**United States Department of Commerce**
**The Foreign-Trade Zones Board**
Washington, D.C. 20230

December 29, 2014

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

Greg Jones
Foreign-Trade Zone Corporation
2062 Old Shell Road
Mobile, AL 36607

Dear Messrs. Tucker and Jones:

This letter responds to Mr. Tucker's e-mail message of November 7, 2014 ("November 7th e-mail") which further describes certain activities that the Foreign-Trade Zone Corporation or a related entity (collectively "FTZ Corporation") would undertake on behalf of the Huntsville-Madison County Airport Authority (grantee of FTZ 83). The activities in question pertain to what FTZ 83 has identified in prior communications as "Business Model Elements" 7 ("start-up reviews") and 9 ("compliance reviews"), hereinafter abbreviated as BME #7 and BME #9. In his November 7th email, Mr. Tucker expresses that, because neither the grantee of FTZ 83 "nor FTZ Corporation are in the business of supervising or directing any Zone participant in the way it conducts its day-to-day zone operations" (emphasis added), Mr. Tucker does not believe that performance of the activities under BME #7 and BME #9 "require a waiver from the Board in order to comply with its regulations concerning operation as a public utility and uniform treatment."

Although we have provided prior guidance on the proposed BMEs for FTZ 83, the Foreign-Trade Zones staff has again analyzed BME #7 and BME #9 and related information contained in the November 7th e-mail, Mr. Tucker's e-mail message of October 1, 2014 as well as prior correspondence to determine whether, when viewed within the context of the FTZ Act and the meaning of the FTZ Board's regulations, these activities constitute "key functions" undertaken on behalf of the zone's grantee. After completing this review and consulting the FTZ Board member delegates with whom you have met previously, the Assistant Secretary of Commerce for Enforcement and Compliance and the Deputy Assistant Secretary of the Treasury for Tax, Trade, and Tariff Policy, we conclude that identified activities that FTZ Corporation would perform under BME #7 and BME #9 constitute a "key function" undertaken on behalf of the zone's grantee.

As we have previously discussed[1] and as you correctly note in your November 7th email, the FTZ Act mandates that all FTZ's operate as a "public utility" and "afford" to all zone users "uniform treatment under like conditions" (19 U.S.C. § 81n). The FTZ Board's regulations (15 CFR Part 400) advance these requirements in part via provisions that, among other things, seek to ensure that zone participants receive uniform, not disparate treatment. As noted in our letter of October 29, 2014 to Mr. Tucker, one of these provisions, found at 15 CFR §400.43(d) precludes firms that offer/provide zone-related products or services to zone participants from undertaking any "key function" within a designated zone.[2] (The regulations further provide that parties that violate 15 CFR §400.43 may be subject to the penalties set forth in 15 CFR § 400.62(c).) Further 15 CFR §400.43(d)(1) provides that, "[o]verseeing zone participants' operations on behalf of a grantee" are among the functions that are considered to be "key functions."

In September 2013, FTZ 83 submitted to the FTZ Board a waiver application for FTZ Corporation which, among other things, stated that FTZ Corporation would not be engaged in the specific key function of "[o]verseeing zone participants' operations on behalf of [the] grantee." After the FTZ Board approved this application, subject to certain restrictions in May 2014, however, Mr. Tucker (on behalf of FTZ 83) subsequently submitted an email on October 1, 2014 to the FTZ staff that stated, in part, as follows:

> [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.)

These comments were made in reference to BME #7 and BME #9.

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[1] *See* Letter from Andrew McGilvray to Richard Tucker, dated September 12, 2014.

[2] *See* Letter from Andrew McGilvray to Richard Tucker, dated October 27, 2014.

Because the waiver application that FTZ 83 submitted to the FTZ Board in September 2013 specifically stated that FTZ Corporation would not be performing any oversight activities, we responded to Mr. Tucker's October 1, 2014 email in a letter dated October 29, 2014. Our October 29 letter stated, in relevant part, that "the above-quoted language in your October 1, 2014 e-mail indicates that FTZ Corporation's actions... involve, for example, 'verification that Operators are in 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.'"

On November 7, 2014, Mr. Tucker responded to our October 29, 2014 letter via email. This November 7th e-mail contained the following statements:

> Let me assure you that the Huntsville-Madison County Airport Authority has no desire – either directly or through a third party – to "oversee" the Zone-related activities of FTZ 83 Zone Operators... "Overseeing" [previous operators'] operations -- that is, according to the Oxford English Dictionary, to "Supervise (a person or work), especially in an official capacity," would have been antithetical to the core principle of our Zone project.
>
> Neither we nor FTZ Corporation are in the business of supervising or directing any Zone participant in the way it conducts its day-to-day zone operations. Accordingly, neither the Grantee nor FTZ Corporation "oversees" Zone participants' operations. We do, however, employ a third-party expert – specifically the FTZ Corporation – to review, verify, and/or confirm that proposed and existing operations meet the requirements imposed by federal agencies for operation within the FTZ program. (Emphasis added.)

