



**THE FOREIGN-TRADE ZONES BOARD**  
**UNITED STATES DEPARTMENT OF COMMERCE**  
**INTERNATIONAL TRADE ADMINISTRATION**  
**IMPORT ADMINISTRATION**

**REQUEST FOR COMMENTS ON**  
**THE FOREIGN-TRADE ZONES BOARD PROPOSED RULE TO AMEND**  
**15 CFR PART 400: REGULATIONS OF THE FOREIGN-TRADE ZONES BOARD**  
**DOCKET NO. 090210156-0416-01**  
**RIN 0625-AA81**

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Comment Submitted Electronically On: April 19, 2011

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**I. INTRODUCTION**

I would like to thank the Foreign-Trade Zones Board (the “Board”) for inviting public comment on this promulgated rule, and welcome this opportunity to submit the following remarks regarding the proposed amendments to the substantive and procedural provisions for the authorization and regulation of Foreign-Trade Zones (“FTZs” or “zones”). I am currently a second-year law student at Villanova University School of Law, and am concurrently pursuing a Master of Public Administration degree at Villanova University Graduate College of Liberal Arts and Sciences. I write on my own behalf as an advocate of efficient government administration and effective, competitive international trade. My limited expertise pertains to federal legislation and state-based legislative lobbying, yet my current educational focus centers on international relations and business transactions. Please note that the opinions expressed in this comment represent my personal views, and do not necessarily reflect the positions or views of

Villanova University School of Law or Villanova University Graduate College of Liberal Arts and Sciences.

Due to the comprehensive nature of these revisions, this comment will address a limited number of changes relating to production, manufacturing, value-added activity, uniform treatment of zone users, compliance issues, and enhanced enforcement abilities. Overall, I consider vast portions of these amendments necessary to modernize FTZ regulations and further reduce the economic burden on large and small businesses involved with FTZ activities, while continuing to provide American firms with a competitive advantage in international trade. Moreover, many of these changes simply codify current procedures which have evolved through interpretation of Board decisions<sup>7</sup> and generally accepted practices in the industry.

I begin in Section II by briefly describing FTZs, this proposed rule, and the general issues on which the Board seeks comment. Additionally, I believe the inevitable progression towards accommodating the public interest is preserved within these new provisions. Section III accordingly investigates how and why the greater public interest plays such an influential role with respect to zone activity approval and subsequent policies. While I do applaud the regulation in its current form and commend the Board for taking such a substantial step in modernization legislation, several improvements could be made to specific segments of 15 CFR Part 400. Section IV thus contains a detailed discussion on the numerous highlights as well as potential clarifications of §§ 400.2, 400.3, 400.14, 400.15, 400.42, 400.43, and 400.62. Section V then sets forth a brief conclusion.

## II. BACKGROUND

FTZs were designed to significantly lower the costs of United States-based operations engaging in international trade; since the initial authorization act of 1934, FTZs have continued to play a central role in tariff and tax relief for qualifying institutions.<sup>1</sup> The Foreign Trade Zone Act (“FTZA”), found in 19 U.S.C. §§ 81a-81u, delineates the required statutory authority for creating these geographic regions and affording preferential duty treatment to activity resulting in goods eligible for U.S. entry and consumption.<sup>2</sup> These physical restricted-access areas are located in or near U.S. Customs and Border Protection (“CBP”) ports of entry, yet considered outside of Customs territory for the purpose of duty payment.<sup>3</sup> Duty-free treatment is afforded to goods and items that are brought into FTZs and custom tariffs are not assessed until the goods formally enter U.S. Customs Territory for domestic consumption.<sup>4</sup> However, actions taken by entities within a zone must not conflict with domestic trade policy, harm industry, or injure other domestic plants outside of zones.

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<sup>1</sup> Foreign-Trade Zone Resource Center, A Brief History of the U.S. Foreign-Trade Zones Program, <http://www.foreign-trade-zone.com/history.htm> (last visited Apr. 17, 2011).

<sup>2</sup> See 19 U.S.C.A. §§ 81a-81u (West 1996).

<sup>3</sup> See *supra* note 1.

<sup>4</sup> The National Association of Foreign-Trade Zones, Benefits of FTZs, [http://www.naftz.org/index\\_categories.php/ftzs/5](http://www.naftz.org/index_categories.php/ftzs/5) (last visited Apr. 17, 2011).

