



**United States Department of Commerce**  
**The Foreign-Trade Zones Board**  
Washington, D.C. 20230

January 12, 2017

Paul Wesch  
Senior Director of Finance  
City of Mobile  
P.O. Box 1827  
Mobile, AL 36633

Dear Mr. Wesch:

In August 2016, the Foreign-Trade Zones (FTZ) Board voted not to approve a waiver requested by FTZ 82 pursuant to 15 CFR 400.43(f). In response to that vote, in September 2016, FTZ 82 submitted certain additional evidence or argument. I am writing to inform you that, after consideration of FTZ 82's September 2016 submission, the Board has now voted to maintain its vote of August 2016 not to approve the requested waiver. A copy of the decision documents, signed by the Board members, is attached, as is a related memorandum from the Executive Secretary.

Please let us know if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Andrew McGilvray".

Andrew McGilvray  
Executive Secretary

Attachments


## RESOLUTION

Waiver Requests under 15 CFR 400.43(f) from  
the City of Mobile, grantee of FTZ 82;  
Huntsville-Madison County Airport Authority, grantee of FTZ 83; and  
Mississippi Coast Foreign Trade Zone, Inc., grantee of FTZ 92

The FTZ Board has considered the submissions of the City of Mobile, grantee of FTZ 82; Huntsville-Madison County Airport Authority, grantee of FTZ 83; and Mississippi Coast Foreign Trade Zone, Inc., grantee of FTZ 92, in response to the FTZ Board's vote in August 2016 not to approve waivers requested by each of those grantees pursuant to 15 CFR 400.43(f).<sup>1</sup>

### **DECISION**

Regarding the above-cited submissions from the grantees of FTZs 82, 83 and 92, after consideration and review of the analyses and conclusion in the Executive Secretary's memorandum to the Assistant Secretary of Commerce for Enforcement and Compliance and the Deputy Assistant Secretary of the Treasury (Tax, Trade and Tariff Policy), dated January 9, 2017, I hereby vote to maintain the FTZ Board's vote of August 2016 not to approve the waivers requested by those grantees pursuant to 15 CFR 400.43(f).

Signed:   
Paul Piquado  
Assistant Secretary of Commerce  
for Enforcement and Compliance

Date: JANUARY 12, 2017

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<sup>1</sup> Those waiver requests sought to enable Foreign-Trade Zone Corporation or a related entity to offer/provide zone-related products/services to or represent "zone participants" (15 CFR 400.2(x)) of a zone while "[o]verseeing zone participants' operations on behalf of [the] grantee" (*i.e.*, the "key function" of 15 CFR 400.43(d)(1)(iii)).

RESOLUTION


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The FTZ Board has considered the submissions of the City of Mobile, grantee of FTZ 82; Huntsville-Madison County Airport Authority, grantee of FTZ 83; and Mississippi Coast Foreign Trade Zone, Inc., grantee of FTZ 92, in response to the FTZ Board's vote in August 2016 not to approve waivers requested by each of those grantees pursuant to 15 CFR 400.43(f).<sup>1</sup>

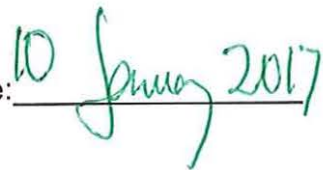
**DECISION**

Regarding the above-cited submissions from the grantees of FTZs 82, 83 and 92, after consideration and review of the analyses and conclusion in the Executive Secretary's memorandum to the Assistant Secretary of Commerce for Enforcement and Compliance and the Deputy Assistant Secretary of the Treasury (Tax, Trade and Tariff Policy), dated January 9, 2017, I hereby vote to maintain the FTZ Board's vote of August 2016 not to approve the waivers requested by those grantees pursuant to 15 CFR 400.43(f).

Signed: \_\_\_\_\_

  
Timothy E. Skud  
Deputy Assistant Secretary of the Treasury  
(Tax, Trade and Tariff Policy)

Date: \_\_\_\_\_



<sup>1</sup> Those waiver requests sought to enable Foreign-Trade Zone Corporation or a related entity to offer/provide zone-related products/services to or represent "zone participants" (15 CFR 400.2(x)) of a zone while "[o]verseeing zone participants' operations on behalf of [the] grantee" (*i.e.*, the "key function" of 15 CFR 400.43(d)(1)(iii)).



Memorandum for: Paul Piquado  
Assistant Secretary of Commerce  
for Enforcement and Compliance

Timothy E. Skud  
Deputy Assistant Secretary of the Treasury  
(Tax, Trade, and Tariff Policy)

From: Andrew McGilvray   
Executive Secretary  
Foreign-Trade Zones Board

Through: Khalil Gharbieh   
Attorney, Office of Chief Counsel  
for Trade Enforcement & Compliance

Date: January 9, 2017

Subject: Analysis of Submissions from Three Grantees in Response to FTZ  
Board Vote on Waiver Requests under 15 CFR 400.43(f)

## **BACKGROUND**

Pursuant to Section 400.43(f) of the Foreign-Trade Zones (FTZ) Board's regulations (15 CFR Part 400), the grantees of FTZ 82 (the City of Mobile), FTZ 83 (the Huntsville-Madison County Airport Authority), and FTZ 92 (Mississippi Coast Foreign Trade Zone, Inc.) each requested a waiver from the FTZ Board. The requested waivers would allow Foreign-Trade Zone Corporation (collectively with related entities, "FTZ Corp") to undertake the "key function" of 15 CFR 400.43(d)(1)(iii) – "[o]verseeing zone participants' operations on behalf of a grantee" – while FTZ Corp also offers/provides zone-related products/services to those zone participants. In August 2016, the Board voted not to approve the grantees' requests for waivers. The decision documents for that vote – including the memorandum dated August 12, 2016 providing background and detailing the analysis conducted by the Board's staff regarding the waiver requests – are attached to this memorandum at Appendix 1.

