



## Mississippi Coast Foreign Trade Zone, Inc.

Hancock, Harrison, & Jackson Counties

May 24, 2011

Mr. Andrew McGilvray  
Executive Secretary  
Foreign-Trade Zones Board  
International Trade Administration  
U.S. Department of Commerce  
1401 Constitution Avenue, NW.  
Room 2111  
Washington, DC 20230

Re: Docket Number ITA-2010-0012, RIN 0625-AA81

Dear Mr. McGilvray:

As the members of the Executive Committee of the Mississippi Coast Foreign-Trade Zone, Inc., Grantee of Foreign-Trade Zone No. 92, we are writing in response to the Foreign-Trade Zones Board's proposed regulatory changes as set forth in its Federal Register Notice of December 30, 2010.

The Mississippi Coast Foreign Trade Zone (FTZ No. 92) is a nonprofit corporation whose board of directors is appointed by five (5) public entities including:

- Gulfport-Biloxi International Airport;
- Harrison County Development Commission;
- Hancock County Development Commission;
- Jackson County Port Authority; and.
- Mississippi State Port Authority.

The Chief Executive Officers of the five organizations serve as the members of the Executive Committee of the Grantee Organization.

Foreign-Trade Zone No. 92 was approved by Board order 232 November 4, 1983 and was activated February 15, 1985. Its General-Purpose Zone consists of 13 sites in the three coastal counties of Mississippi and one site in Forrest County. FTZ No. 92 contains the following General-Purpose Zone and subzone users:

- General-Purpose Zone – Signal International, Channel Control Merchants
- Subzone 92-A – VT Halter Marine
- Subzone 92-B – Northrup Grumman Corporation
- Subzone 92-C – Northrup Grumman Corporation
- Subzone 92-D – Chevron USA Products Company



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FTZ No. 92 employed the Foreign-Trade Zone Corporation (FTZ Corp.) as its zone project administrator in beginning in 1996. In addition to adding several zone users, FTZ Corp. assisted in growing overall business through the zone, significantly improving compliance and relations with local port offices of U.S. Customs. Retaining the services of a zone project administrator that operates at “arm’s length” has been critical to our growth. In 2010, total Zone-related activity for FTZ No. 92 was \$13 billion; value added was \$500 million; and direct employment was 7,200.

FTZ No. 92 maintains the policy that zone users or prospective users are encouraged to utilize services of any FTZ trade compliance professional they wish. FTZ No. 92 utilizes the professional services of FTZ Corp. to guide us in training, advice and essential procedural enhancements. The philosophy of FTZ No. 92 is that of transparency, risk mitigation, compliance, confidence and sound business practices.

We are concerned that the proposed provisions set forth as Section 400.43 are overly intrusive and will result in more harm than good. We recognize that potential and current Zone users should always have freedom of choice in hiring FTZ trade compliance professionals. We believe that Zone users’ range of choice should include local Zone project administrators (defined in the proposed regulations as “Agents.”)

The proposed changes set forth in draft Section 400.43 are not productive when the true outcome is not fully defined for the Grantee and Zone user. The FTZ Board does not know what the outcome will be; however, based on our experience, we know this change will cost more and result in poorer services for Grantees and users. Furthermore, we believe that the proposed changes set forth in draft Section 400.43 go beyond the regulatory standard of establishing ground rules based on policy principles, and instead, unnecessarily intervene in the ways in which Zone Grantees enable Zone-related services to be provided to their communities. We acknowledge that the Board has broad discretionary authority in how it administers the U.S. Foreign-Trade Zones program. At the same time we believe that each Zone Grantee, having been granted the authority to establish, operate and maintain a Zone project should be allowed to exercise some reasonable degree of discretion in offering Zone services to the community. We accept and embrace public utility principles. We reject policies and actions that restrain trade or deny access to the Zones program. However, we fail to see the sensibility in the proposed regulations’ attempt to preclude behavior on the part of “Agents” or service providers to Grantees that result in restraint of trade by offering a solution that consists entirely of a measure that enforces restraint of trade. Rather than adopting a “one-size-fits-all” rule, we believe that the Board should set forth a principle – specifically, that potential and current Zone users have freedom of choice in hiring FTZ trade compliance professionals for applications, activations and software – and use the Board’s enforcement provisions to deal with offenders.

