

Chair

Salli Swartz, France
sswartz@pgparis.com
+33-144-292-323

Chair-Elect

Michael E. Burke, DC
mburke@williamsullen.com
202-293-8137

Vice-Chair

Barton Legum, France
blegum@salans.com
+33-14-268-4870

Finance Officer

Gabrielle M. Buckley, IL
gbuckley@vedderprice.com
312-609-7626

Liaison Officer

Lisa J. Savitt, DC
lsavitt@crowell.com
202-624-2761

Membership Officer

Marcelo E. Bombau, Argentina
marcelo.bombau@bomchil.com
+54-11-4321-7500

Secretary/Operations Officer

Ronald A. Cass, VA
roncass@cassassociates.net
703-438-7590

Programs Officer

Adam B. Farlow, England
adam.farlow@bakermckenzie.com
+44 20 7919 1000

Rule of Law Officer

Jason P. Matechak, VA
jmatechak@ird-dc.org
703-957-1427

Policy/Government Affairs Officer

Ronald J. Bettauer, VA
ron.bettauer@verizon.net
703-536-0729

Publications Officer

Marilyn J. Kaman, NY
kamanm@un.org
212-963-2568

Diversity Officer

Sara P. Sandford, WA
ssandford@gsblaw.com
206-816-1464

Technology Officer

Robert L. Brown, KY
rlb@gdm.com
502-587-3716

Communications Officer

Steven M. Richman, NJ
smrichman@duanemorris.com
609-631-2426

Immediate Past Chair

Glenn P. Hendrix, GA
glenn.hendrix@agg.com
404-873-8692

Section Delegates to the House of Delegates and At-Large Members

A. Joshua Markus, FL
jmarkus@carltonfields.com
305-539-7433

Michael H. Byowitz, NY
mhbyowitz@wlrk.com
212-403-1268

ABA Board of Governors Liaison

Mitchell A. Orpett, IL
maorpett@tribler.com
312-201-6413

Deputies to the Chair

Victor S. Mroczka, DC - **Administration**
mroczka@hugheshubbard.com
202-721-4692

Liaisons

Dixon F. Miller, OH - **Liaisons**
dmiller@porterwright.com
614-227-2241

Operations

William R. Black, CA - **Operations**
William.Black@BAEsystems.com
408-289-0494

Task Forces

John H. Harrington, NY - **Task Forces**
john@jhlegal.com
212-378-4145

May 25, 2011

VIA eRulemaking Portal: Docket No. ITA-2010-0012

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

REF: RIN 0625-AA81

RE: Proposed Revisions to the Foreign Trade Zones Regulations

Dear Mr. McGilvray:

The American Bar Association (“ABA”) Section of International Law (“Section”) welcomes this opportunity to comment on the proposed rule published by the U.S. Department of Commerce, International Trade Administration, Foreign-Trade Zones Board (“Board”) on December 30, 2010 (75 Fed. Reg. 82,340-82,362) regarding proposed revisions to the Regulations of the Foreign-Trade Zones Board (the “Proposed Rule”).

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the association itself.

The ABA is the largest voluntary professional association in the world. The Section, with over 20,000 members, is the ABA leader in the development of policy in the international arena, the promotion of the rule of law and the education of international law practitioners. Many of its members are experienced in the foreign trade zone laws of the United States and other countries.

The Section commends the Board’s efforts to amend the foreign trade zone regulations to improve flexibility for U.S. based operations in the application process and enhance clarity in the areas of production activity and uniform treatment of users. We believe this approach will “expedite and encourage foreign commerce” as stated in the Foreign-Trade Zones Act (the “Act”).

We provide our comments below. Please note that proposed language to be added is indicated in **bold font** and that proposed text to be deleted is indicated by “~~strikethrough~~” text (which appears as ~~strikethrough text~~).