According to 15 CFR 400.43(f), "If the Board votes not to authorize a waiver or to discontinue a waiver, the applicant shall be notified in writing and allowed 30 days to present evidence in response." On August 26, 2016, the grantees of FTZs 82, 83 and 92 were notified of the

FTZ Board's vote not to approve their requested waivers and allowed 30 days to submit evidence in response. The grantees' responses are attached to this memorandum as Appendices 2 through 4.

15 CFR 400.43(f) does not specify what subsequent action(s) that the Board or its staff might take after receiving such responses to a Board vote not to authorize a waiver (or to discontinue a waiver). The Board's August 2016 vote on the waiver requests from FTZs 82, 83 and 92 was the first Board vote "not to authorize a waiver or to discontinue a waiver" under the regulation. To provide an explanation for all parties and reviewers, this document sets forth the FTZ Board staff's analysis of the points made by the applicants in their responses to the Board's August 2016 vote. Finally, this document contains the staff's conclusion(s) on whether the content of the applicants' submissions provides a basis for modifying the August 2016 recommendation adopted by the FTZ Board.

## **SUMMARIES AND ANALYSIS OF THE ARGUMENTS/EVIDENCE IN THE RESPONSES**

Below are summaries of the primary arguments and associated evidence presented by the grantees of FTZs 82, 83 and 92 and the FTZ Board staff's analysis of each argument:

### Users Do Not and Will Not Experience Implied Pressure

#### *Summary of Arguments/Evidence:*

FTZ 92 states that it would not allow FTZ Corp to "take over" the zone or allow the users of the zone to be pressured inappropriately by FTZ Corp. FTZ 92 also states that FTZ Corp has actually declined potential business from one or more FTZ users when that business would conflict with FTZ Corp's work for the grantee. As evidence that zone users have not experienced implied pressure to purchase FTZ Corp's products/services – and, therefore, would not experience such pressure in the future – FTZ 82 cites a survey it conducted pertaining to users' actions after FTZ Corp conducted compliance reviews of the users on behalf of the grantee. In response to this survey, none of the users of the zone reported purchasing any product or service from FTZ Corp during the past five years. FTZs 82, 83 and 92 maintain that, because the proposed compliance reviews by FTZ Corp would only occur after a user has begun using a zone, those compliance reviews inherently could not have an impact on the user's "access" to the FTZ program or whether the user perceives any implied pressure to purchase FTZ Corp's products/services in order to obtain such access. Therefore, there should be no reason to deny the waivers requested for FTZ Corp to undertake compliance reviews on the grantees' behalf. Approval of those waivers is necessary to preserve zone users' "freedom of choice" for FTZ products/services, and would not "nullify or abridge" the Board's regulation stating that "zone participants shall not be required (either directly or indirectly) to utilize or pay for a particular provider's zone-related products or services."

*FTZ Board Staff's Analysis:*

After assessing a range of considerations relevant to determining the appropriate regulatory approach, the Board adopted a standard to bar a person from undertaking a key function for a grantee if that same person offers/provides zone-related products/services to users of the grantee's zone. The Board also opted to allow for possible circumstance-specific waivers of that bar. As the Board explained in the regulatory Preamble: "This approach strikes an appropriate balance in order to avoid the types of broad, negative impacts projected by commenters while continuing to reflect the fact that a zone grantee often has a monopoly in its region for valuable access to the federal privilege of FTZ use (with zone participants reluctant to make uniform treatment-related complaints to the FTZ Board because of a perceived risk of jeopardizing key relationships with grantees or with third parties undertaking key functions on behalf of grantees)."

The Preamble explained key points about the adoption of 15 CFR 400.43(d) and (f), but was not exhaustive in delineating relevant considerations for the adoption and implementation of the regulation. For example, as noted below, companies' needs for involvement by grantees or grantees' contractors pertaining to modifications of the companies' FTZ operations over time mean that concerns about "access" to a zone are not limited to the initial point at which companies apply to – and sign contracts with – grantees. Therefore, contrary to the assertions of these grantees, the potential for impact on FTZ users' access and for implied pressure on users to purchase a contractor's products/services is not limited to the period before a company begins using a zone.

Although these grantees have indicated that their own evaluations or monitoring of the actions of their contractor(s) should be sufficient to allay uniform treatment-related concerns, FTZ users have indicated that they are reluctant to make complaints to grantees about the grantees' contractors due to a perceived risk of the contractor subsequently giving the FTZ user less favorable consideration or reduced responsiveness to essential requests. Further, a clear, close and longstanding relationship between the grantee and its contractor – of the type highlighted by some of these grantees regarding their relationships with FTZ Corp, for example – could actually heighten those types of concerns. In that context, a grantee's ability to ensure that its contractor(s) treated users of the zone in a manner consistent with the statutory uniform treatment requirement would be diminished by users' reluctance to report concerns to the grantee. There is reason to believe that users reporting to the zone's grantee via the type of survey that FTZ 82 reports having conducted would feel reluctance to report problems or concerns. In adopting 15 CFR 400.43(d), the Board rejected a reliance on grantees monitoring their contractors as inadequate for addressing the Board's uniform treatment concerns. The submissions by FTZs 82, 83 and 92 do not present a sufficient basis for the Board to effectively embrace such a reliance specific to those zones through approval of the requested waivers.

For the key function in question – involving a grantee engaging a contractor to verify the compliance of the zone’s users with the requirements of U.S. Customs and Border Protection (CBP) – there is at least one clear alternative option available to grantees that does not give rise to problems under 15 CFR 400.43(d): a grantee setting a requirement for operators in the zone to obtain periodic compliance reviews from third parties of the operators’ independent choosing. The FTZ Board staff recently clarified that this alternative option is available in a letter correcting the misconception of certain grantees, which became evident in the grantees’ responses to a Congressionally mandated survey issued by the FTZ Board.<sup>1</sup> That survey process revealed one other key piece of information: of the 253 responding grantees – from a population of 263 FTZs overall – only ten grantees reported engaging a third party to “[r]eview zone participants’ compliance with CBP’s requirements.” Therefore, the vast majority of grantees find that they are able to operate their zones successfully without undertaking the types of compliance reviews for which FTZs 82, 83 and 92 request waivers for FTZ Corp to perform on their behalf.