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This would be in keeping with the rule generally attributed to Hippocrates (and repeated in the Board's public forum on the proposed regulations in Washington, D.C.), "First, do no harm." Lest there be any misunderstanding about "harm done," we would like to point out what would happen if the current proposals in Section 400.43 are adopted.

As noted in the Board's public forum in Washington, D.C., the number of Grantees who have contracted with private firms to provide certain Zone-related functions has generally increased in recent years. This is not at all surprising given the complexities of the Zones program and the fact the most Grantees' core business (or in our case, the core business of our volunteer Board members and their organizations) is something other than running Foreign-Trade Zones. Even in the case of larger local governmental or public organizations (which are typically among the population of Zone Grantees) certain functions (*e.g.* maintenance or engineering) are conducted in-house if the specific task is relatively simple, or alternatively, contracted out if the task is more complex. This is the case even if the nature of the complex task (*e.g.* repairing or upgrading an electrical system) is relatively alike to that of the simple task. The reason why Grantees hire and share Zone Project Administrators is the same reason that local municipalities, port and airport authorities, and economic development agencies (and even electrical power suppliers) occasionally hire and share outside electricians. The economic rule is pretty simple: It is not cost effective to maintain an in-house electrical department that is capable of dealing with all of the complexities that may (or may not) arise in maintaining or upgrading the electrical system of a given enterprise or individual. Likewise, some electricians do work for local power companies and individual members of the public, just as some Zone Project Administrators do work for the local Grantee and for individual members of the local trade community. If, however, the local Zone Project Administrator is forced by government regulation to choose between one set of clients and another, that person will do what any sensible service provider would do – he or she will go where the money is. When discerning where the money is – that is, for-profit companies engaged in international trade versus local public entities – the answer to the question of which set of clients most competent service providers will choose is easy: For-profit companies engaged in international trade.

Who loses? Grantees. Grantees (who as a group have demonstrated the need and economies of scale for engaging outside expertise) will be forced to: 1) settle for less-capable Zone Project Administrators, or, 2) pay more for the expertise they need (whether that expertise be in-house or contract expertise).

Who else loses? Zone users. Zone users will be forced to use consultants who, as a rule, charge more for Zone-related services than do local service providers. With less capable local expertise at hand to assist in resolving local operational or Customs issues, Zone users will be forced to call upon more expensive national in scope service providers who,

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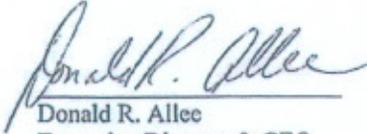
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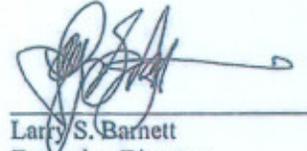
because of the size of their practice and the likelihood of the necessity to travel, may not be available in as timely a fashion as may be necessary to resolve issues that, if acute enough, could even affect the production or shipping schedules of Zone users.

We appreciate the opportunity of commenting on this very important issue, and look forward to reviewing a more practical solution to the issue of conflicts of interest being addressed by the Board in its proposed regulations.

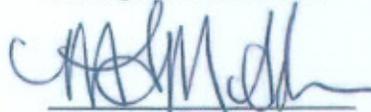
Additionally, we have asked our Legal Counsel to review several issues raised by the proposed regulations from both a policy and legal perspective. Those comments are included as an attachment.

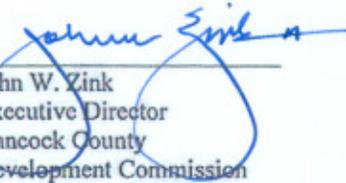
Respectfully submitted by,

  
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Mississippi State Port Authority  
At Gulfport

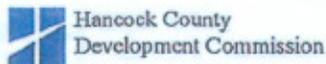
  
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Attachment



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May 23, 2011

Mr. Andrew McGilvray  
Executive Secretary  
Foreign-Trade Zones Board  
International Trade Administration  
U.S. Department of Commerce  
1401 Constitution Avenue, NW, Room 2111  
Washington, DC 20230

Re: Docket Number ITA-2010-0012, RIN 0625-AA81

Dear Mr. McGilvray:

As legal counsel for Mississippi Coast Foreign-Trade Zone, Inc., Grantee of Foreign-Trade Zone No. 92, we offer the following comments to the Foreign-Trade Zone Board's proposed regulatory changes as set forth in its *Federal Register* Notice of December 30, 2010.