1. We recommend the Proposed Rule be amended to include the detailed criteria for the Alternative Site Framework (“ASF”). ASF is an increasingly popular option for zone grantees, and the process for approval should be formally adopted in the revised regulations.
2. With the adoption of the proposed definition of production, we believe the concept of a subzone has been diminished to the point that the designation is no longer necessary. The regulations should be simplified by separating geographic approval from production activity approval. To effect this change, the concept of adjacency should be adjusted by revising Section 400.11(b)(2)(i) to refer to a “site,” rather than “general purpose zone site” and Section 400.11(b)(2)(ii) to replace the word “subzone” with “site.” Additional references to “subzone” should be eliminated.
3. We recommend the careful review of the definition of “agent” provided in Section 400.2(b). As currently drafted, the definition applies to a person “acting on behalf of or under agreement with the zone grantee in zone-related matters.” This definition is broader than that traditionally applied to an agent. An “agent” is commonly understood to act in a fiduciary relationship with a principal. Black’s Law Dictionary (7th ed. 2000) defines an agent as “[o]ne who is authorized to act for or in place of another; a representative,” and “agency” as “[a] fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind the other party by words or actions.” One who simply acts under agreement with a zone grantee would not necessarily be an agent of the grantee. This distinction becomes particularly important when coupled with the proposed penalty of Section 400.62 (see comment 16 below). 19 U.S.C. Section 81s grants authority to the Board to fine a “grantee, any officer, agent or employee thereof.” This overly expansive definition of agent potentially subjects to penalty persons not intended by the statute, and may be beyond the authority of the Board.
4. We believe Section 400.2(l) should be amended to read as follows:

“Production, as used in this part, means any activity which results in a change in the 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.”

Similarly, Section 400.14(c) should 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 **imported** inputs, finished products, and production capacity presented in the approved application pursuant to Sec. 400.22(a)”

We believe this change will clarify that non-imported materials are outside the scope of the definition of production.

5. We believe Section 400.2(n) should be amended to read as follows: “Site is one or more parcels of land organized **and functioning as an integrated unit**, such as all or part of

an industrial park or airport facility.” The currently proposed word “entity” is potentially confusing, as it may connote a legal entity.

6. Proposed Section 400.14(a)(4) may be disruptive to current operations in which users have agreed to place items which may become subject to post-grant of authority antidumping or countervailing duty order in privileged foreign status. A transition rule, which allows the current process to continue for approved grants of authority, is merited. Business should be afforded time to request continuing approval of use of privileged foreign status for any items currently subject to an ADD/CVD order that were not addressed specifically in the original grant of authority.
7. Proposed Section 400.14(b), which requires all production activity to be reported to the Board, could be problematic for users of some existing foreign trade zone software systems. Specific information on items which are not controlled for FTZ purposes (e.g., domestic status goods) may not be tracked by some systems. Consistent with our recommended change to limit the definition of “production” to imported articles (comment 4 above) reporting should be limited to items placed in foreign status.
8. We believe the proposed requirement in Section 400.14(d)(3) to require written concurrence from the CBP Port Director for interim approval of production activity is superfluous. The Port Director must approve activation; this provision will require unnecessary time and effort on the part of both applicants and CBP.
9. We believe Section 400.14(e)(1), 400.14(e)(2) and 400.37(b)(1) should be clarified to better provide consistency and uniformity. Section 400.14(e)(1) states that applicants may request authority to notify the Board of production changes on a “quarterly retrospective basis,” Section 400.14(e)(2) states that increases in production capacity shall be communicated to the Board “no later than the end of the calendar quarter during which the capacity increase becomes effective,” and Section 400.37(b)(1) states that production changes must be communicated to the Board “no later than 45 days after the end of the calendar quarter during which the production change took place.” Reporting to the Board on production changes or increases in capacity should be uniform. We also believe that 90 days from the end of the calendar quarter in which the change or increase takes place is a reasonable timeframe for reporting. Finally, the requirement to request Board approval is unnecessary. This provision should apply automatically to all zone users.
10. Sections 400.14(e)(1) and 400.37 seem unnecessarily complicated and difficult to administer. For ease of administration, we believe the Board should consider any grant of authority for production, except those subject to AD, CVD or Section 337, to be eligible for the notification procedure provided that the finished product produced at the zone is within the scope of authority as determined at a four-digit HTS level. With changes required to be reported by the close of the next quarter, there is minimal risk of material impact on the domestic economy due to production changes. Moreover, Section 400.14(e)(3) gives the Assistant Secretary authority to restrict any activity in advance of further review of the production change on public interest grounds, which further mitigates risk.

11. The reference to the ad valorem tax exemption found in Section 400.1(c) was specifically added to the 1991 regulations so a condition of the ad valorem tax exemption was apparent from the phrase “to the extent ‘activated.’” Section 400.1(c) is unchanged. Proposed Section 400.16 replaces the phrase “to the extent ‘activated’” with the phrase “in the zone in zone status.” We believe there is no impact to this change – the phrases mean the same thing. However, state and local taxing authorities have become familiar with “activation” as a trigger for the tax exemption over the past 20 years. To avoid any confusion as to the reason different language was selected, we recommend making 400.1(c) and 400.16 parallel by amending Section 400.16 as follows:

“Foreign merchandise (tangible personal property) admitted to a zone and domestic merchandise held in a zone for exportation are exempt from state and local ad valorem taxation while such merchandise remains ~~in the zone in zone status~~ **in an activated zone** (19 U.S.C. 81o(e)).”

