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Via E-Rulemaking Portal
<http://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 Proposed Revisions to Foreign-Trade Zone Regulations
RIN: 0625-AA81; Docket No.: ITA-2010-0012

Dear Mr. McGilvray:

On behalf of its Foreign-Trade Zone ("FTZ") participant clients, the law firm Drinker Biddle & Reath LLP ("DBR") hereby provides the following comments on the December 30, 2010 proposed rule published by the U.S. Department of Commerce, International Trade Administration, Foreign-Trade Zones Board ("Board") (75 *Fed. Reg.* 82,340-82,362) regarding suggested revisions to the FTZ regulations. In a subsequent March 9, 2011 *Federal Register* notice, the Board extended the time period for comments until May 26, 2011.

The operation of FTZs in the United States is a key element in support of U.S. manufacturing and export promotion. Absent an effective and transparent FTZ program in the United States that enables U.S. manufacturers to remain competitive in the global marketplace, production activities would inevitably shift overseas, depressing key U.S. manufacturing and export initiatives. In support of this program, DBR provides the following comments for the Board's consideration.

I. General Comments

DBR applauds the Board's continued support for the FTZ program and its willingness to consider important and necessary amendments to the current regulations that are essential to the continuing development, enhancement, and transparency of this important program.

Particular support is noted for the Board's efforts to streamline the approval processes whenever possible. Current processing timelines can be burdensome and may deter

companies from locating business operations in the U.S. The administrative burdens placed on the application process are often considerable when compared to foreign manufacturing options.

We also encourage the inclusion of formal regulatory defined terms and Board practices in connection with current Alternative Site Framework (ASF) and Temporary/Interim Manufacturing (T/IM) processes. Formal regulations surrounding these current Board practices will further increase transparency and continuity which are necessarily absent without regulatory definitions and processes.

DBR also suggests that the Board implement clearly defined and transparent obligations and circumstances that may give rise to potential penalties under the FTZ program. The failure to clearly define violating conduct and corresponding penalties places zone participants at a disadvantage, and may discourage program participation.

Similarly, we support the Board's proposal to allow for a process of voluntary disclosure to mitigate any potential penalties that may arise from inadvertent errors in connection with FTZ operations. As with the disclosure process currently in place under the Customs laws, 19 U.S.C. § 1592, the provision of a voluntary disclosure mechanism with defined mitigation benefits serves to encourage self-assessment and internal compliance programs. The Board should make clear that the filing of periodic voluntary disclosures that identify and correct inadvertent errors associated with a company's FTZ operations is evidence of an effective internal control program, and should be encouraged.

II. Targeted Comments

A. Section 400.2. We respectfully suggest that the definitions and corresponding regulations be modified to allow the closest Customs port (even if located in a different state) to provide services. There have been instances where Customs does not have the necessary manpower to travel across a state to service an FTZ. However, a closer Customs port in another state could handle these services. We suggest that such a change would remain consistent with the Customs regulations under 19 C.F.R. Part 101.

We also suggest amending the proposed language to Section 400.2(l) to read as follows:

Production, as used in this part, means any activity which could result in a change in the customs classification of a foreign status article or any activity that involves a change in condition of foreign merchandise which impacts 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. [*Emphasis provided to demonstrate proposed amendment.*]

To remain consistent, we propose Section 400.14(c) be amended to read as follows:

“Scope of approved authority. The Board’s approval of production authority for a particular operation is limited to the foreign status inputs, finished products, and production capacity presented in the approved application pursuant to Sec. 400.22(a)” [*Emphasis provided to demonstrate proposed amendment.*]

We believe the above changes will clarify that non-imported or duty-paid (domestic) materials are outside the scope of the definition of production.

B. Section 400.14(b). The proposed regulations require all production activity to be reported to the Board. However, some FTZ software does not track domestic merchandise. FTZ users will have to generate additional reports and possibly modify their systems to generate this information. We agree with other submitted comments that suggest that information on items which are not controlled for FTZ purposes (*e.g.*, domestic status goods) need not be tracked.

C. Section 400.16. We suggest that the Board review the proposed language in this section. The proposed language could be interpreted to be more restrictive than the language of the Act itself and affect state or local legislation already enacted regarding zone merchandise that provide exemptions from *ad valorem* taxation of personal property.

D. Approval of Production Activities. We recognize that the Board, when evaluating requests for production activity, must take into consideration sometimes competing interests between the applicant requesting authority for the proposed production activity, the US suppliers of components, and US government agency policies related to international trade. Further, to complete such evaluation, there must be a clear presentation of the proposed production activities and the benefits that will accrue if the FTZ is approved. We suggest that any such evaluation focus primarily on the end product that results from the production activity.