There are currently 277 operational zones located in various parts of the country, into which foreign and domestic merchandise may be moved for a myriad of operations.<sup>5</sup> Zone related activities effectively retained employment and capital investment opportunities to the tune of over 330,000 workers and a combined value of shipments exceeding \$430.6 billion in 2009.<sup>6</sup> This amount includes nearly \$30 billion in U.S. exports, and accordingly represents the total value of commercial operations that remained within America, preventing job loss and divestment to foreign locations.<sup>7</sup>

Zone activity functions include, but are not limited to, assembly, storage, packaging, testing, manufacturing, and processing of goods.<sup>8</sup> Additionally, merchandise that is shipped to foreign countries from one of these zones is exempt from duty payments; re-exporting from any zone after activity incorporates merchandise into a downstream product avoids U.S. duties. This latter provision is especially important to corporations importing components to manufacture finished products intended for export, such as consumer electronics or crude oil refining and other petroleum applications.

The current FTZ regulations were last substantively revised in 1991; emerging issues within the realm of international trade mandate an updated approach which continues economic developmental efforts, improves competition, and maintains substantial investments in the domestic economy. Among the issues on which the Board seeks comment include the adequacy of the proposed definitions, the future impact of zones on American industry, and whether further modifications should be made to existing safeguards, enumerated powers, or other oversight concerns. The following discussion generally supports the Board's proposals to expand and enhance the application and use of FTZs. However, the propagated rules must not be overly simplified or restructured, as they may inadvertently lead to misuse or abuse of zone privileges.

### III. EVOLUTION OF "PUBLIC INTEREST"

The international marketplace today resembles nothing like the world has ever seen; multinational enterprises exist in numerous countries and it is rare to find a major corporation with a single base of operations. Free trade agreements, bilateral agreements, and other international treaties are now prevalent in both developing and developed countries. The traditional notion of free trade implies efficiency and relationships which allow components to be cheaply obtained; therefore, to stay competitive in our globalized

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<sup>5</sup> Gary Locke and Timothy F. Geithner, 71<sup>st</sup> Annual Report of the Foreign-Trade Zones Board to the Congress of the United States at 1-2 (Nov. 2010), available at <http://ia.ita.doc.gov/Ftzpage/annualreport/ar-2009.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> Texas Office of the Governor Economic Development and Tourism division, Texas Foreign Trade Zones at 1-2 (Feb. 2011), available at <http://www.texaswideopenforbusiness.com/assets/documents/fdi/Texas-General-Foreign-Trade-Zones.pdf>.

<sup>8</sup> Foreign-Trade Zones Board, What Activity is Permitted in Zones?, <http://ita-web.ita.doc.gov/FTZ/OFISLogin.nsf> (last visited Apr. 17, 2011).

economy, companies must use parts from around the world to balance quality and price.<sup>9</sup> Unfortunately, when a U.S. company is presented with enough incentives to relocate abroad, a domino effect ripples through the economy, affecting other domestic operations and ultimately the American consumer.<sup>10</sup> Due to tax penalties associated with operating a business in the U.S., international trade is often frustrated, stifled, or simply taken elsewhere.

Modern economic thought consistent with Adam Smith's rationalization for the integration of world economies argues "that it is the natural progression of an economy to move from a manufacturing and industrial power to more of a service power, exporting the production of goods for the efficiency of the overall economy."<sup>11</sup> As it is now generally an economic necessity for foreign businesses to serve the American economy in order to remain competitive, removing such incentives (tax and otherwise) to supply the U.S. market from abroad shifts the cost-benefit analysis of relocating, increases the ability to retain U.S. domestic manufacturing, and attracts new business.<sup>12</sup> Consequently, by expanding FTZ benefits and offering tariff rates comparable to international competitors, the domestic economy retains valuable operations.

