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Mr. Andrew McGilvray
Executive Secretary
Foreign-Trade Zones Board
U.S. Department of Commerce
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Re: ***Comments on Proposed Change to Foreign-Trade Zones Board Regulations***

Dear Mr. McGilvray,

On behalf of MPM Silicones, LLC (“MPM”), we hereby respond to the Foreign-Trade Zones Board’s (“FTZB”) proposed change in regulations dated December 30, 2010 (“Proposed Regulation”).¹ These comments focus on the FTZB’s proposed treatment of goods subject to antidumping or countervailing duty (“AD/CVD”) order that are admitted into a zone, further manufactured, and re-exported. The Proposed Regulation would significantly alter the status quo by: (1) changing the existing presumption that duty-free admission of goods subject to AD/CVD order into a zone is non-controversial and supported by law; and (2) requiring the FTZB to oversee a burdensome and time-consuming *de-facto* trade remedy proceeding to determine whether the duty-free admission of these goods is in the public interest. We address these issues in turn.

¹ 75 Fed. Reg. 82,340 (Dec. 30, 2010).

I. FTZB's Proposed Regulation Eliminates the Presumption That the Duty-Free Admission and Re-Export of Goods Subject to AD/CVD Order is in the Public Interest

A. The FTZB's Existing Regulation

The FTZB's existing regulations at 15 CFR § 400.33 address its policy and practice governing the admission of goods subject to AD/CVD order. That regulation states:

§ 400.33 Restrictions on manufacturing and processing activity.

(a) *In general.* In approving manufacturing or processing activity for a zone or subzone the Board may adopt restrictions to protect the public interest, health, or safety. The Commerce Department's Assistant Secretary for Import Administration may similarly adopt restrictions in exercising authority under § 400.32(b)(1).

(b) *Restrictions on items subject to antidumping and countervailing duty actions -- (1) Board policy.* Zone procedures shall not be used to circumvent antidumping (AD) and countervailing duty (CVD) actions under 19 CFR parts 353 and 355.

(2) *Admission of items subject to AD/CVD actions.* Items subject to AD/CVD orders or items which would be otherwise subject to suspension of liquidation under AD/CVD procedures, if they entered U.S. Customs territory, shall be placed in privileged foreign status (19 CFR 146.41) upon admission to a zone or subzone. Upon entry for consumption, such items shall be subject to duties under AD/CVD orders or to suspension of liquidation, as appropriate, under 19 CFR parts 353 and 355.

To summarize this regulation, pursuant to 15 CFR § 400.33(a), the FTZB is given broad authority to adopt restrictions to “protect the public interest.” That said, 15 CFR § 400.33(b) articulates the FTZB's policy and regulation that specifically govern one type of restriction – those placed on goods admitted into a zone that are within the scope of an AD/CVD order. According to 15 CFR § 400.33(b)(1), the FTZB's policy is to prevent zone procedures from being used to circumvent AD/CVD orders.

That policy – as implemented in section 400.33(b)(2) –applies to each and every admission of goods subject to AD/CVD order into a zone. Section 400.33(b)(2) requires that

goods subject to AD/CVD order that are admitted into a zone must be assigned “privileged foreign status.” “Privileged foreign status” means that the goods admitted into the zone cannot benefit from an inverted tariff – *i.e.*, the AD/CVD goods cannot be reprocessed into another good outside the scope of an AD/CVD order that might enter the United States free of AD/CVD duties. Under privileged foreign status, even downstream goods will be subject to AD/CVD duties upon entry into the United States based on the quantity of AD/CVD goods incorporated in the downstream product. However, “privileged foreign status merchandise may be exported . . . without the payment of taxes and duties. . . .” *See* 19 CFR § 146.41(e).

The FTZB’s intent – to prevent the circumvention of AD/CVD duties on goods entered for consumption in the United States – is evident from the preamble to the regulations published in 1991. *See* Exhibit A. The preamble makes clear that a number of commentators asked the FTZB to broaden section 400.33(b)(2) to require that AD/CVD duties be imposed on goods subject to AD/CVD order even if those goods were admitted into a zone and subsequently re-exported. The FTZB rejected that request. It reiterated that “it has been the general policy of the Board that zone procedures should not be used to circumvent AD/CVD orders” and that section 400.33 “adopts an absolute requirement making all shipments of items covered by AD/CVD orders . . . if they entered U.S. Customs territory, subject to the privileged-foreign status requirement.” *Id.* However, the FTZB then immediately rejected broadening the regulation to cover AD/CVD goods ultimately re-exported from a zone. It stated that, “In precluding relief from the effects of AD/CVD orders under zone procedures for goods other than exports, the Board notes that the AD/CVD statute itself prescribes situations and procedures under which it is appropriate to make exceptions to AD/CVD orders.” *Id.*