As discussed at more length in the August 12, 2016 memorandum attached as Appendix 1 to this memorandum, the pending waiver requests involve three grantees proposing to engage FTZ Corp to conduct reviews of the compliance of the zones’ users with CBP’s requirements while FTZ Corp also attempts to sell its compliance-oriented products/services to those users. As also explained in the August 12, 2016 memorandum, providing zone-related products/services is FTZ Corp’s sole line of business and FTZ Corp would be the sole firm engaged by each of the grantee to conduct the types of compliance reviews in question. Those types of circumstances led to the conclusion in the August 12, 2016 memorandum that approval of the requested waivers was not appropriate. Our analysis indicates that the responses of FTZs 82, 83 and 92 to that conclusion do not provide an adequate basis to justify approval of waivers in light of the full set of circumstances present (which were delineated in the August 12, 2016 memorandum).

### The Board’s Standards for Judging Potential Pressure Are Inappropriate

#### *Summary of Arguments/Evidence:*

FTZ 83 argues that the standards applied by the Board in assessing the likelihood that users would “feel” “implied pressure” based on what “could” or “may” happen are inappropriately speculative and subjective, and devalue what actually happens in the FTZ in question. The Board should instead focus on how the grantee actually manages its zone.

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<sup>1</sup> See letter dated October 13, 2016 from Andrew McGilvray to Richard Tucker and Andrew Mayo – attached as Appendix 5. The misconception was reflected in the responses of the grantees of FTZ 83 (one of the grantees whose response to the FTZ Board’s August 2016 vote not to approve a waiver request is the subject of this memorandum) and FTZ 98.

### *FTZ Board Staff's Analysis:*

As delineated above in response to other points raised by FTZs 82, 83 or 92, the Board's goals in adopting the regulation could not be carried out adequately if implementation relied exclusively or primarily on FTZ users' willingness to make complaints – either to the Board or to their grantee – or on grantees monitoring their contractors. Therefore, it is not feasible to rely only on FTZ users reporting whether they encounter “implied pressure” to purchase products/services from the grantee's contractor. The standards that the FTZ Board applies in evaluating waiver requests are appropriate in their systemic context. Ensuring that access to the federal privilege of FTZ use is not perceived by FTZ users as conditioned upon the purchase of certain, privately-provided products or services is an important goal.

### The Board's Waiver-Evaluation Process to Date Has Been a Sham

#### *Summary of Arguments:*

FTZ 83 argues that, in the regulatory Preamble, the Board stated that “[i]n total, the adopted provisions will allow the Board to respond to individual circumstances, and should avoid the ‘one-size-fits-all’ impact about which some commenters expressed concern.” However, the “Conclusions and Recommendation” section of the analysis memorandum dated August 12, 2016, pertaining to the pending waiver requests states: “This analysis is not specific only to FTZ Corp, but would apply to any company in FTZ Corp's situation.” In a waiver process that purports “to respond to individual circumstances,” the statement that the analysis by the Board staff would apply to any company in a particular situation indicates that the waiver process is a sham.

#### *FTZ Board Staff's Analysis:*

The language cited above from the August 12, 2016, analysis memorandum simply emphasizes that the overall analysis is not linked to the identity of the grantee's contractor – in this case, FTZ Corp – but, rather, to the specific circumstances presented. Therefore, if a future waiver request were to present another company whose circumstances mirrored those of FTZ Corp in the pending waiver requests, the analysis for that future request would similarly mirror the analysis done for the pending requests. By the same token, in cases where the specific circumstances differed from those presented here, the Board would necessarily have to evaluate the facts and circumstances with a fresh eye.

### The Board's Process in Adopting the Regulation Was Flawed

#### *Summary of Arguments/Evidence:*

FTZs 82, 83 and 92 argue that the public comment process for adoption of the Board's revised regulations in 2012 was inadequate because the Board issued final revised regulations after allowing public comment only on its initial proposed regulations – *i.e.*,



without publishing for public comment a revised regulatory proposal containing changes the Board proposed to make to the initial proposed regulations in response to the public comments. According to FTZ 92, the Grantee Task Force of the National Association of Foreign-Trade Zones (NAFTZ) had stated that the proposed rule "may force a number of Grantees to withdraw from the zone's program as they do not have the human resources or the financial ability to meet and maintain the new requirements" and that "the Board's concerns over the actions of the very small number of Grantees and parties providing services to these Grantees should not require such radical change but rather can be effectively dealt with under the transparency and enforcement provisions of the new Regulations." Separately, FTZ 83 claims that the Board allowed an untimely submission from Kelley Drye and Warren, LLP, that influenced the final regulations.

FTZs 82, 83 and 92 argue that, in adopting the uniform treatment regulation, the Board ignored the intent and meaning of Executive Order (EO) 13563 (issued by President Obama on January 18, 2011). EO 13563 includes provisions requiring that agencies "allow for public participation and an open exchange of ideas" before adopting regulations, that the regulatory system must "measure, and seek to improve, the actual results of regulatory requirements," and that agencies must use the "least burdensome tools for achieving regulatory ends."

*FTZ Board Staff's Analysis:*

FTZs 82, 83 and 92 have presented legal arguments questioning the legitimacy of the underlying regulations, not "evidence," *i.e.*, factual information or arguments based on such factual information, that would cause the Board to reconsider its vote not to authorize a waiver.<sup>2</sup> However, in order to provide the grantees of FTZs 82, 83, and 92 a fuller understanding of the Board's process for adopting its revised regulations, the process is summarized here. The process of developing and adopting the revised regulations was in full compliance with all applicable requirements, including the Administrative Procedure Act (5 U.S.C. §551, *et seq.*). In particular, the process included a lengthy period for submission of public comments – with the Board ultimately extending that initial comment period to 147 days in response to one or more requests – followed by an additional month-long period allowed by the Board for any parties to submit "reply" comments addressing points made by commenters during the initial comment period. All of the comments submitted during the initial and reply comment periods were considered by the Board for its final regulations, and all comments considered had been timely submitted during one of those comment periods (including the referenced submission from Kelley Drye and Warren, LLP, that was timely submitted during the announced period for reply comments).

