

RECEIVED  
FOREIGN-TRADE ZONES BOARD

May 12, 2011

2011 MAY 26 AM 10: 23

Mr. Andrew McGilvray  
Executive Secretary  
Foreign-Trade Zones Board  
U.S. Department of Commerce  
1401 Constitution Avenue, N.W.  
Room 2111  
Washington, D.C. 20230

OFFICE OF THE  
EXECUTIVE SECRETARY

RE: Comments to Federal Register Notice of Proposed Amendments to Foreign-Trade Zone Regulations (Docket No. 090210156-0416-01)

Dear Mr. McGilvray:

The Federal Register notice referenced above, has generated considerable thought. In particular, the following comments are focused on proposed amendments pertaining to Section 400.43 -- Uniform Treatment. The proposed amendments would create circumstances that have the de facto effect of eviscerating the on-going practice of Grantee-independent contractor agreement for out-sourced zone administration expertise and services.

The Board's supporting rationale suggests that conflict of interest, the abuse of power and position, and the lack/impairment of uniform treatment arise from such grantee-independent contractor agreements. The Board's logic continues that if the contract model of Grantee-independent contractor is disallowed, then the unlawful behavior/violations would not be possible.

Rather than enforce existing laws and punish individual wrongdoers and acts of noncompliance, the Board has, instead, proposed amendments which would contravene and deny myriad rights and protections embodied in law and at equity. The obvious negative impact is on Grantees, contractors and the user public, but also there is a negative impact and a chilling effect on the zones program itself -- its intent and objectives as envisioned by Congress.

In the Background section (page 82341) the Board states that "Continued interest in zones on the part of both communities providing zone access as part of their economic development efforts and firms using zone procedures to help improve their international competitiveness, demonstrates zones' importance to international trade and to investment in the domestic economy."

May 12, 2011

Page 2

To deny Grantees and zone services providers the ability to enter into necessary contractual arrangements which make possible the lawful conduct of zone operations, is to deny the Board's own above-stated objective. Especially, this impairs fair access to the zones program by less economically developed or advantaged community providers of zone access and thus, also, to the very firms who might locate in these communities and use the zone procedures.

Ironically, the Board's proposed amendment would result in exactly the converse of the Board's stated intent - that is - a lack of uniform treatment would be affirmatively created, and moreover, tipped in favor of the economically advantaged communities.

The Board's proposed amendments patently contravene the statutory law (19 U.S.C. 81n) which affords "all who may apply to make use of or participate in the zone project uniform treatment under like conditions."

Denial of access to the zones program occurs when smaller, less economically advantaged or developed economic areas cannot afford to have on staff, personnel possessing the requisite expertise to operate and administer a foreign-trade zone and all its complexities, not just with the foreign-trade zone laws, but also with Customs and Border Protection and others.

The fair opportunity to access exists when, as is common practice throughout commerce, there is an out-sourced contractual arrangement between a Grantee and a zone services provider, whereby the Grantee is able to engage the requisite expertise to run a zone under the full requirements and parameters of the laws which would exist whether that zone services provider is in-house personnel or out-sourced.

Clearly, the laws which apply and which, of course, must be adhered to by all, are not affected by the contractual nature of the parties who must follow the law at all times. Instances of abuse of power and position, conflict of interest and other impairments must be addressed case-by case as they occur, in fact.

The Board's proposed amendment denies the freedom to contract. There is no rational basis in law to support this proposed action.

The Board's proposed amendment denies protections of the Commerce Clause of the Constitution. There is no rational basis in law to support this proposed action.

The Board's proposed amendment is in restraint of trade. There is no rational basis in law to support this proposed action.

May 12, 2011

Page 3

The Board's proposed amendment has an ex post facto punitive and discriminatory effect. There is no rational basis in law to support this action.

The Board's proposed amendment actually and ironically creates an obvious and expansive lack of uniform treatment. It, de facto, benefits wealthy areas and, at the same time, punishes less advantaged communities and developing communities.

The Board's proposed actions are discriminatory, arbitrary and capricious.

The punitive effect of the measures proposed by the Board are particularly harsh and unjust in these difficult economic times when states and municipalities are laying off teachers, police and firefighters. Communities strive desperately to increase economic sourcing and also to save on spending wherever possible. Outsourcing has been a valuable tool.

To properly fill an in-house position with staff possessing the sophisticated, legally complex skills of an FTZ administrator would be relatively costly. Outsourcing is a smart, responsible answer.