The FTZB's statement can only mean that the "policy . . . that zone procedures should not be used to circumvent AD/CVD orders" only applies to goods that ultimately enter U.S. customs territory. The FTZB specifically noted that its carve-out for exports was consistent with the AD/CVD statute, which "prescribes situations and procedures under which it is appropriate to make exceptions to AD/CVD orders." *Id.* Any other reading of the regulations is wholly improper and fails to take account of the FTZB's regulatory framework.

B. The FTZB's Proposed Regulation

Under the Proposed Regulation at 15 CFR § 400.14, the FTZB requires that advance approval be obtained for all production activity in zones or subzones that involves, "a foreign article that would be subject (if it were to enter the U.S. customs territory) to an antidumping duty (AD) or countervailing duty (CVD) order or which would be otherwise subject to suspension of liquidation under AD/CVD procedures. . . ." Nowhere does the Proposed Regulation carve out admissions of goods subject to AD/CVD order that are used only in export activities from its advance approval requirements. On the contrary, the preamble to the Proposed Regulations explicitly states advance approval is required because "avoidance of antidumping or countervailing duties" has raised "public interest concerns."² Yet, these putative "public interest concerns" have only been raised recently, and involve a single U.S. industry participant seeking to preclude foreign status silicon metal from admission into FTZs,³ an action

² Proposed Regulations at 82,343.

³ Order No. 1730, December 20, 2010 (Docket 20-2009), Approved, with restrictions, the application of the Louisville & Jefferson County Riverport Authority, grantee of Foreign-Trade Zone 29, to establish Subzone 29K at the manufacturing facility of Dow Corning Corporation in Carrollton, Elizabethtown and Shepherdsville, Kentucky. Signed by Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Alternate Chairman of the Board (76 F.R. 771; January 6, 2011); Order No. 1731, December 20, 2010 (Docket 22-2009), Approved, with restrictions, the application of the Port of Moses Lake Public Corporation, grantee of Foreign-Trade Zone 203, to establish Subzone 203B at the manufacturing facility of REC Silicon in Moses Lake, Washington. Signed by Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Alternate Chairman of the Board (76 F.R. 88; January 3, 2011); Order No. 1554, March 28, 2008 (Docket 4-2007), Approved, with

which is not controversial under existing regulations. The FTZB should not alter decades of policy and practice based on the desires of a single participant in one U.S. industry, especially since the FTZB's stated public policy objective is "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."⁴ It should leave to the AD Enforcement office of the U.S. Department of Commerce and the U.S. International Trade Commission the responsibility of determining whether foreign status FTZ admissions should fall within the scope of an antidumping duty order. That is neither the FTZB's role nor within its area of expertise.

As such, the FTZB should codify in these regulations that, consistent with its prior policy and practice, foreign status admissions of goods subject to AD/CVD orders are non-controversial and do not warrant advance approval. MPM proposes that the FTZB revise the proposed regulations (with additions underlined) as follows:

§400.1 Scope

(a) This part sets forth the regulations, including the rules of practice and procedure, of the Foreign-Trade Zones Board with regard to foreign-trade zones (FTZs or zones) in the United States pursuant to the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a-81u). It includes the substantive and procedural rules for the authorization of zones and the regulation of zone activity. The purpose of zones as stated in the Act is to "expedite and encourage foreign commerce, and other purposes." The Foreign-Trade Zones Board has also recognized that a policy objective of zones is to create and maintain employment through the encouragement of operations in the United States which, for customs reasons, might otherwise have been carried on abroad. The regulations provide the legal framework for accomplishing this purpose in the context of evolving U.S. economic and trade policy, and economic factors relating to international competition.

restrictions, the application of the Capital District Regional Planning Commission, grantee of Foreign-Trade Zone 121, to establish Subzone 121C at the silicone-based products and intermediaries manufacturing facility of MPM Silicones, LLC, in Waterford, New York. Signed by David M. Spooner, Assistant Secretary of Commerce for Import Administration, Alternate Chairman of the Board (73 F.R. 19191-19192; April 9, 2008).

⁴ Proposed Regulations at 82,341.