We appreciate that the November 7th email was submitted to us in an effort to remove any chance of a misunderstanding regarding the FTZ Board's interpretation and application of the statute and regulation with respect to the proposed BME #7 and BME #9, particularly with respect to the definition of the word "overseeing" (within the context of 15 CFR §400.43(d)), and the temporal nature of any "oversight" activity that FTZ Corporation may perform (*e.g.*, in that any oversight activity that FTZ Corporation may perform may not reach the level of "day-to-day" oversight). We disagree, however, with the conclusion that is reached in the November 7th email that the activities that FTZ Corporation would undertake under BME #7 and BME #9 do not constitute overseeing zone participants' operations.

As a threshold matter we note that the Oxford English Dictionary contains several definitions of the word "oversee." These definitions include: "to keep watch over" and "to examine the various parts of, inspect." The American Heritage Dictionary also defines the word "oversee" to mean "to subject to scrutiny; examine or inspect." We

note that none of these definitions mandate the conduct of any form of "day-to-day" activity.

First, with regard to the definition of the word "oversee," the October 1, 2014 e-mail states that FTZ Corporation would perform activities that include "verification that Operators are in compliance with Customs regulations," "[r]eview of proposed and ongoing FTZ processes," and "confirm[ing] that the proposed or existing practices of Zone participants meet [applicable federal] requirements...." We determine that these activities are the equivalent of "keep[ing] watch over," "inspect[ing]," "subject[ing] to scrutiny," or "examin[ing]" zone participants' operations.

Second, with regard to the public utility/uniform treatment provisions of the FTZ Act and FTZ Board's regulations, we note that if a grantee were to engage a single firm to "[r]eview" zone participants' "proposed and ongoing FTZ processes" – including tasking such a firm to determine whether all zone participants were "in compliance with Customs regulations" and/or "to review, verify, and/or confirm that proposed and existing [zone user] operations meet the requirements imposed by federal agencies for operation within the FTZ program" – such a firm would be uniquely positioned to potentially exercise significant influence over zone participants. The FTZ Board's regulations recognize that this type of arrangement holds the potential to impair the public utility/uniform treatment principles of the FTZ Act.[3] As a result, 15 CFR §400.43(d)(1)(iii) specifically includes "[o]verseeing zone participants' operations on behalf of a grantee" among the key functions that may not be undertaken on behalf of a zone grantee by a firm offering/providing zone-related products/services to zone participants.

Given this, and after consulting the FTZ Board member delegates on the matters discussed in this letter, we determine that the activities contained in FTZ 83's BME #7 and BME #9 are, in fact, encompassed by the key function of 15 CFR §400.43(d)(1)(iii). This determination is consistent both with the definition of the word "oversee" described above, and with the public utility/uniform treatment provisions of the FTZ Act and the FTZ Board's regulations.

15 CFR §400.43(d) precludes any firm that offers or provides zone-related products or services to zone participants from performing any "key function" on behalf of that zone's grantee absent a waiver from the FTZ Board specific to the performance of the key function in question. FTZ 83 requested and was approved for a waiver, subject to

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[3] *See, e.g.,* Foreign-Trade Zones in the United States, Proposed Rule; Request for Comments, 75 FR 82340, 82342 (Dec. 30, 2010) (noting importance of "preclud[ing] certain conflicts of interest that could otherwise lead to non-uniform treatment of actual or potential zone users by private firms that assist zone grantees in zone management"); *see also* Preamble, Foreign-Trade Zones in the United States, Final Rule, 77 FR 12112, 12131 (Feb. 28, 2012) (noting the "risk that zone users will experience implied pressure to procure a particular private party's services as a condition of obtaining access to the federal FTZ program").

certain conditions or limitations, pertaining to FTZ Corporation's performance of a different key function, namely "[a]pproving, or being a party to, a zone participant's agreement with the grantee (or person acting on behalf of the grantee) pertaining to FTZ authority or activity (including activation by CBP)", see 15 CFR §400.43(d)(1)(ii).[4] Therefore, if FTZ Corporation offers/provides zone-related products/services to zone participants in FTZ 83, it may not undertake for the zone's grantee activities that we have determined constitute the performance of the separate key function of 15 CFR §400.43(d)(1)(iii).

If you have questions regarding these matters, do not hesitate to contact myself or Elizabeth Whiteman at (202) 482-2862.

Sincerely,

Andrew McGilvray
Executive Secretary/Staff Director

[4] *See* Waiver Decision dated May 30, 2014.

