



October 13, 2016

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

Andrew Mayo  
Office of Economic Development  
City of Birmingham  
710 20th Street North, Third Floor  
Birmingham, AL 35203

Dear Messrs. Tucker and Mayo:

I am writing to your organizations – the grantees of Foreign-Trade Zones (FTZs) 83 and 98, respectively – to provide clarification pertaining to a grantee establishing a requirement for each operator within its FTZ to obtain periodic reviews of the operator's compliance with regulatory requirements. In February 2016, the FTZ Board issued a survey to grantees that included a question about any change(s) each grantee has needed to make as a result of the FTZ Board's uniform treatment regulation (15 CFR 400.43). In response to that question, FTZ 83 stated:

*Our Operator Agreements provide that each Operator will comply with all regulations (including CBP regulations) for operating in a Foreign-Trade Zone. The only means of confirming this is to have someone with the requisite knowledge take a look and make some sort of assessment.*

*Without the permanent, unconditional approval of our waiver request of January 14, 2015 (which seeks to enable our grantee organization to choose the professional service-provider who may confirm Operator compliance, while also enabling the Operator the freedom to choose their preferred service-provider), one of the following three predicaments will be imposed upon us:*

*1. We will be unable to utilize the professional of our choice to confirm any Operator's compliance with government requirements for the use of Zone procedures;*

2. We will be unable to require any Operator to hire a 3rd party of its choice to confirm that Operator's compliance with government requirements for the use of Zone procedures without that 3rd party first obtaining a Board waiver, because, by definition, that activity will be performed on our behalf; and would be performed by that same 3rd party as a service to the Zone participant; and according to the FTZ Board's definition of "Overseeing" (See letter of Andrew McGilvray dated December 29, 2014) to include, "inspect," "subject to scrutiny," "examine," "verification that Operators are in compliance with Customs regulations," "review of proposed and ongoing FTZ processes," or "confirming that proposed or existing practices of zone participants meet applicable federal requirements," would constitute a violation of the FTZ Board's Uniform Treatment regulations;

3. We will be unable to confirm any Operator's compliance with government requirements for the use of Zone procedures except through the use of our own permanent Airport Authority employee who must be properly trained and well-versed in the complexities of FTZ regulatory and operational complexities, and is willing to work for what we can afford to pay – at least until such time as that person realizes that the real money is in being a consultant.

In its response to the same survey question, FTZ 98 stated (in part):

*[T]he FTZ Board's interpretation of its own Uniform Treatment regulations calls into question whether any third party can review the operations of a Zone Operator if that review is in the interest ("on behalf of") a Zone grantee - which, given the terms of most Operator Agreements, could be regarded as occurring every time such a review is done. It may be that the City and other zone grantees have no third party mechanisms by which to assess Operator compliance, and, it may be that Zone Operators may someday have some trouble in meeting one of U.S. Customs core elements of Informed Compliance- that is the use of third-party experts for review and assessment.*

In the context of the statements quoted above, I am writing to address the matter of a grantee setting a requirement that each operator in the grantee's zone obtain from a third party of the operator's independent choosing periodic reviews of the operator's compliance with regulatory and other governmental requirements that apply to operators' FTZ activity. Setting a requirement that an operator obtain a review by a third party of its independent choosing does not, standing alone, render the review "on behalf of" the grantee within the meaning of 15 CFR 400.43(d)(1)(iii).<sup>1</sup>

---

<sup>1</sup> We also note that under 15 CFR 400.42(a), "zone participants shall not be required (either directly or indirectly) to utilize or pay for a particular provider's zone-related products or services." Any requirement set by a grantee for operators to obtain compliance reviews from third parties of the operators' independent choosing would need to be implemented in a manner consistent with 15 CFR 400.42(a).

Specific to the above quote from FTZ 83's survey response, a grantee establishing a requirement for each operator to obtain periodic compliance reviews from a third party of the operator's independent choosing does not mean that "by definition, that activity will be performed on [the grantee's] behalf." Similarly, specific to the above quote from FTZ 98's survey response, if a compliance review is "in the interest" of a grantee, it does not mean that the review is performed "on behalf of" that grantee. The above-quoted positions or concerns expressed by FTZ 83 and FTZ 98 appear to involve interpretations of the phrase "on behalf of" that extend beyond those required by the ordinary meanings of "on behalf of" (e.g., act for, act vicariously, appearing for, as agent for, be deputy for, be envoy for, be spokesman for, be the authorized agent for, be the authorized representative for, by proxy, representing, stand in for, substitute for). Such a construction would lead to the illogical conclusion that, for instance, audited financial statements are prepared "on behalf of" the U.S. Securities and Exchange Commission, rather than on behalf of the publicly held companies that procure the audits.<sup>2</sup>

In sum, a grantee is free to set a requirement for operators in the grantee's zone to obtain periodic compliance reviews from third parties of the operators' independent choosing. As expressed above, such a requirement would not make the conduct of those reviews "on behalf of" the grantee within the meaning of 15 CFR 400.43(d)(1)(iii). Therefore, a third party chosen independently by an operator to conduct such a review would not need to obtain a waiver for that activity from the FTZ Board under 15 CFR 400.43(f). I hope this information and clarification have been helpful to you. If you have questions regarding this matter, do not hesitate to contact myself or Elizabeth Whiteman at (202) 482-2862.

Sincerely,



Andrew McGilvray  
Executive Secretary/Staff Director

---

<sup>2</sup> See e.g., the summary of audit requirements on the website of the U.S. Securities and Exchange Commission at <https://www.sec.gov/investor/pubs/aboutauditors.htm>