such that closing our eyes to possible problems, then pointing the finger at someone else if problems do occur, is not a viable choice for us. If you viewed our website presentation that outlined the history of our development, then I am sure you are aware of the tremendous amount of infrastructure, economic development, and job creation that has taken place under the auspices of the Huntsville-Madison County Airport Authority. Essential to our success has been our demonstration that we are a reliable partner for both private and government entities. Due diligence is essential to the trust that we have built. Review of proposed and ongoing FTZ processes is nothing more than the exercise of that due diligence. I fail to understand why it is inappropriate for us to use a contractor to perform a function that we otherwise would perform ourselves. If Zone Operators want to have a compliance review performed for their own purposes, they are free to choose whomever they want to perform that service. That choice should be entirely up to them. Likewise, choice of performing certain due diligence functions in-house – or through the use of a specific contracted service provider – should be entirely up to a Zone grantee.

With this in mind, I would like to address the public comments to which you referred in your letter of September 12, 2014.

As you note in your letter, the NAFTAZ wanted your regulations “to ensure that Zone Participants are not forced to use or pay beyond reimbursement to the Grantee of expenses incurred for zone project administration requirements.” I have reviewed the NAFTAZ's comments on public utility provisions and can tell you that I do not disagree with any of those comments. That said, I must point out that the NAFTAZ's comments do not appear to exclude due diligence as a part of “zone project administration requirements.”

You also reference another party who offered that “[s]ubzone operators should have a choice in whom they select for a particular service and should not be forced ... to pay for consulting or expert services as a condition of participating in a federal program ... There is a real cost for these services and subzone operators should be free to select the expert consultant of their choice and not be required to contract with a particular technical expert in order to operate within a zone. “ I agree. Nonetheless, I believe that Zone grantees have a right to confirm for themselves – by in-house means or, alternatively, “be free to select the expert consultant of their choice” – to confirm that the proposed or existing practices of Zone participants meet the requirements of “participating in a federal program.” As you know, Zone participants are free to implement Zone procedures themselves, or choose their own service providers in helping them implement and use Zone procedures. The Huntsville-Madison County Airport Authority is likewise free to exercise its own due diligence or choose its own service provider in helping it do so. I hope you understand and agree.

As I mentioned above, I also want to put your mind at ease regarding the Business Model Elements (1 through 4, and No. 10) discussed in Footnote 7 of your letter. However, before doing so I must let you know that the line of discussion regarding those Business Model Elements left me scratching my head. I decided to discuss these with Greg Jones in order to test my own mental competence. In our discussions, we both agreed that our mutual understanding is that potential and existing Zone participants of our Zone project are not required to utilize FTZ Corporation or any of its affiliates to obtain a cost-benefit analysis, learn about operational or security requirements, learn about Board or trade policy issues, or be educated about operational or logistical considerations. In the case of folks like VF, GE, and Toyota, they have their own resources for obtaining this information. I hope this puts your mind at ease.

