

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

The Voice of the International Trade Community Since 1921

May 18, 2011

Via eRulemaking: www.regulations.gov
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: Comments on Foreign-Trade Zones in the United States
Docket: 090210156-0416-01
RIN: 0625-AA81

Dear Mr. McGilvray:

On behalf of the American Association of Exporters and Importers (AAEI), the Association respectfully submits the following comments on the Foreign Trade Zone Board's (FTZ) recently proposed rule published in the Federal Register issued on December 30, 2010 at 75 Fed. Reg. 82340, concerning proposed changes to the FTZ regulations.

I. Introduction

AAEI has been a national voice for the international trade community in the United States since 1921. AAEI represents the entire spectrum of the international trade community across all industry sectors. Our members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the industry, which is comprised of brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. Many of these enterprises are small businesses and FTZ users seeking to export to foreign markets. AAEI promotes fair and open trade policy. We advocate for companies engaged in international trade, supply chain security, export controls, non-tariff barriers, import safety and customs and border protection issues.

AAEI is the premier trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade. We are recognized as technical experts regarding the day-to-day facilitation of trade. We have commented extensively on customs practices and procedures, and look forward to continuing to provide the FTZ with the practical perspective to the impact that the proposed amendments will have on our membership.

II. General Comments

On behalf of its members, AAEI strongly supports the use of the FTZ program to expand global trade. We believe that FTZs are important tools that the government provides to increase manufacturing and trade-related activity by reducing the administrative and tax requirements that would otherwise deprive the United States

of value-added economic activity. AAEL's members are comprised of trade compliance professionals, many who are responsible for administering FTZs and have expressed concerns about the proposed regulations. The members seek clarification to questions regarding certain sections of the proposed regulations, and also have comments and recommendations on other sections. We therefore believe it behooves the FTZ Board to revisit the proposed regulations – if the intent of some of the proposed provisions are not clarified or revised, compliance and participation in the program will likely suffer.

We echo the concerns expressed by our colleagues at the National Association of Foreign-Trade Zones that the proposed FTZ regulations must achieve the larger policy goals of the United States, principally:

- The FTZ program should attract “value added” economic activity in the United States that would otherwise be done in other countries.
- The FTZ program should promote U.S. exports, particularly in light of the Administration’s significant efforts, including the National Export Initiative and the Export Control Reform proposed rules. Thus, the FTZ program should work in concert with these efforts to broaden the segment of American businesses that export finished goods.
- The FTZ program should operate in an open and transparent way since FTZs are technically not part of the customs territory of the United States, and as such, constitute a carefully designed exception to our regulatory regime.
- Because the FTZ program requires strict inventory controls, we believe that the proposed rules must clearly articulate expected outcomes instead of further micromanaging business operations of FTZ users. Otherwise, many companies will be reluctant to use FTZs as part of their global trade “tool kit” for locating operations (and more importantly, jobs) in the United States.

AAEL offers these comments in the spirit of assisting the FTZ Board “get it right” so that the FTZ program fulfills the policy goals articulated by Congress.

III. Specific Comments

A. Scope, Definitions and Authority

- 400.2(l) Definition of Production: To clarify that non-imported materials, or imported materials that are entered into U.S. Commerce prior to admission into an FTZ, are outside the scope of the definition of production, we suggest the following amendment to the proposed section:

“Production, as used in this part, means any activity which results in the change in a customs classification of an **{ imported }** article or in its eligibility for entry for consumption, regardless of whether U.S. customs entry actually is ultimately made on the article resulting from the production activity.”

B. Ability To Establish Zone; Limitations and Restrictions on Authority Granted

- 400.14(a)(1): We seek clarification of this provision as to whether an FTZ user would be required obtain advance approval for any change in foreign articles incorporated into a product or simply those foreign articles that would result in a lower duty rate being collected on a consumption entry because the duty rate in the Harmonized Tariff Schedule of the United States (HTSUS) for the finished product is lower than the component (i.e., the foreign article) resulting in the inverted tariff. For example, if there are new inputs to the product being manufactured in the FTZ, do they require advance approval? Also, in our experience, part numbers change all the time, but the foreign article still has the same HTS number as the previous input – do these successor inputs require advance approval? Finally, please clarify whether advance approval is required for a new input component with a different HTSUS, but it still is used to produce the same finished product?
- 400.14(b): To be consistent with our proposed change in section A above, we note that Proposed Section 400.14(b), requires **all** production activity to be reported to the Board. This could be problematic for users of some existing foreign trade zone software systems where only foreign status items are tracked and reported. In certain zone situations, specific information on items which are not controlled for FTZ purposes (e.g., domestic status goods) may not be tracked. We therefore believe that the proposed regulation should be revised to limit reporting to items placed in foreign status.
- 400.14(d): We understand that the FTZ Board provides interim authority before final approval to allow companies begin operations. Our members believe that the FTZ Board should allay the fears of FTZ users by advising U.S. Customs and Border Protection that FTZ users are authorized to begin operations under this section to avoid disruption to its FTZ operations. As the Port Director must approve a formal activation request for a zone site, the proposed requirement in Section 400.14(d)(3) will require unnecessary time and effort on the part of both applicants and CBP. We believe it is therefore unnecessary to require written concurrence from the CBP Port Director for interim approval of production activity for the FTZ Board's consideration.