Initially, Congress intended the FTZA to provide a public interest through re-export trade and trans-shipments; as a centrally located country, government officials saw the potential opportunity as a middleman in international trade.<sup>13</sup> Today the focus has shifted to increased employment opportunities; driving public policy encourages the creation and maintenance of U.S. operations which otherwise might have been carried on outside the country.<sup>14</sup> The current § 400.31 demonstrates how the Board designed the 1991 revision to incorporate domestic policy and more definitively determine what exactly the public interest was by defining the "net economic effect" of certain activity.<sup>15</sup>

Since 1994, NAFTA has also played a pivotal role in trade and has arguably damaged domestic manufacturing facilities and capabilities.<sup>16</sup> Furthermore, the emerging economies of China, India, and the escalating power of the European Union, attempt to overtake American dominance in international trade. Through this complex web of interactions, the Board must also navigate amongst parties who share the belief that their interests are most aligned with that of the general public. Effective oversight must therefore permeate through all zone activity and the Board must have the necessary tools to limit abuse. The charge in § 400.31(b) to restrict or prohibit activity found

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<sup>9</sup> Zachary T. Lee, *Leveling the Trade Playing Field: The Ailing U.S. Manufacturing Sector and the Need for Trade Parity*, 20 Ind. Int'l & Comp. L. Rev. at 372 (discussing the key aspects and practices involved in international trade, and those U.S. policies which encourage domestic manufacturers to retain operations in the U.S.).

<sup>10</sup> *Id.* at 380 (explaining the negative implications following relocation of U.S. manufacturer abroad).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 381 (discussing importance of U.S. markets in international trade).

<sup>13</sup> *Id.* at 375 (discussing Congressional intent when creating FTZA).

<sup>14</sup> John P. Smirnow, *From the Hanseatic Cities of the 19<sup>th</sup> Century Europe to Canned Fish: The Radical Transformation of the Foreign Trade Zones Act of 1934*, 10 T.M. Cooley L. Rev. 697.

<sup>15</sup> *Id.* at 721 (discussing threshold provisions enacted to empower Board with public policy oversight).

<sup>16</sup> 20 Ind. Int'l & Comp. L. Rev. at 353-368.

“detrimental to the public interest” exemplifies the refocused ideology as compared with what existed in 1934.<sup>17</sup>

In this proposed rule, the Board has further clarified procedures for effective monitoring and review of zone activity.<sup>18</sup> Zone status may only remain operational if the grantees are in compliance with the stated public interest; changed circumstances may also necessitate a renewed approach or enacting possible restrictions to zone activity.<sup>19</sup> Although both § 400.25 and § 400.38 of the 2010 regulation are substantively unaltered from many 1991 sections, there is a stronger emphasis on product evaluation and stricter requirements to meet the significant public benefit standard. Furthermore, the streamlined approach and general ease of use alleviates unnecessary complications and confusions commonly stumbled upon when applying the current, more-disjointed rules.

Though these changes are minor, the Board continues to recognize the importance of public influence, while creating a proper balance between FTZ flexibility and oversight. Specificity, documentation, reliability, and guidance provide the foundation for effective public accountability. Regulators will continue to enforce and industry-members willingly comply with program rules that are more transparent to public needs and facially hold merit. The financial and influential value gained from public acceptance supplements the significant benefits FTZs provide to public corporations and the American economy by and large.

#### **IV. DISCUSSION OF REVISED SECTIONS**

##### **A. § 400.2 Definitions.**

Traditionally the CBP has applied the “substantial transformation” test to determine whether zone activity has constituted significant change for an existing product to become something “new and different.”<sup>20</sup> The 1991 regulations define “manufacturing” as “. . . activity involving the substantial transformations . . . resulting in a new and different article having a different name, character, and use.”<sup>21</sup> Moreover, “processing” is defined as “. . . any activity involving . . . other than manufacturing, which results in a change in the Customs classification . . .” Yet, in our modern trade environment this standard has simply become unworkable. When FTZ activity combines an imported component with one or more other components to create a different finished product, confusion over applying the proper technical classifications results in categorical errors.

This proposed regulation will abridge application of a unified concept, “production,” with a single set of procedures for any type of zone activity “. . . which

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<sup>17</sup> See 15 C.F.R. § 400.31(b) (West 1991).

<sup>18</sup> See 15 C.F.R. § 400.25 and § 400.38 (Proposed 2010).

<sup>19</sup> See 15 C.F.R. § 400.38(a) (Proposed 2010).