For the Board's final regulations, any modifications of provisions of the proposed regulations were made directly in response to comments submitted. In response to public comments expressing concern about the potential negative impact of the proposed uniform treatment

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<sup>2</sup> See 15 CFR 400.43(f).

regulation on a significant number of grantees, the Board substantially modified the proposed regulation to take account of comments received. The available evidence indicates that the final regulation successfully avoided the type of broad, negative impacts on grantees about which commenters expressed concerns. In particular, as noted earlier, a recent survey conducted by the FTZ Board pursuant to a Congressional requirement found that only fifteen of 253 responding grantees (from a total population of 263 FTZs) indicated any impact of the regulation on their management of their FTZs.<sup>3</sup>

EO 13563<sup>4</sup> – which states that it “is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person” – requires in part that “our regulatory system... must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.” FTZs 82, 83 and 92 posit that one or more other, less burdensome tools could have been used by the FTZ Board to achieve the Board’s goal(s) in adopting the regulatory provision barring persons in certain key categories from undertaking certain key functions for grantees. Similar arguments were made by those and certain other grantees during the comment process undertaken with respect to public review of the proposed regulations (which, in the words of EO 13563, “allow[ed] for public participation and an open exchange of ideas” through the 147-day initial comment period and the month-long period for reply comments, as noted above). Those were among the numerous comments taken into account for the development of the final regulations. Also, although not every matter addressed by the regulations was susceptible to specific measurement, the Board’s revised regulations were consistent *in toto* with EO 13563’s statement that the regulatory system “must measure, and seek to improve, the actual results of regulatory requirements.”

The regulatory approach adopted by the Board in 15 CFR 400.43(d) and (f) reflected important considerations such as not forcing FTZ users to rely on the grantee of their zone to effectively monitor the actions of the grantee’s contractor. That type of consideration would hold in a context – such as has been expressed by FTZs 82, 83 or 92 in prior submissions to the Board – in which the contractor may have a close, long-term relationship with officials of the grantee organization. In particular, the approach adopted by the Board reflected its recognition of the reluctance expressed by certain FTZ users to raise uniform-treatment related issues due to concerns that perceived “complaints” by a user might ultimately lead to the grantee or its contractor (about whom the complaints would be made) providing less favorable consideration or being less responsive to essential requests by the complaining user. Such less favorable consideration or reduced responsiveness to

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<sup>3</sup> The survey question on this point asked: “Has your organization needed to change its list of activities/actions undertaken (as enumerated above) and/or the identity of the entity(ies) undertaking any activities/actions on its behalf as a result of the FTZ Board’s adoption in 2012 of its ‘uniform treatment’ regulation (15 CFR 400.43)?”

<sup>4</sup> The full text of EO 13563 is available at <https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>

essential requests – such as for the zone’s necessary sponsorship of any modification the user might need to make to its FTZ designation – could have a direct impact on the user’s access to the FTZ program.

For a range of reasons, any potential cause-and-effect relationship between complaints by a zone user and differential treatment of that user by the grantee or its contractor would appear to be effectively impossible for the Board to monitor. For example, it would be difficult if not impossible for the Board to determine whether differences in the time taken by a grantee’s contractor to respond to requests from several different zone users would be attributable to factors such as which of those users had purchased products/services from the contractor or had made complaints about the contractor, or to other entirely different factors. In the context in which such monitoring was not feasible, the Board’s approach – *i.e.*, adopting a provision to preclude certain narrowly targeted key functions from being undertaken on behalf of a grantee by any firm that was also offering/providing zone-related products/services to users of that grantee’s zone – did, in fact, represent the least burdensome tool for achieving the Board’s regulatory ends.

## **CONCLUSION**

As summarized above, the arguments and evidence presented by FTZs 82, 83 and 92 do not present a sufficient basis for modifying the recommendation which the FTZ Board adopted by vote in August 2016 (*i.e.*, not to approve these grantees’ requested waivers for FTZ Corp to review the CBP compliance of users of these zones while FTZ Corp also offers/provides zone-related products/services to those users).

# Appendix 1

## RESOLUTION

Waiver Requests under 15 CFR 400.43(f) from  
the City of Mobile, grantee of FTZ 82;  
Huntsville-Madison County Airport Authority, grantee of FTZ 83; and  
Mississippi Coast Foreign Trade Zone, Inc., grantee of FTZ 92

The FTZ Board has considered requests from the City of Mobile, grantee of FTZ 82; Huntsville-Madison County Airport Authority, grantee of FTZ 83; and Mississippi Coast Foreign Trade Zone, Inc., grantee of FTZ 92, for waivers pursuant to 15 CFR 400.43(f). The pending requests seek to enable Foreign-Trade Zone Corporation or a related entity to offer/provide zone-related products/services to or represent "zone participants" (15 CFR 400.2(x)) of a zone while "[o]verseeing zone participants' operations on behalf of [the] grantee" (*i.e.*, the "key function" of 15 CFR 400.43(d)(1)(iii)).

### **DECISION**

Upon consideration and review of the discussion and recommendation in the Executive Secretary's memorandum to the Assistant Secretary of Commerce for Enforcement and Compliance and the Deputy Assistant Secretary of the Treasury (Tax, Trade and Tariff Policy), dated August 12, 2016, which analyzes the pending requests from the grantees of FTZs 82, 83 and 92, I hereby vote not to approve the requested waivers.