In this regard, we question those proposed Board requirements that focus on current and proposed production capacity. The purpose of the FTZ Program is to increase domestic economic activity and support expansion of export opportunities. Accordingly, it is difficult to understand the motivations for denying production authority because the zone participant was manufacturing too much in the U.S. We suggest that the Board should encourage increased production activity of approved end products, rather than penalizing a zone participant for being successful. Accordingly, we respectfully suggest that production capacity be eliminated as part of the scope of authority for production activity.

Along these same lines, we believe the requirement to provide information as to whether alternative procedures have been considered as a means of obtaining the benefits sought similarly be removed from the proposed amendments. Such an additional review suggests that the FTZ Program is a program of last resort, and that the Board wants to know what other means have been sought and ruled out. It would appear that the only purpose this requirement serves is to allow the applicant to definitively state that the proposed production activity can be conducted under an alternative Customs procedure (e.g., within a bonded warehouse), and therefore should be eligible for expedited treatment. If that is its purpose, the requirement should either be eliminated or restated as a positive requirement rather than the implied negative or eliminated.

E. Section 400.35(d). We suggest revisions to this section to enable more transparency in the process. This section should require the Executive Secretary to notify applicants of the Board's intent to terminate any review and allow 30 days for response prior to any termination action. As proposed, notification and response appear discretionary, as evidenced by the phrase "will generally notify." We respectfully suggest removal of the word "generally" to effectuate this change.

F. Effect of Harmonized Tariff Schedule ("HTS") Classifications. In the 1991 Board regulations, the definition of manufacturing and processing became entwined with United States Customs and Border Protection's ("CBP") practice of defining production and manufacturing as a change from one tariff classification to another. This has led to a scope of authority for production activity being rigidly defined based on the HTS of end products and inputs as they were established at the time of the initial zone application.

The problem with the scope of FTZ production activity being so intrinsically tied to the initial tariff classifications is that HTS classifications and corresponding duty rates can be changed without a corresponding change to the item (either the end product or corresponding input(s)). A change in HTS may occur through case law or CBP's reclassification of an item, or by the zone participant itself as part of an internal compliance review. It may also occur from additions or deletions to the HTS itself at an international level.

In light of the fluid nature of HTS provisions, a zone participant may find itself out of scope when, in fact, its operations have not changed. In this regard, we suggest that the Board utilize general descriptions of finished products and materials/components used as inputs when defining the scope of authority. Similar to the application in antidumping and countervailing duty scope definitions, HTS numbers should be used solely as guidelines and for the initial determination as to whether a production activity results in an inverted tariff situation to be evaluated against the threshold factors outlined in proposed section 400.25, and not be locked in place or considered determinative.

G. Accessible FTZ Information. Consistent with other comments submitted, we suggest that the Board continue to maintain and provide public access to a database of end products and inputs from approved zone operations. As noted above, while the HTS numbers should be included as guidelines, they should not be an exclusionary factor for the expedited approval of proposed products and inputs that are similar in nature. In addition, it would seem that if an input is approved for one end product, it should be viewed as a favorable factor for expedited treatment when reviewing its use in a new end product since the impact on domestic industry has been analyzed and documented. Similarly, when FTZ authority has been approved for a particular end product, it should continue to be viewed as a favorable factor for expedited treatment when reviewing new applications for the same product.

H. Business Confidentiality. We respectfully request that the Board consider maintaining the business confidentiality of certain information required for any zone application. This is a particular concern with the Board's current practice of publicly posting applications. Such posting has enabled competitors to obtain specific details about a company's employment numbers, production trends, sourcing plans, future product introductions, and manufacturing processes. While some information is undoubtedly critical to the Board's analysis of any application, a zone applicant should be able to submit a summarized application for posting on the Board website, or otherwise be afforded an opportunity to redact certain information from a separate public version.

In this regard, we suggest that any *Federal Register* notice posted in connection with proposed or expanded zone activity only include the name of the actual applicant, the zone grantee, and omit the name of the proposed zone user. This would keep the focus on the proposed production activity, instead of who is requesting the activity. Inclusion of the potential zone user encourages comments on an application simply because someone has an issue with the company itself and may be entirely unrelated to the proposed zone activity and create controversy where none would otherwise exist if the application was reviewed on its merits. In the past, the submission of these non-related comments has had a detrimental impact by unnecessarily extending the review process and leading to costly delays in approvals.

