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May 23, 2011

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

Re: Docket Number ITA-2010-0012, RIN 0625-AA81

Dear Mr. McGilvray:

As legal counsel for Mississippi Coast Foreign-Trade Zone, Inc., Grantee of Foreign-Trade Zone No. 92, we offer the following comments to the Foreign-Trade Zone Board's proposed regulatory changes as set forth in its *Federal Register* Notice of December 30, 2010.

1. Definition of "agency"

Proposed regulation section 400.2(b) defines "agent" as "a person ... acting on behalf of or under agreement with the zone grantee in zone-related matters." We believe the proposed definition of "agent" might create unforeseen issues, and we urge you to carefully review the potential consequences of proposed section 400.2(b). Every person "under agreement with the zone grantee" will not *also* be an agent of the grantee. One obvious example is that zone users act "under agreement" with the zone grantee but are not typically "agents" of the grantee. Zone users do not have authority to act on the grantee's behalf or bind the grantee to a contract with a third party, the hallmarks of any agency relationship. The same would hold true of the various contractors who are "under agreement" with a grantee to provide goods or services relating to operation or

management of the zone. In this sense, proposed regulation 400.2(b) appears to be overbroad.

2. Conflicts of interest

Section 400.43 proposes new regulations intended to further the statutory mandate of uniform treatment by precluding certain activity deemed to be “conflicts of interest.” However, as Zone No. 92 points out in the comments to which this letter is attached, proposed section 400.43 would preclude the now-common practice of zone users and potential users hiring consultants who also hold the position of zone project administrator for the same zone. As Zone No. 92 explains, both grantees and users will suffer a significant negative impact as a result of that rule.

The expected negative impact of section 400.43 on grantees and users is not consistent with the basic regulatory philosophy and principles set forth in Section 1 of Executive Order #12866, which has governed the federal regulatory system for almost two decades.

a. *Consideration of costs to grantees and users*

Section 1(b)(6) of Executive Order #12866 states, “Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” We urge the Board, in making its cost-benefit analysis, to give further consideration to the significant costs of section 400.43—to grantees, zone users and potential users—as discussed in the comments provided by Zone 92.

b. *Focus on performance objectives rather than specific behavior*

Section 1(b)(8) of Executive Order #12866 requires, “Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying behavior or manner of compliance that regulated entities must adopt.” We propose that the Board consider emphasizing ways to insure the performance objective of “uniform treatment” rather than focusing on prohibiting transactions that may technically fall under the proposed definition of “conflict of interest” but that do not, in fact, result in disparate treatment of zone users.

As a potential starting point, we refer you to the *Armco Steel* opinion by the U.S. District Court for the Southern District of New York. In that opinion, affirmed by the U.S. Court of Appeals for the Second Circuit, the District Court held that a grantee met the “uniform treatment” requirement of 19 U.S.C. § 81n by committing to offer all areas within the zone at the “same arrangements under similar terms and conditions.” *Armco*

Steel Corp. v. Stans, 303 F. Supp. 262, 270 (S.D.N.Y. 1969), *aff'd* 431 F.2d 779, 789 (2d Cir. 1970). The *Armco Steel* opinion indicates that a prohibition on conflicts of interest is not required by the Foreign-Trade Zones Act, as long as all users are given the “same arrangements under similar terms and conditions.”

c. Narrow tailoring to impose the least burden

Section 1(b)(11) of Executive Order #12866 provides, “Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of different sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives....” Section 400.43 could be much more narrowly tailored to achieve its objective of uniform treatment while imposing significantly less of a burden on users and grantees. We urge the Board to consider ways of mitigating conflict of interest concerns without precluding the common practice of zone users and potential users hiring consultants who also serve as the zone’s project administrator.

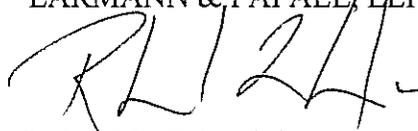
3. Confidential Complaints

We also urge you to carefully consider proposed Section 400.46(a), which allows for confidential complaints to the Executive Secretary by zone participants who believe “conditions or treatment” in a zone are “inconsistent with the public utility and uniform treatment requirements of the FTZ Act and [the] regulations.” The proposed regulations do not make clear how confidential complaints would be handled and resolved. Before any fine or other consequence could be imposed on a party as the result of a confidential complaint, it would seem that Constitutional due process under the Fifth Amendment may require adequate notice, including disclosure of the identity of the complainant, and some form of hearing. To the extent Section 400.46(a) could be construed otherwise, we believe it has the potential to result in a series of lawsuits.

We believe the comments and recommendations set forth above will expedite and encourage foreign commerce and are consistent with the Board’s intent. We appreciate your consideration of these comments.

Sincerely,

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