Signed: Paul Piquado  
Paul Piquado  
Assistant Secretary of Commerce  
for Enforcement and Compliance

Date: 8/25/2016

## RESOLUTION

Waiver Requests under 15 CFR 400.43(f) from  
the City of Mobile, grantee of FTZ 82;  
Huntsville-Madison County Airport Authority, grantee of FTZ 83; and  
Mississippi Coast Foreign Trade Zone, Inc., grantee of FTZ 92

The FTZ Board has considered requests from the City of Mobile, grantee of FTZ 82; Huntsville-Madison County Airport Authority, grantee of FTZ 83; and Mississippi Coast Foreign Trade Zone, Inc., grantee of FTZ 92, for waivers pursuant to 15 CFR 400.43(f). The pending requests seek to enable Foreign-Trade Zone Corporation or a related entity to offer/provide zone-related products/services to or represent "zone participants" (15 CFR 400.2(x)) of a zone while "[o]verseeing zone participants' operations on behalf of [the] grantee" (*i.e.*, the "key function" of 15 CFR 400.43(d)(1)(iii)).

### **DECISION**

Upon consideration and review of the discussion and recommendation in the Executive Secretary's memorandum to the Assistant Secretary of Commerce for Enforcement and Compliance and the Deputy Assistant Secretary of the Treasury (Tax, Trade and Tariff Policy), dated August 12, 2016, which analyzes the pending requests from the grantees of FTZs 82, 83 and 92, I hereby vote not to approve the requested waivers.

Signed: Timothy E. Skud

Timothy E. Skud  
Deputy Assistant Secretary of the Treasury  
(Tax, Trade and Tariff Policy)

Date: 25 August 2016



Memorandum for: Paul Piquado  
Assistant Secretary of Commerce  
for Enforcement and Compliance

Timothy E. Skud  
Deputy Assistant Secretary of the Treasury  
(Tax, Trade, and Tariff Policy)

From: Andrew McGilvray *AMG*  
Executive Secretary  
Foreign-Trade Zones Board

Through: Scott McBride *SM*  
Assistant Chief Counsel for  
Trade Enforcement and Compliance

Date: August 12, 2016

Subject: Three Waiver Requests under 15 CFR 400.43(f)

The contents of this memorandum reflect the analysis conducted by the staff of the Foreign-Trade Zones (FTZ) Board (the Board) pertaining to requests from three FTZs for waivers under Section 400.43(f) of the Board's regulations (15 CFR Part 400). For ease of review, this memorandum is divided into the following sections:

- Executive Summary
- Background
- Arguments Presented by the Requesters
- Standard for Decisions
- Discussion
- Conclusions and Recommendation

This memorandum is accompanied by a resolution for adoption by each FTZ Board member that would institute the memorandum's recommendation.

## EXECUTIVE SUMMARY

The FTZ Act provides that the Board may confer local “grantee” entities the valuable privilege of a monopoly of access to sponsoring FTZ sites in those entities’ regions. Pursuant to this privilege, the FTZ Act requires that each grantee operate its zone as a “public utility” and afford to zone users “uniform treatment under like conditions” (19 U.S.C. §81n). The FTZ Act also mandates that the FTZ Board “prescribe such rules and regulations... as may be necessary to carry out” the FTZ Act’s requirements (19 U.S.C. §81h).

In 2012, after an extensive notice-and-comment process, the FTZ Board adopted revised regulations that include provisions intended (as expressed in the *Preamble*<sup>1</sup>) to “maintain safeguards to ensure the integrity of the FTZ program” and maximize compliance with the statutory “uniform treatment” requirement. The uniform treatment regulation generally bars a company from undertaking any of three identified “key functions” on behalf of a grantee if the company also offers/provides zone-related products/services or representation to users of that grantee’s FTZ.<sup>2</sup> The sole exception is if the FTZ Board has approved a waiver permitting the company to undertake the key function in question.<sup>3</sup>

FTZs 82 (Mobile, AL) , 83 (Huntsville, AL) and 92 (Gulfport, MS) each propose to have a private company, Foreign-Trade Zone Corporation (collectively with related entities, “FTZ Corp”), review the regulatory compliance of the participants in those FTZs – an activity which we have determined constitutes the regulatory key function of “[o]verseeing zone participants’ operations on behalf of a grantee.”<sup>4</sup> However, because FTZ Corp offers or provides zone-related products/services to participants in FTZs 82, 83 and 92, FTZ Corp can only undertake that key function on behalf of the grantees if the FTZ Board approves a waiver (which the grantees of FTZs 82, 83 and 92 have now requested<sup>5</sup>). In May and July of 2014, the FTZ Board approved waivers with certain conditions/limitations specific to FTZ

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<sup>1</sup> *Preamble, Foreign-Trade Zones in the United States, Final Rule*, 77 FR 12112, 12129-12131 (February 28, 2012) (*Preamble*).

<sup>2</sup> See 15 CFR 400.43(d).

<sup>3</sup> See 15 CFR 400.43(f).

<sup>4</sup> See letter from Andrew McGilvray to Richard Tucker and Greg Jones, dated December 29, 2014.

<sup>5</sup> The grantees of FTZs 134 (Chattanooga, TN) and 158 (Vicksburg/Jackson, MS) have also requested waivers for FTZ Corp to undertake the same key function on their behalf. Certain different circumstances exist in FTZs 134 and 158 relative to FTZs 82, 83 and 92 – in particular, the waiver requests indicate that FTZ Corp has existing customers for its consulting or software services among the users of FTZs 134 and 158 but has no such existing customers among the users of FTZs 82, 83 and 92. As a result, the waiver requests from FTZs 134 and 158 will be analyzed separately from the requests from FTZs 82, 83 and 92.



Corp undertaking a different key function which had been proposed by the grantees of FTZs 82, 83, 134 and 158.<sup>6</sup>

A key factor the Board takes into account when considering a waiver request is “whether a grantee’s specific arrangement presents a significant risk that zone users will experience implied pressure to procure a particular private party’s services as a condition of obtaining access to the federal FTZ program.”<sup>7</sup> The pending requests seek waivers for FTZ Corp to conduct regulatory compliance reviews of zone participants on behalf of the zones’ grantees while at the same time FTZ Corp seeks to sell compliance-related products or services to those zone participants. In general, such practices carry a substantial risk of implied pressure for zone participants to procure products/services from the contractor. In the pending requests, there are no underlying specific circumstances, such as disrupting an already existing business relationship, that warrant undertaking that risk. Therefore, we are unable to recommend approving the requested waivers. This differs from our May and July 2014 recommendations for the prior waiver requests because the key function that FTZs 82, 83 and 92 now propose for FTZ Corp to undertake creates a more significant risk of implied pressure on zone users to procure FTZ Corp’s products/services.