## Andrew McGilvray

**From:** Rick Tucker <Rick@hsvairport.org>
**Sent:** Friday, November 07, 2014 5:31 PM
**To:** Andrew McGilvray
**Cc:** Paul Piquado; 'timothy.skud@treasury.gov'; Ronald Lorentzen; Elizabeth Whiteman; Tipten Troidl; 'joanna.theiss@trade.gov'; Jill Pollack; Scott McBride; Camille Evans; 'Alan Hanson (Alan_Hanson@shelby.senate.gov)'; 'Hines, Shannon (Appropriations)'; 'Rathburn, Kolo (Appropriations)'; 'Dunn, Jay (Shelby)'; 'Ronnie Flippo'; 'Vicki Wallace'; 'Greg Jones'
**Subject:** FTZ #83 Business Model

Andrew,

Thank you for your letter of October 29, 2014.

Based on all of our discussions and correspondence, I am now sure that our adjusted Business Model meets the letter and spirit of the Board's current regulations concerning operation as a public utility and uniform treatment.

As I noted in my earlier e-mail correspondence, we have decided to change our standard Operator Agreement from a three-party agreement to a two-party agreement between the Huntsville-Madison County Airport Authority as Grantee and each Zone Operator. In accordance with your advice, we have forwarded to GE a new two-party Agreement that will supersede the previously executed Agreement with GE. Also, we have recently been asked by Toyota for a copy of our standard Operator Agreement and have forwarded the new two-party Agreement to them. This will be our practice going forward. We are in the process of updating our Zone Schedule to reflect this change. Additionally, we plan to conduct a broader review of the Zone Schedule in order to assure ourselves that all of its stated policies are in compliance with your regulations. We will forward the new Zone Schedule to you when these tasks are complete.

In your October 29 letter you raised a concern about the appearance that certain activities of FTZ Corporation might constitute the key function of "overseeing zone participants' operations on behalf of the grantee." Let me assure you that the Huntsville-Madison County Airport Authority has no desire – either directly or through a third party – to "oversee" the Zone-related activities of FTZ 83 Zone Operators. An essential element of the way in which we employed FTZ Corporation to facilitate the Just-In-Time Zone-to-Zone collaboration between the Chrysler Electronics plant and its General-Purpose Zone suppliers was the principle that Chrysler and its suppliers must be able to conduct their Zone-related activities without interference from anyone. "Overseeing" those operations -- that is, according to the Oxford English Dictionary, to "Supervise (a person or work), especially in an official capacity," would have been antithetical to the core principle of our Zone project.

As Grantee of FTZ 83, we allow all users to conduct their own operations and accept direct Customs liability under their own FTZ Operators' bonds. Neither we nor FTZ Corporation are in the business of supervising or directing any Zone participant in the way it conducts its day-to-day zone operations. Accordingly, neither the Grantee nor FTZ Corporation "oversees" Zone participants' operations. We do, however, employ a third-party expert – specifically the FTZ Corporation – to review, verify, and/or confirm that proposed and existing operations meet the requirements imposed by federal agencies for operation within the FTZ program. This is nothing more than due diligence and good practice. We are no more interested in overseeing our Zone participants' operations than we are in having our professional auditors oversee our own.

Furthermore, I want to assure you that the Airport Authority has an interest in reducing any potential liability that may be associated with any and all of the services it provides. I can tell you that I have paid close attention to your new regulations concerning Grantee liability, and I can assure you that detailed operational oversight and/or direction to zone participants is not the business I want to be in. I do, however, recognize that as the Zone Grantee, the Airport Authority has a real responsibility for protecting the revenue of the United States. This is not unlike the Airport Authority's responsibility for reviewing, verifying and confirming that others who operate within its airport facilities meet various federal and state requirements for assuring the safety and well-being of airline passengers who use them. That said, do we (or FTZ Corporation) "oversee" the operations of Zone participants? No.

I hope this clarifies this matter for you; I believe it is important that we do not convey even the appearance that we or our contactors are operating in a manner that is not consistent with the many federal regulations to which the Airport Authority, its facilities, and its services to the public are subject. Based on our discussions and correspondence, I am now very comfortable in assuring you that our adjusted Business Model operates in a manner that does not require a waiver from the Board in order to comply with its regulations concerning operation as a public utility and uniform treatment.

Again, I want to thank you, Secretaries Piquado and Skud, Deputy Assistant Secretary Lorentzen, your staff (particularly Liz Whitman), and your colleagues within the Departments of Commerce and Treasury in helping us to reach a full understanding of the requirements of the Board's new regulations. Each and every one of you have been of great value to us as we have carefully examined the questions that must be addressed in order to assure ourselves and you that as we move forward with a Business Model that provides Zone participants a full range of choice regarding Zone-related services and products, we remain in compliance with both the letter and spirit of your regulations.

We look forward to our continued working relationship with you and your staff.

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