§400.14 Production – activity requiring approval or reporting; restrictions

a) Activity requiring advance approval. Approval in advance by the Board (or notification to the Board under circumstances described in §400.37) is required for all production activity in zones or subzones which involves:

* * *

2) A foreign article that would be subject (if it were to enter the U.S. customs territory) to an antidumping duty (AD) or countervailing duty (CVD) order or which would be otherwise subject to suspension of liquidation under AD/CVD procedures, except for such goods that are used in production activity that is for export only...

II. Failure to Change the FTZB's Proposed Regulation Will Transform FTZB Reviews into Mini-AD/CVD Investigations That Significantly Increase the FTZB's Administrative Burden

U.S. trade law draws a bright line between the treatment of goods subject to AD/CVD order that enter the U.S. for consumption and those that do not. Goods that enter the U.S. for consumption must pay AD/CVD cash deposits and are reviewed annually by the U.S. Department of Commerce in administrative review proceedings.⁵ Goods subject to AD/CVD orders that do not enter the U.S. for consumption are not subjected to administrative reviews by the U.S. Department of Commerce.⁶ Consistent with that approach, the admission and re-export of foreign status merchandise has never been considered controversial by the FTZB or any other office within the U.S. Department of Commerce. The FTZB prevents circumvention of AD/CVD orders by requiring such goods be admitted into the zone under privileged foreign status, ensuring that AD/CVD duties are ultimately paid upon entry into the United States.⁷ However, the FTZB, until recently⁸, never questioned a grantee's ability to re-export those goods or downstream goods.

⁵ 19 U.S.C. § 1675.

⁶ 19 U.S.C. § 1675(a)(2)(A).

⁷ 15 CFR § 400.33(b)(2).

⁸ See fn 3.

By 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. For example, Proposed Regulation 15 CFR § 400.25(2), which parallels existing regulation 15 CFR § 400.31, requires the FTZB to evaluate the following criteria when considering subzone proposals:

- (i) Overall employment impact;
- (ii) Exports and re-exports;
- (iii) Retention or creation of value-added activity;
- (iv) Extent of value-added activity;
- (v) Overall effect on import levels of relevant products;
- (vi) Extent and nature of foreign competition in relevant products;
- (vii) Impact on related domestic industry, taking into account market conditions; and
- (viii) Other relevant information relating to the public interest and net economic impact considerations, including technology transfers and investment effects.⁹

⁹ Proposed regulation 15 CFR § 400.25, like its predecessor, lays out a two-part test for determining whether activity is in the public interest. First, the FTZB must consider whether certain threshold factors are implicated. If they are, then the proposed zone activity is not in the public interest. The threshold factors are:

- (i) The activity is inconsistent with U.S. trade and tariff law, or policy which has been formally adopted by the Executive branch;
- (ii) Board approval of the activity under review would seriously prejudice U.S. tariff and trade negotiations or other initiatives; or
- (iii) The activity involves items subject to quantitative import controls or inverted tariffs, and the use of zone procedures would be the direct and sole cause of imports that, but for such procedures, would not likely otherwise have occurred, taking into account imports both as individual items and as components of imported products.

The admission and re-export of goods subject to AD/CVD order does not implicate any of these threshold factors. First, this activity would not violate U.S. trade or tariff law, and there is no policy formally adopted by the Executive Branch that prohibits this activity. Indeed, the FTZB’s own policy has, for decades, allowed such activity. Second, such activity would not seriously prejudice the U.S. in any known tariff and trade negotiations or initiatives. Finally, the admission and re-export of goods subject to AD/CVD order does not involve goods subject to quantitative import controls or inverted tariffs (because the goods are being exported, the zone operator/user does not take advantage of an inverted tariff).

In addition, the FTZB is required to consider “the significant public benefit(s) that would result from the production activity, taking into account the factors”¹⁰ identified above.

The FTZB has no history of drafting lengthy opinions supported by a developed factual record that is available to all contesting parties. Even in “controversial” cases, such as the recently completed FTZB review of Dow Corning’s application for subzone authority, the FTZB’s preliminary findings were 3 double-spaced pages.¹¹ By comparison, when the U.S. International Trade Commission considers factors like the “extent and nature of foreign competition in relevant products” and “impact on related domestic industry” in antidumping investigations, it produces lengthy opinions that are supported by a substantial factual record.¹²

Moreover, as these proceedings grow more demanding, the threat of judicial review will grow as well. The FTZB is prohibited from taking any action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹³ Under this standard, when the FTZB issues a recommendation, the courts have stated that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹⁴ Moreover, the FTZB’s path must be “reasonably discerned.”¹⁵ The FTZB will not survive judicial scrutiny if “the notices do not explain why the Board imposed the conditions {on a proposed subzone}, how the conditions serve the public interest, or how the conditions conform the proposed subzones to the FTZA’s

¹⁰ Proposed Regulation 15 CFR § 400.25(a)(3).