## **BACKGROUND**

### The Regulations Have a Default Bar on Certain Conflicts of Interest but Allow for Waivers

Section 81a(b) of the FTZ Act (19 U.S.C. 81a-81u) defines the Board as “the Board which is established to carry out the provisions of this chapter...” Section 81b of the FTZ Act states that the Board is “authorized, subject to the conditions and restrictions of this chapter and of the rules and regulations made thereunder,” to approve applications to establish FTZs, while section 81h of the FTZ Act states that the Board “shall prescribe such rules and regulations not inconsistent with the provisions of this chapter... as may be necessary to carry out this chapter.” Section 81n of the FTZ Act requires that the grantee of each zone provide “uniform treatment under like conditions” for zone participants.

In 2007, the Board published a *Federal Register* notice citing “[c]oncerns [that] ha[d] been raised to the FTZ Board” and inviting public comment “related to potential conflicts of interest in local access to FTZ procedures” in the context of the FTZ Act’s uniform treatment requirement.<sup>8</sup> In 2012, after an extensive notice-and-comment process, the Board adopted regulations (15 CFR Part 400) that include a provision (§ 400.43(d)) designed to prevent

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<sup>6</sup> See letters from Andrew McGilvray to the grantees of FTZ 83, 134 and 158, dated May 30, 2014, and to the grantee of FTZ 82, dated July 29, 2014.

<sup>7</sup> *Preamble*, 77 FR at 12131.

<sup>8</sup> See Request for Comment on Uniform Treatment (and Related Issues) in Local Access to Foreign-Trade Zone Procedures, 72 FR 53989, 53989-53990 (September 21, 2007).

certain conflicts of interest where a service provider acts on behalf of the grantee (that controls access to the federal benefits provided by the FTZ program) and could use that position to improve its own business position through improper pressure on zone users to contract with the service provider in order to obtain zone privileges.<sup>9</sup> In response to comments on the similar regulatory provision proposed by the Board in 2010, section 400.43(d) of the 2012 regulations was narrowed in scope relative to the proposed rule, while section 400.43(f) was added to allow a party to request a waiver by the Board of the requirements of § 400.43(d) based on the circumstances presented by the party.<sup>10</sup> Absent approval of a waiver, the 2012 regulations allowed a two-year period (through February 28, 2014) for “existing business arrangements” which would otherwise be precluded by section 400.43(d) to be terminated or brought into compliance.

### Pending Request for Waivers

Now pending are requests submitted in January through August of 2015 from the City of Mobile (grantee of FTZ 82), Huntsville-Madison County Airport Authority (grantee of FTZ 83), and Mississippi Coast Foreign Trade Zone, Inc. (grantee of FTZ 92). Each request seeks “permanent, unconditional” approval of a waiver to enable FTZ Corp to offer/provide zone-related products/services to zone participants in these zones while undertaking for each zone’s grantee the “key function” of “[o]verseeing zone participants’ operations on behalf of [the] grantee” (15 CFR 400.43(d)(1)(iii)).<sup>11</sup> More specifically, each grantee seeks

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<sup>9</sup> See *Preamble*, 77 FR at 12155. A “person” in a “key category” may not undertake any “key function” for a grantee. Key categories are: (1) A person that engages in, or has during the preceding 12 months engaged in, offering/providing a zone-related product/service to or representing a user of a zone; (2) A person that stands to gain from a person’s offer/provision of a zone-related product/service to or representation of a user of a zone; or (3) A person “related” to the persons in (1) or (2). Key functions are: (1) Taking action on behalf of a grantee, or making recommendations to a grantee, regarding the disposition of proposals or requests by zone users pertaining to FTZ authority or activity (including activation by U.S. Customs and Border Protection); (2) Approving, or being a party to, a zone user’s agreement with the grantee (or person acting on behalf of the grantee) pertaining to FTZ authority or activity (including activation by U.S. Customs and Border Protection); or (3) Overseeing zone users’ operations on behalf of a grantee.

<sup>10</sup> See *id.* at 12131.

<sup>11</sup> On October 1, 2014, FTZ 83 presented certain information to the FTZ Board regarding two “business model elements” (BMEs) that it engaged FTZ Corp to perform. FTZ 83 characterized the activities of FTZ Corp under those BMEs as including “verification that Operators are in compliance with Customs regulations” and “[r]eview of proposed and ongoing FTZ processes.” We responded that FTZ Corp’s activities under those BMEs as described by FTZ 83 “appear to constitute the performance of the key function of ‘[o]verseeing zone participants’ operations on behalf of [the] grantee.” See letter from Andrew McGilvray to Richard Tucker of FTZ 83, dated October 29, 2014. On November 7, 2014, FTZ 83 responded and indicated its belief that the activities of FTZ Corp on behalf of FTZ 83 did not constitute the performance of the key function in question. We subsequently addressed those activities in a letter jointly addressed to FTZ 83 and FTZ Corp (the party subject to 15 CFR 400.43(d), which does not pertain to activities undertaken by a grantee but rather pertains to certain activities that a third party might undertake on behalf of a grantee). That letter formally notified FTZ 83 and FTZ Corp of the FTZ Board’s “determination” that the activities of FTZ Corp at issue “are, in fact,

to have FTZ Corp review the operations of all participants in the zone for compliance with the regulatory requirements of U.S. Customs and Border Protection (CBP) for handling and tracking FTZ merchandise.

Subsequent to the Board's receipt of the pending waiver requests, we presented each requester with certain additional questions. The requesters' answers to those questions were submitted in June through November of 2015.