<sup>20</sup> Charles Routh and Garvey S. Barer, *Don't Let your Client Import Trouble: A Few Pointers on Customs Law*, SN056 ALI-ABA 173 (May 8-10, 2008).

<sup>21</sup> See 15 C.F.R. § 400.2(g) (West 1991).

results in a change in the customs classification of an article or in its eligibility for entry for consumption . . .”<sup>22</sup> Furthermore, this simplified process will bring zone operations closer in line with international treaty obligations such as the reporting requirements of the United Nations Conventions on Contracts for the International Sale of Goods (“CISG”).<sup>23</sup> The bill of lading, insurance documents, and other items necessary for international trade require specific information prior to the transfer of goods; the unitary “production” term will no longer burden contract negotiations or delay shipments because of miscommunication or mistake with paperwork.<sup>24</sup>

A caveat I do maintain once again relates to the Board’s oversight ability of zone activities. Because there will be less intrusion into the production process, as is currently necessary to differentiate between manufacturing or processing, corporations may become lenient in their strict application of approved zone operations. Infringement of protected domestic production capabilities and violations of the public benefit requirement are possible without proper monitoring and proficient supervision.

### **B. § 400.3 Authority of the Board.**

While this section has not been subject to any substantive alterations from the current 1991 version, I suggest that the Board take into account shortcomings within the zone approval process to ensure that the criteria for zone selection is consistent with the legislative intent behind the FTZA.<sup>25</sup> In addition, criticism surrounds the manner in which zone status is granted. The public benefit of expanded re-export business and increased domestic employment coupled with a positive economic advantage seems to be overshadowed by the influence and pressure of private actors rather than a consideration of what the public benefit may actually be.<sup>26</sup>

Instead of basing zone approval on the positive expected economic impact that the approved business may have, the Board utilizes criteria resting upon the vague notion of a public benefit.<sup>27</sup> This ill-defined, yet crucial term, can be so easily overcome that it is possible for a FTZ having a negative economic effect on domestic employment to receive Board approval.<sup>28</sup> This lack of specificity does not hold the Board accountable to any consistent line of policy creation; thus the Board wields an enormous amount of unadulterated discretion. Political and other pressures unrelated to the public interest can prove so powerful that they alone may result in zone application approval or denial; “thus, FTZs could be awarded, not to the business which would best serve the public interest, but to the business which has the most competent political operators.”<sup>29</sup>

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<sup>22</sup> See 15 C.F.R. § 400.2(l) (Proposed 2010).

<sup>23</sup> See 52 F.R. 6262-02 (Mar. 2, 1987) (West).

<sup>24</sup> *Id.*

<sup>25</sup> See generally William G. Kanellis, *Reining in the Foreign Trade Zones Board: Making Foreign Trade Zone Decision Reflect the Legislative Intent of the Foreign Trade Zones Act of 1934*, 15 Nw. J. Int’l L. & Bus. 606 (1995).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 625.

<sup>29</sup> *Id.* at 627.

This susceptible application and approval process can often provide unfair competitive advantages to those businesses which are most capable and fortunate enough to obtain them.<sup>30</sup> Therefore, the Board should modify their overreaching powers and restore integrity to the FTZ system as a whole. The Board must take an increased responsibility to limit pressure from private actors, and increase the likelihood that zone status does actually result in positive economic growth. Further insulation from the political lobbying process, limiting negative economic impacts, greater Board credibility, and clearer standards are all essential to the continued use and growth of FTZs.

**C. § 400.14 Production–activity requiring approval or reporting; restrictions.**

The Board has done a very effective job in focusing on the different types of zone activity which have raised serious public interest concerns in the past, and appear likely to do so in the future. This redone section relates to the general provisions and restrictions concerning FTZs, but now focuses on possible issues such as anti-dumping and countervailing duties or International Trade Commission orders.<sup>31</sup> Furthermore, this section now explicitly mandates an existing practice, that of annual reporting involving all production activity.<sup>32</sup> New sections here also delineate authority to impose limitations and additional requirements on changed production procedures and increases in production capacity.<sup>33</sup>

I strongly support the Board's decision to limit advance approval requirements to certain circumstances as compared to all production involving inverted tariffs or quotas. In addition, explicitly mandating current practices to require annual reporting of all production activity serves to enhance FTZ accountability and Board oversight. Allowing notification of increases in production capacity will also diminish unnecessary waiting time and other delays encountered by zone users. Furthermore, a clearly defined scope of authority for an approved production operation enhances Board oversight protections.