In our discussions, Greg and I also agreed that the word “Pay” in the context of your regulations means to transfer money as compensation for services rendered. Please let me know if this is incorrect. I asked Greg to share some examples of Business Model Elements 1 through 4 with me in the context of his company’s activities with potential Zone participants of Zone projects in which FTZ Corporation or its affiliates are not involved with the grantee organization in any way. He was happy to provide me with a recent example of a visit by a prospective client to his office in Mobile. According to Greg, the prospect sent two representatives who arrived at about 9 AM and left late in the afternoon. Prior to the visit, FTZ Corporation had done a free cost-benefit work-up. During the visit, a number of topics were discussed in some detail. According to Greg, these included detailed discussions on operational and security requirements, the discussion of one potentially sensitive foreign input and the history of Board actions involving that input, and a detailed step-by-step discussion of Zone-related document flow and record-keeping requirements from the unloading of imported components at the first port-of-unloading through the transfer of finished products from the Zone. Greg then informed me that the company chose another consulting firm to help it with its FTZ designation and implementation. I then asked the obvious question, “How much did they pay you for providing them with all of this information?” Greg’s answer was, “Zero.” He also described a situation in which FTZ Corporation was on the short list of prospective consultants for a firm that wanted to obtain FTZ manufacturing authority for the export production of a finished product for which a substantial portion of foreign inputs were subject to anti-dumping duties. Greg described the time and effort that was spent in trying to convince the company that it should engage its principle domestic supplier in fashioning an arrangement and scope of authority by which that supplier could be assured that it would not be negatively affected by the proposed scope of FTZ authority that the company would seek. He further described how FTZ Corporation tried to explain that the FTZ Board regulations concerning admission of such inputs in “Privileged Foreign” status was a restriction, not a license. Greg then described how the company chose another consultant, and how the FTZ Corporation received no compensation for the technical information that it had shared. My understanding from all of our correspondence is that, as long as a Zone participant has freedom of choice in procuring consulting services, FTZ Corporation may accept payment for similar services when it is not a party to our Operator Agreement with that Zone participant. What has me scratching my head and questioning my own mental competence is the idea that the performance of such “services” without payment or obligation can possibly be construed as forcing that Zone participant to pay for such a service. I hope you agree, and accordingly, your mind is put at ease.

With regard to your reservations about Business Model Element No. 10 (“Respond to requests for information from existing and potential Zone participants”), I want to you know that Greg Jones reported to me the results of his outreach effort to ascertain his own mental competence. Greg reported to me that during the recent NAFTA Conference he sat down with the representative of a Zone Operator and its consultant and asked whether they felt that calling him regarding operational or technical information would constitute a case of the Operator being forced to utilize or indirectly pay for his services. According to Greg, the representative of the Operator immediately answered, “No.”

When Greg asked, "Why not?" the answer was, "Because I only pick up the phone to call you when I want to."

According to Greg, the Operator's consultant agreed.

In accordance with what Greg has reported to me, it seems that the threshold for this Business Model Element (as well as for Business Model Elements 1 through 4) ought to be whether or not a Zone participant is required to use the service or not. If, under a two-party Operator Agreement between the Zone participant and the Grantee, FTZ Corporation is allowed to charge for technical information, then, it ought, when freely called upon by a Zone participant, to be able to provide that information at no charge if it wishes. Otherwise, Greg would be put in a position of answering a telephone call in which a Zone participant asked what you might deem to be a technical question, and be forced to answer, "Under the FTZ Board regulations, I can't tell you the answer unless you pay me; however, you are free to pay another consultant if you like." If you believe that such a response is required under the regulations, then I ask two simple questions: 1) why are the regulations designed to protect FTZ consultants? And, 2) why are they designed to do so at the expense of both Zone participants and Grantee organizations who want to serve their trade communities to the greatest extent possible?

I look forward to your thoughts about what I have presented in this email. I hope what I provided makes good sense to you; and I hope we can reach a mutual understanding of the way in which the adjustment of our FTZ Business Model to a model that provides for two-party Operator Agreements is consistent with both the letter and spirit of your new regulations.

*Rick Tucker*  
*Executive Director*  
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**From:** Andrew McGilvray [mailto:Andrew.McGilvray@trade.gov]  
**Sent:** Friday, September 12, 2014 3:20 PM  
**To:** Rick Tucker  
**Cc:** Greg Jones; Elizabeth Whiteman; Camille Evans  
**Subject:** Response to your inquiry re Business Model Elements

Hello Rick,

Please find attached our response to your inquiry regarding certain Business Model Elements of FTZ 83.

Please let us know if you have any questions.

Andrew McGilvray  
Executive Secretary/Staff Director, U.S. Foreign-Trade Zones Board

Enforcement and Compliance  
U.S. Department of Commerce | International Trade Administration

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