C. Applications To Establish and Modify Authority

- 400.25(b)(1): AAEL understands that it has been routine for the FTZ Board to inquire whether an operation could be conducted in a multi-purpose facility. As we understand the goal of the revised FTZ regulations is to further encourage the use of and ease in setting up FTZs so that the United States remain competitive in the global marketplace, we recommend that the FTZ Board consider removal of this requirement altogether. It is our opinion that in practice operations which may be conducted within existing sites at a grantee FTZ will clearly be delineated from those requiring site specific designation at a user facility.

D. Procedures for Application Evaluation and Reviews

- 400.35(d): The section as proposed allows for discretionary notification to an applicant if the circumstances presented in the application are no longer applicable as a result of a "material change". This action should be a requirement, not an option of the Board. We believe that removal of the word "generally" in the following phrase would serve the intended purpose: ". . . change, and will **{generally}** notify the applicant of the intent to terminate the review . . . ". Further, the phrase "material change" is not specifically defined in the proposed section 400.2, and we believe that guidelines explaining what would or would not be considered as a material change in the Board's view will result in clarity to applicants. Alternatively, the phrase "as a result of a material change" appears to be superfluous and should be removed. Should the Board conclude that the circumstances presented in the application are no longer applicable, the notice itself to the applicant should include an explanation, and as such, only a material change itself would trigger such an event.

E. Operation of Zones and Administrative Requirements

- 400.43(e): AAEL members concur with the FTZ Board's desire to extend uniform treatment among FTZ grantees and users. However, as proposed, the regulation is so rigid that it unintentionally may preclude an agent or service provider from offering otherwise acceptable services separately to both the zone participant and the grantee. As the FTZ Board has the authority to restrict grants when in the public interest, we express our concern that a mandatory blanket prohibition would restrict business relationships with which the Board has no concern. Rather we recommend that the FTZ Board adopt a regulation that would allow review of situations which are believed to be problematic, and then, following notice and appropriate due process to establish pertinent facts, provide the Board with the discretion to restrict particularly identified activities on a case-by-case basis. Following is an example of a provision which may serve this purpose.

(e) *Preclusion of conflicts of interest.* To avoid non-uniform treatment of zone participants, this section provides the Board with the authority to restrict the activities of grantees and/or their agents when the Board has made a finding that a material conflict of interest exists. A material conflict of interest exists if:

(a) the grantee has actually or in practice delegated the authority to approve applications made to the Board, approve annual reports to be submitted to the Board, or approve activation by CBP to a third person (or a party related to such third person) who currently engages in offering or providing a zone related product or service to a zone participant in the grantee's zone project, and

(b) the Board finds that the conduct of the grantee and/or agent has detrimentally impacted one or more zone participant or prospective zone participant.

(f) Unchanged.

(g) *Reviews.* Reviews of potential material conflicts of interest may be initiated by the Board, the Commerce Department's Assistant Secretary for Import Administration, or the Executive Secretary, or they may be undertaken in response to requests from parties directly affected by the activity in question showing good cause. After initiation of review, any affected parties shall provide in a timely manner any information requested as part of the conduct of the review. Upon the request of any affected party, the Executive Secretary shall schedule and hold a public hearing with no less than 30 days advance notice. The Executive Secretary shall develop a recommendation to the Board within 90 days of the completion of the public hearing if it believes further action is warranted. If the recommendation proposes to restrict activities of either a grantee or an agent, the affected party will be notified in writing of a preliminary recommendation and the factors considered in the development of the preliminary recommendation. Such party will be given 30 days from the date of notification in which to respond to the preliminary recommendation and submit additional evidence pertinent to factors considered. Final action will be documented in a Board Order.