Finally, the revised procedures for reviewing FTZ activity on a public-interest basis and for compliance with Board regulations supports this broad effort at increased transparency and limited avenues for zone abuse. I also support the Board's amplified ability to restrict zone activity if found to be no longer serving the public interest. Imposing restrictions based on a preliminary review, subject to the completion of a full review, boosts the Board's regulative powers thereby mandating compliance with all final decisions.

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<sup>30</sup> *Id.* at 629.

<sup>31</sup> See 15 C.F.R. § 400.14(a) (Proposed 2010).

<sup>32</sup> See 15 C.F.R. § 400.14(b) (Proposed 2010).

<sup>33</sup> See 15 C.F.R. § 400.14(c) (Proposed 2010).

**D. § 400.15 Production equipment.**

In 1996, Congress amended the FTZA to allow for a delay or reduction of duty rates on production equipment imported into FTZs until that equipment was actually used in the zone.<sup>34</sup> This section reflects that statutory change, clarifies the legislative intent behind the 1996 amendment, and essentially codifies current Board practices. Prior interpretations consistent with the language of the act and legislative history indicate that such production equipment could be used in a zone while a company waits for operational approval.<sup>35</sup> In order to encourage manufacturing within a zone, Congress attempted to increase export production by allowing assembly, installation, and testing of equipment within a zone before any duties were levied.<sup>36</sup>

I support the Board's decision to explicitly state the requirements for production equipment imports, and further, agree with the standardized definition appearing in § 400.2(l) made applicable to this section as well. Previous case law suggests that Congress had rejected the notion that production equipment used in FTZs was exempt from import duties.<sup>37</sup> Since Congress did not pass measures specifically permitting the entry of production equipment into zones, most courts were not willing to interpret otherwise.<sup>38</sup> However, the statute clearly encourages trade through the use of zone procedures, and admitting production equipment to zones while the application is either still pending or post-approval is generally consistent with the intent of Congress.

**E. § 400.42 Operation as public utility.**

Under the FTZA, a zone grantee generally has a regional monopoly on the access to and use of zone procedures; because of this, Congress mandates specific requirements and other limitations on the authority and privileged use of FTZs.<sup>39</sup> While the FTZA requires that each zone "be operated as a public utility, and all rates and charges for all services or privileges . . . be fair and reasonable," FTZ regulations have lacked sufficient guidance to properly enforce this decree.<sup>40</sup> As international trade continues to expand, it is essential that those corporations participating in zones understand and meet their statutory expectations, especially when operating services with potential public backlash.

I strongly support this section, yet am puzzled as to why it took the Board this long to provide clear direction for zone users on the implications of the public utility requirement. I believe that the Board must explicitly state all expectations of zone participants, agents, and grantees. Moreover, the general position taken by the Board in these promulgated rules to satisfy this notification need represents a much-needed stronger stance relative to effective enforcement and efficient oversight. In particular, the

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<sup>34</sup> See 19 U.S.C.A. § 81c(e) (West 1996).

<sup>35</sup> See *supra*, note 14.

<sup>36</sup> *Id.*

<sup>37</sup> See *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 693 F. Supp 1183 (Ct. Int'l Trade 1988), *aff'd*, 884 F.2d 1375 (Fed. Cir. 1989).

<sup>38</sup> See *supra*, note 14.

<sup>39</sup> See generally 19 U.S.C.A. §§ 81a-81u (West 1996); 15 C.F.R. Part 400 (West 1996).

<sup>40</sup> See 19 U.S.C.A. § 81n (West 1996).

detailed discussion on imposed fees and incurred costs illuminates the legal and contractual relationships of proper zone performance.