## 1. Definition of "agency"

Proposed regulation section 400.2(b) defines "agent" as "a person ... acting on behalf of or under agreement with the zone grantee in zone-related matters." We believe the proposed definition of "agent" might create unforeseen issues, and we urge you to carefully review the potential consequences of proposed section 400.2(b). Every person "under agreement with the zone grantee" will not *also* be an agent of the grantee. One obvious example is that zone users act "under agreement" with the zone grantee but are not typically "agents" of the grantee. Zone users do not have authority to act on the grantee's behalf or bind the grantee to a contract with a third party, the hallmarks of any agency relationship. The same would hold true of the various contractors who are "under agreement" with a grantee to provide goods or services relating to operation or

management of the zone. In this sense, proposed regulation 400.2(b) appears to be overbroad.

## 2. Conflicts of interest

Section 400.43 proposes new regulations intended to further the statutory mandate of uniform treatment by precluding certain activity deemed to be “conflicts of interest.” However, as Zone No. 92 points out in the comments to which this letter is attached, proposed section 400.43 would preclude the now-common practice of zone users and potential users hiring consultants who also hold the position of zone project administrator for the same zone. As Zone No. 92 explains, both grantees and users will suffer a significant negative impact as a result of that rule.

The expected negative impact of section 400.43 on grantees and users is not consistent with the basic regulatory philosophy and principles set forth in Section 1 of Executive Order #12866, which has governed the federal regulatory system for almost two decades.

### *a. Consideration of costs to grantees and users*

Section 1(b)(6) of Executive Order #12866 states, “Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” We urge the Board, in making its cost-benefit analysis, to give further consideration to the significant costs of section 400.43—to grantees, zone users and potential users—as discussed in the comments provided by Zone 92.

### *b. Focus on performance objectives rather than specific behavior*

Section 1(b)(8) of Executive Order #12866 requires, “Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying behavior or manner of compliance that regulated entities must adopt.” We propose that the Board consider emphasizing ways to insure the performance objective of “uniform treatment” rather than focusing on prohibiting transactions that may technically fall under the proposed definition of “conflict of interest” but that do not, in fact, result in disparate treatment of zone users.

As a potential starting point, we refer you to the *Armco Steel* opinion by the U.S. District Court for the Southern District of New York. In that opinion, affirmed by the U.S. Court of Appeals for the Second Circuit, the District Court held that a grantee met the “uniform treatment” requirement of 19 U.S.C. § 81n by committing to offer all areas within the zone at the “same arrangements under similar terms and conditions.” *Armco*

*Steel Corp. v. Stans*, 303 F. Supp. 262, 270 (S.D.N.Y. 1969), *aff'd* 431 F.2d 779, 789 (2d Cir. 1970). The *Armco Steel* opinion indicates that a prohibition on conflicts of interest is not required by the Foreign-Trade Zones Act, as long as all users are given the "same arrangements under similar terms and conditions."

*c. Narrow tailoring to impose the least burden*

Section 1(b)(11) of Executive Order #12866 provides, "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of different sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives...." Section 400.43 could be much more narrowly tailored to achieve its objective of uniform treatment while imposing significantly less of a burden on users and grantees. We urge the Board to consider ways of mitigating conflict of interest concerns without precluding the common practice of zone users and potential users hiring consultants who also serve as the zone's project administrator.

**3. Confidential Complaints**

We also urge you to carefully consider proposed Section 400.46(a), which allows for confidential complaints to the Executive Secretary by zone participants who believe "conditions or treatment" in a zone are "inconsistent with the public utility and uniform treatment requirements of the FTZ Act and [the] regulations." The proposed regulations do not make clear how confidential complaints would be handled and resolved. Before any fine or other consequence could be imposed on a party as the result of a confidential complaint, it would seem that Constitutional due process under the Fifth Amendment may require adequate notice, including disclosure of the identity of the complainant, and some form of hearing. To the extent Section 400.46(a) could be construed otherwise, we believe it has the potential to result in a series of lawsuits.

We believe the comments and recommendations set forth above will expedite and encourage foreign commerce and are consistent with the Board's intent. We appreciate your consideration of these comments.

Sincerely,

HAILEY, MCNAMARA, HALL,  
LARMANN & PAPAIE, LLP



Richard B. Tubertini

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