12. We believe Section 400.35(d) should require the Executive Secretary to notify applicants of intent to terminate review and allow 30 days for response prior to completion of any termination action. As proposed, Section 400.35(d) makes notification and response discretionary, as evidenced by the phrase “will generally notify.” We believe removal of the word “generally” is all that is required to effectuate this change.
13. The preclusion of conflict of interest provision in Section 400.43(e) seems to us to be overreaching. It has inconsistencies with the rigorous rules designed to prevent conflicts of interest already applicable to attorneys, and potentially interferes with a grantee's or zone participant's right to select counsel of its choice. We recommend that Section 400.43(e) be replaced with a rule similar to that contained in the ABA Model Rule of Professional Conduct 1.7, which serves as the model for the ethics rules of most states applicable to attorneys on conflicts of interest. A central tenet of this rule is the requirement of informed consent by both parties afforded representation. Our suggested text follows:

(e) Preclusion of conflicts of interest. To avoid non-uniform treatment of zone participants, this section seeks to preclude concurrent conflicts of interest in a third party's performance of zone-related services for, sale or license of products to, or representation of both a grantee and a zone participant in the same zone.

(1) A concurrent conflict of interest exists if:

- (a) the third party's concurrence (or the concurrence of a party related to the third party) is required by the grantee as a condition to approval of a request by a zone participant for either FTZ authority or activation by CBP; or
- (b) there is a significant risk that the services or products to be provided to a grantee or zone participant will be materially limited by the third party's (or a party related to the third party) responsibilities to the other party.

(2) Notwithstanding the existence of a concurrent conflict of interest under paragraph (1), a third party may provide services, products, or representation to a zone participant in addition to the grantee if:

- (a) the third party reasonably believes that it will be able to provide competent and diligent services, products, or representation to each affected party;
- (b) the activity is not prohibited by law;
- (c) both the grantee and zone participant provide informed consent to the concurrent conflict of interest in writing; and
- (d) the grantee documents the conflict of interest waiver procedure in the zone schedule, and further documents in the zone schedule that zone participant(s) are not required to use the services or products of any third party performing zone-related services or products to the grantee.

14. We believe Section 400.61(b)(3) should specify the adjudicative standard that will govern the hearing and that the grantee or operator will have the opportunity to call and cross examine witnesses.

15. Several changes should be made to proposed Section 400.62. First, 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 FTZ 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 Customs and Border Protection. The violations subject to penalty under this section should be specifically defined, e.g., failure to file an annual report or failure to follow a Board Order. 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.

16. Section 400.62 should be carefully reviewed to ensure conformity with 19 U.S.C. Section 81s, which provides authority to issue penalties for violations by “the grantee, any officer, agent or employee thereof.” In this regard, we also recommend the careful review of the definition of “agent” provided in Section 400.2(b) as a person “acting on behalf of or under agreement with the zone grantee in zone-related matters” as noted in comment 3 above.

17. Along with identifying the appropriate range of penalties for each specific violation referenced in Section 400.62, the regulations should clarify the approach to be taken when multiple parties may be subject to penalty for the same violation. It appears that multiple parties could be subject to the same \$1,000 fine (e.g., agents as well as grantees). The amounts of possible fines could potentially be astronomical and duplicative as a result.

18. Any hearing contemplated by proposed subsection 400.62(e)(2) should specify the adjudicative standards that will govern the hearing and that the grantee or operator will have the opportunity call and cross examine witnesses.
19. We believe that there should be a clear and unambiguous limitations period on the enforcement or any fine, penalty or sanction (i.e., five years from the date of the alleged violation).

We recommend that the proposed revisions to the language of the Proposed Rule set forth herein be made before any amendments to the FTZ regulations are issued in an interim or final rule. We believe the recommendations and comments set forth above are consistent with the Board's intent and will expedite and encourage foreign commerce. We look forward to continued communications regarding these important issues, and we appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Salli A. Swartz', with a large, sweeping flourish extending to the right.

Salli A. Swartz
Chair, ABA Section of International Law