## **ARGUMENTS PRESENTED BY THE REQUESTERS**

Key arguments presented by the requesters pertaining to the pending waiver requests include:

- The operation of the zone such that FTZ Corp may offer/provide zone-related products/services to zone participants and also conduct compliance reviews on behalf of the grantee "is consistent with the aims of the [FTZ] Board in assuring easy access to the Zones program."
- Being able to "call upon [FTZ Corp] to verify and review prospective and ongoing FTZ operations and maintain the ability of [FTZ Corp] to provide professional Zone-related services to" participants in the zone are "two elements of our Business Model that have proven effective for more than 20 years."
- "[I]ndividual Zone participants are free to use Zone-related services and products from whomever they may choose." "[E]ach Zone participant is free to make its own choice of Zone-related and/or other services providers."
- "Under the Zone Project Administration Agreement between [FTZ Corp] and the Grantee, [FTZ Corp's] income is dependent on its success in seeing that members of the trade community successfully utilize Zone procedures."
- FTZ Corp's conduct of compliance reviews on the grantee's behalf "in no way controls access to our Zone project." The grantee "is the sole authority who controls Zone participant's access to [the zone]."
- "With regard to the [grantee's] Zone project, the offer of a complete set of services and products by a firm that also has a responsibility to local and regional public entities [*i.e.*, FTZ Corp] is seen as an asset."

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encompassed by the key function of 15 CFR 400.43(d)(1)(iii)." See letter from Andrew McGilvray to Richard Tucker of FTZ 83 and Greg Jones of FTZ Corp, dated December 29, 2014.

- “Given that 15 CFR 400.42 in and of itself protects Zone participants from being forced to use any particular service provider for other Zone-related services, [the grantee] see[s] no impediment to [the Board’s] permanent, unconditional approval of this waiver request.”

## STANDARD FOR DECISIONS

The regulatory standard for decisions on waiver requests, as set forth in 19 CFR 400.43(f), is as follows:

In deciding whether to grant a waiver, the Board shall determine whether there is an unacceptable risk that the waiver would result in non-uniform treatment being afforded by the person undertaking a key function(s) listed in paragraph (d)(1) of this section. In its assessment, the Board shall consider the specific circumstances presented, including the nature and extent of the person's involvement in undertaking a key function(s) listed in paragraph (d)(1) of this section. In general, the more significant the requester's involvement or interest in the undertaking of a key function(s) listed in paragraph (d)(1) of this section or activity(ies) identified in paragraph (d)(2)(i) of this section, the greater the risk will be that non-uniform treatment will be afforded and, thus, the less likely it will be that a waiver will be granted. The Board may attach to individual waivers such conditions or limitations (including, for example, the length of time a waiver is to be effective) as it deems necessary.

The *Preamble* to the rulemaking included the following additional explanation pertaining to the waiver provision<sup>12</sup>:

[I]n response to comments received, we have added new Sec. 400.43(f) that will allow the Board to issue case-by-case waivers of the provision in Sec. 400.43(d) that bars certain categories of persons from performing certain key functions. This approach strikes an appropriate balance in order to avoid the types of broad, negative impacts projected by commenters while continuing to reflect the fact that a zone grantee often has a monopoly in its region for valuable access to the federal privilege of FTZ use (with zone participants reluctant to make uniform treatment-related complaints to the FTZ Board because of a perceived risk of jeopardizing key relationships with grantees or with third parties undertaking key functions on behalf of grantees)... In considering whether to approve an individual application for a waiver, the Board will take into account the specific circumstances presented, and the Board will also impose conditions on individual waivers, as warranted. As raised by one commenter, a key factor the Board will consider is whether a grantee's specific arrangement presents a significant risk that zone users will experience implied

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<sup>12</sup> *Preamble*, 77 FR at 12131.

pressure to procure a particular private party's services as a condition of obtaining access to the federal FTZ program.

## DISCUSSION

### The FTZ Board's Regulations

The Board's 2012 revision of its regulations constituted the Board's first set of substantive regulatory changes since 1991. In the twenty-year interval between regulatory revisions, a number of changes and evolutions occurred in the FTZ environment that warranted focus by the Board through the rulemaking process. For example, the period from 1990 (when the Board published its proposed rule that led to the 1991 final rule) to 2010 (when the Board published its proposed rule that led to the 2012 final rule) saw a dramatic acceleration of business processes, in general, including a marked reduction in the timeframes that a potential FTZ user could be expected to wait for a decision from the Board on a proposed FTZ site or proposed FTZ manufacturing authority. Recognizing the need to respond to that changed environment, the Board's 2012 regulations significantly simplified and accelerated the Board's processes pertaining to the various types of requests that a company might need to submit to the Board to obtain FTZ authority.<sup>13</sup>

One matter that the Board sought to address through the rulemaking process was the evolution in certain zones of arrangements in which a zone's grantee outsources to a private contractor functions that could give the contractor leverage over potential zone participants in a context where that contractor may be attempting to sell its zone-related products/services to those same participants. In September 2007, the Board had sought public comment<sup>14</sup> on the potential impact of such situations on the statutory requirement that each zone afford "uniform treatment" to all actual or potential participants. In the Board's 2010 proposed rule, the Board incorporated a provision for "Preclusion of conflicts of interest" (§400.43(e)). After the extensive notice-and-comment process<sup>15</sup> cited above, the Board in its 2012 final rule adopted an "Avoidance of non-uniform treatment" provision (§400.43(d)) addressing the same fundamental concerns, but narrowed in scope in response to comments received during the rulemaking process. In response to such

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<sup>13</sup> For example, the FTZ Board's 2012 regulations have set a 120-day timeframe for decisions on most requests for manufacturing authority (versus the one-year timeframe for such decisions under the 1991 regulations).

<sup>14</sup> See *Request for Comment on Uniform Treatment (and Related Issues) in Local Access to Foreign-Trade Zone Procedures*, 72 FR 53989, 53989—53990 (September 21, 2007).