The zones program and the Board's concerns are better served by communities/Grantees employing/contracting with the best expertise possible. The complex and highly legalistic nature of zones including interaction with Customs and Border Protection requires specific knowledge and expertise. With such expertise in place, there is much better ability to use the zones program as intended by the Congress, and for such use to be compliant with law.

The Board's proposed amendments have no basis in equity/equitable treatment under the law. Detrimental reliance has been created because such programs have been established, and Grantees, and especially the user public, have made significant investments based reliance on the existing law and practices.

#### THE PROPOSED GRACE-PERIOD REMEDY

To provide a grace period for compliance is not a remedy for the Board's proposed inequality to access and the denial of uniform treatment by communities and by the user public, which would functionally result from the proposed amendments. This is because, as has been explained above, not all communities would be able to simply move their business model over to an in house staff scenario - due to cost - and also to legal representations made to the community.

May 12, 2011

Page 4

Grantees cannot afford to hire on-staff, the necessary expert personnel. Zones programs have been founded by city governments responsible to their citizenry, based on the right to contract within the current existing law.

The zone user public has relied on and made significant business choices and investments based on the existence of and offerings of the zone program as it exists in the community.

The Board's idea that a community could now, any more than previously, just fund and hire someone in-house within a couple of years, per the grace period, is not feasible.

Moreover, to charge the cost of this as a pass-thru to the user public would be inherently un-uniform and unfair in treatment. This would clearly disadvantage/discriminate against developing and economically disadvantaged communities.

The Board's proposed amendments create liability and undue hardship for Grantees when the FTZ Board retroactively changes law that puts a Grantee in jeopardy of defaulting on its contractual representations to the user public, its citizenry and others.

These contractual representations pertain to the written, published and duly signed and agreed to Zone Schedule which is the public utility rate required by the Board and by law.

The arbitrary and capricious proposed amendments might resolve the concerns of the Board. However, the proposed amendments would effectively throw the Grantee under the bus to explain and defend the changes, defaults and breaches which would arise due to the proposed amendments.

## REMEDIES

Remedies and means of enforcement already exist without the need for the Board's proposed amendments.

So, what is the remedy for unlawful behavior/violations such as non-uniform treatment, impairment of use, conflict of interest and other concerns of the Board? The remedy is to cite violations and punish wrongdoers by enforcing existing law. If additional enforcement measures and penalties are needed, amendments might be useful.

May 12, 2011

Page 5

The requisite laws exist -- in many forms -- which provide and assure uniform treatment. Laws are intended to be and must be followed by all. The nature of the zone services provider contractual relationship, in-house or out-sourced, is irrelevant. If a party is not following the laws, remedies already exist to manage the violation/punish the wrongdoer.

The Board's proposed amendments impose undue hardship and are in violation of law and equity because a remedy already exists, has been relied upon and is effective.

The published utility rate called a Zone Schedule assures consistent, equal treatment to all, as required by law. The Zone Schedule is a zone's governance, a written, published, agreed to, binding contract of rules for zone use by all parties -- the Grantee, its out-sourced zone personnel, all operators and users. By law, under the published Zone Schedule, there can be no contract provision, term or condition which prohibits or impairs the user public's ability to freely contract and engage other zone service providers for help, nor can the Zone Schedule impair the user public's right to use the zones program in compliance with law.

#### CONCLUSION

Uniformity of treatment, conflict of interest, abuse of power and position and other concerns of the Board are already addressed by existing laws. These laws need only to be enforced -- against the individual wrongdoer. The broad brush approach of the proposed amendments contravenes law and equity and ironically would, in fact, create impairment and unfairness in the use of the program.

The proposed amendments result in a negative impact, as well as a chilling effect on communities, grantees, and the user public and also as the Congress envisioned the zones program to serve the interests of the country as a whole.

In summary, the outsourcing- of- zone- services contract model is a common practice, typically used throughout the commercial world. For the zones program, this model allows, and in a real sense, creates fair access to the zones program.

All parties must comply with laws, irrespective of the parties' roles in the contractual set-up, whether in-house or out-sourced. There are already laws which govern, and there are already remedies in place for enforcement against violators.

May 12, 2011

Page 6

The retroactive effect and the de facto discrimination of the proposed amendments would be harsh and punitive, effectuate detrimental reliance and create default and liability and needless lawsuits and all the exploitive expense that no one can afford, all of which time, energy and money could otherwise go forward into the development and sustenance of the positive efforts and beneficial results of this trade program.

Respectfully submitted,

*Patricia A Parker, Esq.*  
Patricia Parker  
Foreign-Trade Zone No. 265