**F. § 400.43 Uniform treatment.**

The FTZA also requires that each zone “grantee shall afford to all who may apply for the use of the zone and its facilities and appurtenances uniform treatment under like conditions.”<sup>41</sup> Previously, concerns surrounding uniform treatment in local areas, possible conflicts of interest, and third-party agent control/access to FTZ privileges have not been sufficiently addressed. I therefore find it appropriate to specify the Board’s authority with respect to information gathering, inconsistent actions taken by zone users in violation of the FTZA or FTZ regulations, and perceived differential treatment of participants.<sup>42</sup>

Several of these new provisions do provide clear guidance on the implications of the uniform treatment requirement, yet the Board must retain greater ability to investigate and act in response to potential violations. The inclusion of contractual writings and application of neutral and public-interest based criteria further complements the regulations’ ability to avoid non-uniform treatment of zone participants. However, the Board cannot limit itself to only those specific targeted grantee functions; implementing the statutory mandate requires a broad base of powers, and the Board should not create a closed list essentially restricting its own administrative control capacity.

**G. § 400.62 Fines, penalties and instructions to suspend activated status.**

Potentially, the most significant aspect of this promulgated regulation is contained in this new section, which establishes the procedures relating to the FTZA’s authorization to impose, mitigate, and assess fines on organizations which violate zone policy.<sup>43</sup> Notably, the Board will be better equipped to handle infractions and will gain the power to suspend activated zone status in certain circumstances.<sup>44</sup> Substantial criticism has been levied at the Board for their failure to engage in a meaningful review of zone activity once the initial authorization grant was extended, and the Board still does not consistently contribute any significant monitoring services over FTZs as a whole.<sup>45</sup> Furthermore, the Board is not always perceived as a regulatory body, rather merely a licensing agency granting zone privileges.<sup>46</sup>

With this section, the Board has rectified the glaring omission of oversight and monitoring of zone activity. While the Board does not necessarily have all the resources necessary to monitor FTZs to assure compliance with current trade policy and zone grants, agency procedures have taken a giant leap forward towards significant supervision

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<sup>41</sup> See 19 U.S.C.A. § 81n (West 1996).

<sup>42</sup> See 19 U.S.C.A. § 81e (West 1996).

<sup>43</sup> See 15 C.F.R. § 400.62 (Proposed 2010).

<sup>44</sup> 15 C.F.R. § 400.62(a) (Proposed 2010).

<sup>45</sup> See generally Howard N. Fenton III, *A New Era for Administration and Judicial Review of Foreign Trade Zones Board Decisions*, 4 Minn. J. Global Trade 223 (1995).

<sup>46</sup> *Id.*

over zone activity.<sup>47</sup> However, the Board should next seriously consider the creation of a more formal, adjudicative process for dispute resolution.<sup>48</sup>

While the 1991 amendments did improve procedures and remove many ambiguities, this section regarding fines and penalties should be expanded to include a well-defined analysis of the judicial review process. A more detailed record, beginning with the zone application and continuing to grant/denial should become mandatory. Also, when dealing with adjudication matters, the Board should provide a comprehensive explanation of decisions; this will increase notice for all parties involved, and moreover provide the Court of International Trade and other judicial agencies with a stronger basis for upholding Board decisions.

## V. CONCLUSION

In conclusion, I believe this revised regulation to be extremely important, if not crucial, to the continued expansion and influence of domestic trade capabilities in international relations. Creating these geographic regions and affording preferential duty treatment facilitates the competitive strength of U.S. businesses by preventing unfairly traded imports, which distort the free flow of goods, from adversely affecting American business in the global marketplace. These comprehensive revisions to the substantive and procedural FTZ regulations will advance efficiency, accountability, and further the purpose of zones as described in the 1934 Act, to “expedite and encourage foreign commerce, and other purposes.”<sup>49</sup>

I would like to thank the Board, once again, for this opportunity to comment on the proposed amendments to 15 CFR Part 400, and I respectfully request that the Board consider the suggestions I have made throughout this assessment. I believe these opinions will support the Board’s ability to effectively enforce FTZs, trade laws, and other agreements which protect U.S. industries and workers from unfair pricing by foreign companies and unfair subsidies to foreign companies by their governments. I am happy to discuss my aforementioned views in greater detail, if requested. I appreciate your time and consideration with respect to this matter, and I look forward to reviewing the Board’s Final Rule in due time.

Respectfully Submitted,

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<sup>47</sup> *Id.* at 249-50.

<sup>48</sup> *Id.* at 264.

<sup>49</sup> *See* 19 U.S.C.A. §§ 81a-81u (West 2006).