I. Comments Against Zone Applications. We similarly support comments and proposed language submitted by the NAFTAZ and others concerning increased standards and scrutiny for those parties wishing to submit comments or requests for review of approved zone sites and activity. The standard of review of such comments should be equal to the standard required of the applicant or approved zone participant.

It is important to maintaining and supporting the integrity and policy goals of the FTZ program that those filing comments, particularly those of a negative nature, be an affected party who can provide evidence that is both probative and substantial in value, and can demonstrate a direct impact on the submitting party. In the past, an otherwise

well-prepared and complete application or an existing zone operation has been held hostage by random and unrelated comments by those who object to either the very existence of the FTZ Program or otherwise have an unrelated issue with the applicant/zone operator.

The lack of standards for those filing comments has caused unwarranted delays in the initiation of a zone project or operations and has quashed the policy objectives of the FTZ program without adequate justification, forcing a reduction in U.S. zone activity or the withdrawal of the zone application, only to result in such manufacturing operations moving offshore at the expense of U.S. manufacturing jobs and export opportunities.

J. Sections 400.14 and 400.37. The revisions for these proposed sections appear to expand the ongoing oversight by the Board of FTZ production activity, particularly in regards to production capacity and foreign inputs subject to inverted tariffs, ADD/CVD, and Section 337 orders issued after production activity has been approved for a zone operation.

We believe that the approval for FTZ production activity should focus on the end product itself. We agree that where a zone participant introduces new end products, a new application for production activity should follow defining the inputs and providing general descriptions with the HTS numbers as guidelines. However, we respectfully suggest that the Board's proposed requirement for pre-notification concerning the use of every new input as described in proposed section 400.14 using the procedure described in proposed section 400.37 is unmanageable.

The use of new foreign inputs in a production activity can occur for a variety of reasons such as the addition of a new features to an already approved end product (e.g., cameras added to cars to enhance rear views, enteric coating to an approved drug product), the loss of a domestic supplier, or lack of viability of existing domestic suppliers due to non-sustainable price increases. If end products and inputs are defined simply by HTS numbers (even at the 6 digit level), a change to inputs can occur simply because a zone participant is required to reclassify the item to satisfy a new or amended CBP requirement.

As with the original application, there is also an increased emphasis within the proposed regulations on pre-notifications of inputs subject to ADD/CVD or Section 337 proceedings whose assessment and effective dates are outside a zone participant's control. In none of these instances is there a significant change to the actual production activity which was approved, and it is highly unlikely that a full analysis of this change in inputs or even production capacity would result in the change of the authority for production activity.

Nevertheless, recognizing the competing need for the Board to be aware of what is occurring within zones in regards to production activity, we propose that a more streamlined and less complex process be adopted. For example, it is respectfully recommended that any analysis of production capacity be eliminated both from the initial zone application requirements and from the ongoing monitoring activities.

As for the monitoring of inputs, we suggest that a procedure be implemented to require pre-notification to the Board only if a change or an addition of an input has a significant impact on the production activity and the related zone savings. In essence, we suggest that clearly defined *de minimis* thresholds be established whereby a change to inputs below a certain defined percentage of zone savings would not require pre-notification.

Where Board review is necessitated, however, the zone participant should be allowed to admit the new input in privileged foreign status so that the logistical flow of materials to the zone is not unnecessarily disrupted. Moreover, if the new input has been previously approved for any other zone's production activities, the Board's review should be handled in an expedited manner since the effect on the domestic industry for that input has already been vetted. If it is an entirely new input, a more robust review could be conducted, including public notice and comment, if necessary. Once either an expedited or full review of the new significant input is completed, the zone would implement its handling of the input based on the Board's findings. Reporting of those input changes that fall below the *de minimis* threshold could be noted in the annual report.

Lastly, we disagree with the requirement for notification to the Board of previously approved inputs that become subject to ADD/CVD or Section 337 proceedings. The existing regulations requiring inputs subject to these punitive duties to be placed in privileged foreign status is sufficient to ensure compliance with the outcome of such proceedings. If necessary, the annual report could also be used to report these inputs on an ongoing basis.

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III. Conclusion

Drinker Biddle & Reath appreciates the opportunity to provide the above comments on behalf of its zone participant clients, and reiterates its approval of the Board's endeavor to update the existing FTZ regulations to support the development, enhancement, and transparency of this important program.

Respectfully submitted,

Drinker Biddle & Reath LLP



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