F. Records, Reports, Notice, Hearings and Information

- 400.51(d)(1): AAEI understands that the FTZ Board is required to make an annual report to Congress concerning the economic activity conducted in FTZs. We suggest that the FTZ Board consider changing this provision to provide 120 days for the grantee and 90 days for the zone user to submit their data, respectively. We believe this change will provide clarity and consistency zone to zone since large zone operations may need 90 days to prepare their reports as it is a very complicated/time consuming process. If the FTZ Board does not accept this timeframe change, then AAEI recommends that the regulations permit grantees and users to obtain a 30 day extension.

G. Penalties, Prior Disclosure and Appeals to the Board

- 400.62(a): We suggest that the last sentence should be changed to read: "Suspensions of activated status and suspensions of the processing of requests shall be targeted to . . ." from their statement of "will be targeted to . . .". We further note that there is a significant inconsistency between language in Section 400.62(a) which states "this section authorizes fines for certain specific violations of the FTZ Act or the Board's regulations," and Sections 400.62 (e) which states "[w]hen the Board or the Executive Secretary has reason to believe that a violation of the Act, or any regulation under the FTZ Act, has occurred . . ." (emphasis added). Regulations issued under the Act include both these regulations and regulations issued by Customs and Border protection. The Board should make it clear that any operational activities of FTZs remain the sole purview of U.S. Customs and Border Protection. The violations subject to penalty under this section should

be specifically defined; e.g. failure to file an annual report, failure to follow a Board Order, or failure to timely file a notice change in production or production capacity. Finally, this provision assumes that the statutory maximum fine of \$1000 per day may always be applicable. The regulations should specify normal ranges for penalties for each specific violation identified.

- 400.62(b)(1)(i): The amended rule provides that the operator is fined \$1000 per day for each separate offense for failure to submit notification pursuant to Sec. 400.14. Then later in Section 400.62(b)(2), the regulations state that the grantee or agent may also be subject to a fine. We believe that as worded, there is risk for a double fine for the same offense without clarification of the responsible party for the fine and under what regulation.
- 400.62(c): We are concerned about violations involving requirement to submit an annual report. "Further, each day during which a zone operator fails to submit to the grantee the information required for the grantee's timely submission of a complete and accurate timely report, may constitute a separate offense subject to a fine of not more than" AAEI is concerned about what constitutes a "reasonable timeframe" to furnish reports before penalties are assessed. This is of particular concern because of the wide variation in the activity taking place among zones.
- 400.62(d): With regard to violations involving conflicts of interest, we note that this section provides for fines of \$1,000 per day. We believe that conflicts of interest in many cases can be subjective, and we question whether it is to make this a fine of \$1,000 per day. This per day penalty poses a significant risk to FTZ grantees whenever a change occurs which could be interpreted as a conflict of interest. Therefore, we ask the FTZ Board to clarify this provision as to what constitutes a conflict of interest.
- 400.62(e)(1): As to notification of a violation, the provision states ". . . and provide the party(ies) a specified period (normally 30 days with consideration given to any requests for an extension) to respond in writing" AAEI requests that the FTZ Board clarifies this provision. The uncertainty of responding timely to such letters happens with other federal agencies. For example, an FDA regulation specified "at least 10 days but normally 30 days." AAEI members have experienced receiving letters from the FDA with 10 days to respond, but the actual receipt of the letter occurs after 10 days expired and thus FDA would not allow the company to respond. AAEI recommends that the FTZ Board adopt 30 days with 2 additional 30 days extensions to be granted if requested in writing.
- 400.62(f)(2)(vii): We note that mitigating factor (f)(2)(vii) is: "Contributory Board error such as the violation resulting from the violator having relied on inaccurate written advice provided by a Board staff member" AAEI certainly understands that the FTZ Board cannot be bound by verbal advice provided by an FTZ Board employee, but surely written advice is more than a mitigating factor and should be binding on the government. AAEI believes

strongly that the FTZ Board needs to stand by the written advice they provide and not only to mitigate a fine, but not issue a fine at all. Trade compliance professionals need to have someone to get scope determinations from, deal with operations issues, and thus we need to be able to work with and trust the staff at the FTZ Board.

IV. Conclusion

AAEI appreciates the opportunity to comment on the proposed rule amending FTZ regulations. We would be happy to meet with the FTZ to discuss our comments in further detail.

Sincerely,



Marianne Rowden
President & CEO

cc: Jim Phillips, Co-Chair, AAEI Customs Policy and Procedures Committee
Evelyn Suarez, Co-Chair, AAEI Customs Policy and Procedures Committee