¹¹ Foreign Trade Zone 29, Application for Subzone Authority, Dow Corning Corporation, Invitation for Public Comment on Preliminary Recommendation, 75 Fed. Reg. 31763 (June 4, 2010).

¹² See, e.g., *Circular Welded Carbon Quality Steel Line Pipe from China*, Investigation No. 701-TA-455 (Final), U.S. ITC Pub. 4055, January 2009 (202 pages of decision and factual findings).

¹³ *Conoco, Inc. v. United States Foreign-Trade Zones Board*, 855 F. Supp. 1306, 1311 (June 30, 1994) (“*Conoco*”).

¹⁴ *Id.*

¹⁵ *Id.*

requirements and Board's regulations."¹⁶ Thus, the FTZB does not have unfettered discretion to approve or deny subzone proposals. As in trade remedy investigations, the threat of judicial review will require the FTZB to develop more extensive fact-gathering procedures and to draft well-reasoned findings. This will create a significant burden on the FTZB, which does not currently have the staff or expertise to conduct lengthy and controversial administrative proceedings. It will also create a substantial burden on FTZ applicants, who will incur increased costs, both in money and time, as a result of these more complex and adversarial proceedings.

III. Conclusion

If implemented as currently drafted, the Proposed Regulation will create a massive new burden on the agency, place it in conflict with the duties and authority of other government agencies, and it will impose substantial costs and complexity on FTZ applicants. It is in the FTZB's interest and in the public interest for the new regulations to preserve the presumption that duty-free admission into FTZs and subsequent re-export of goods subject to AD/CVD duties should take place without advance approval.

Sincerely,



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¹⁶ Id. Consistent with this obligation, the FTZB may not defend its recommendations with speculation. The courts have stated in numerous cases that "speculation is not support for a finding." *Anshan Iron & Steel Co. v. United States*, 358 F. Supp. 2d 1236, 1241 n.2; 28 C.I.T. 1728, 1734 n.2 (2004) (citing *Asociacion Colombiana de Exportadores de Flores v. United States*, 704 F. Supp. 1114, 13 Ct. Int'l Trade 13, 15 (1989), aff'd 901 F.2d 1089 (Fed. Cir. 1990)). Rather, the FTZB must provide a reasoned explanation based on the data it has before it. *Conoco*, 855 F. Supp. at 1311.

EXHIBIT A

Section 400.33

Comment : There were numerous comments received both for and against paragraph (b) of this section. A number of parties favored the provision, maintaining that it should not be weakened. Some contended that it should be extended to exports. The opponents argued that the Board should not abdicate its authority to review cases involving antidumping (AD) and countervailing (CVD) duty orders on a case-by-case basis. They maintained that the provision conflicts with the Act, which allows Customs entries to be made on finished products leaving zones unless there is a public interest reason for denying this option. Reference was made to the anti-circumvention provision of the AD/CVD regulations as a more appropriate remedy.

Board Position: It has been the general policy of the Board that zone procedures should not be used to circumvent AD/CVD orders. During the early part of the past decade, this policy was reflected in case-by-case reviews with parties having an opportunity to present evidence as to why they should be allowed to make entries on the finished products leaving zones. In recent years, it became a general practice to require that privileged-foreign status (item classified in its original condition) be elected on items that are subject to AD/CVD orders upon admission to zones, with exceptions possible only on public interest grounds.

The new rule goes a step further and precludes exceptions. It adopts an absolute requirement making all shipments of items covered by AD/CVD orders, or items which would be otherwise subject to suspension of liquidation under AD/CVD procedures if they entered U.S. Customs territory, subject to the privileged-foreign status requirement. The provision recognizes the special nature of AD/CVD duties as a remedy for unfair trade practices. In precluding relief from the effects of AD/CVD orders under zone procedures for goods other than exports, the Board notes that the AD/CVD statute itself prescribes situations and procedures under which it is appropriate to make exceptions to AD/CVD orders.

The Board cannot agree with the argument that the anti-circumvention provisions of the AD/CVD statute adequately address the zone issue. Those provisions mainly involve procedures that make it possible to include within the scope of AD/CVD orders items on which minor alterations are made. They do not cover items that are subject to such orders when they arrive in zones, but are substantially transformed prior to formal Customs entry.

Excerpt from:

Foreign-Trade Zones in the United States, 56 Fed. Reg. 50790 (1991) (Final Rule).