<sup>15</sup> The Board's public comment period on its proposed regulations extended to 147 days, during which the Board held a series of regional forums to facilitate parties' participation in the comment process. The Board ultimately received comments on its proposed regulations from more than 100 parties, and the Board also allowed an additional 30-day period for parties to submit "reply comments" in response to comments submitted by other parties during the initial comment period.

comments, the final regulations also included a provision (§400.43(f)) to “allow the Board to issue case-by-case waivers of the provision in Sec. 400.43(d) that bars certain categories of persons from performing certain key functions.”<sup>16</sup> It is in that context that the FTZs 82, 83 and 92 have submitted the pending requests for waivers for FTZ Corp to undertake a particular key function on the grantees’ behalf while FTZ Corp also offers/provides zone-related products/services to potential or actual participants in those zones.

As detailed above, the regulatory standard for decisions on waivers includes: “In general, the more significant the requester’s involvement or interest in the undertaking of a key function(s) listed in paragraph (d)(1) of this section or activity(ies) identified in paragraph (d)(2)(i) of this section, the greater the risk will be that non-uniform treatment will be afforded and, thus, the less likely it will be that a waiver will be granted.”<sup>17</sup> As also detailed above, the *Preamble* explained “that a zone grantee often has a monopoly in its region for valuable access to the federal privilege of FTZ use (with zone participants reluctant to make uniform treatment-related complaints to the FTZ Board because of a perceived risk of jeopardizing key relationships with grantees or with third parties undertaking key functions on behalf of grantees)” and stated that in “tak[ing] into account the specific circumstances presented... a key factor the Board will consider is whether a grantee’s specific arrangement presents a significant risk that zone users will experience implied pressure to procure a particular private party’s services as a condition of obtaining access to the federal FTZ program” (emphasis added). In that context, our analysis of the pending waiver requests from FTZs 82, 83 and 92 has encompassed the significance of FTZ Corp’s “involvement or interest” in the key function at issue and in offering/providing zone-related products/services to zone participants. We have also focused on whether each grantee’s “specific arrangement” with FTZ Corp presents a “significant risk” of zone participants experiencing “implied pressure” to procure FTZ Corp’s products/services in order to access each zone in question.

#### FTZ Corp’s Activities for Grantees and Services Offered/Provided to Zone Users

Regarding the significance of FTZ Corp’s involvement or interest in “the undertaking of a key function(s),” each waiver request indicates that FTZ Corp would, on behalf of the zone’s grantee, “review the compliance of prospective or existing Zone Operators” with CBP

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<sup>16</sup> The Board explained its adoption of 15 CFR 400.43(d) and the related waiver provision in 15 CFR 400.43(f) as “striking an appropriate balance in order to avoid the types of broad, negative impacts projected by commenters while continuing to reflect the fact that a zone grantee often has a monopoly in its region for valuable access to the federal privilege of FTZ use (with zone participants reluctant to make uniform treatment-related complaints to the FTZ Board because of a perceived risk of jeopardizing key relationships with grantees or with third parties undertaking key functions on behalf of grantees).” See *Preamble*, 77 FR at 12131.

<sup>17</sup> Section 19 CFR 400.43(f) also explains that the “key function(s) listed in paragraph (d)(1)” include “[o]verseeing zone participants’ operations on behalf of a grantee.” The “activity(ies) identified in paragraph (d)(2)(i)” are “engag[ing] in... offering/providing a zone-related product/service to or representing a zone participant in the grantee’s zone.”

requirements for the handling and tracking of merchandise in FTZs. According to the waiver requests, it appears that FTZs 82, 83 and 92 each intend for FTZ Corp to serve as its sole contractor charged with “review[ing] the compliance of prospective or existing Zone operators.” In response to earlier communications from FTZ 83, the FTZ Board informed FTZ 83 and FTZ Corp that such activities as proposed for conduct by FTZ Corp in FTZ 83 were determined to constitute undertaking the key function identified in 15 CFR 400.43(d)(1)(iii).<sup>18</sup> Consistent with that determination and given that FTZ Corp apparently will be the sole contractor to undertake the compliance-review activities for each grantee, FTZ Corp appears to have significant involvement in undertaking the key function in question.

Regarding the significance of FTZ Corp's involvement or interest in “engag[ing] in... offering/providing a zone-related product/service to or representing a zone participant in the grantee's zone,” the pending waiver requests do not indicate that FTZ Corp has any current clients among users of FTZs 82, 83 and 92. However, as discussed in the analyses conducted for the Board decisions on the prior waiver requests from FTZs 82, 83, 134 and 158, FTZ Corp's “involvement or interest” in offering/providing a zone-related product/service to or representing zone participants cannot be gauged only in terms of FTZ Corp's current user base in the zone in question. In particular, a firm's “interest” in providing products/services to or representing companies clearly can relate to clients the firm would like to solicit in the future. Indeed, the submission of waiver requests for FTZs 82, 83 and 92 appears to be based fundamentally on an interest in FTZ Corp serving new clients in the zone (given that the waiver requests from FTZs 82, 83 and 92 do not indicate that FTZ Corp has current clients in those zones for its zone-related products/services).<sup>19</sup>

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<sup>18</sup> See correspondence from the Executive Secretary of the FTZ Board to FTZ 83, dated October 29, 2014, and correspondence from the Executive Secretary of the FTZ Board to FTZ 83 and FTZ Corp, dated December 29, 2014. The determination was based on the information presented by FTZ 83. Any other grantee that believed its circumstances differ from FTZ 83 in a manner that would result in a different determination regarding activities undertaken in its zone could request such a determination from the FTZ Board.

<sup>19</sup> The standard form for waiver requests includes a question regarding the importance to the firm in question of offering/providing zone-related products/services to or representing zone participants. The pending waiver requests – as well as the prior waiver request from FTZ 83 referenced in that zone's pending request – largely do not respond directly to the substance of that question. In response to the question, the other two requesters have presented answers that are very similar to the answer presented by FTZ 82: “With regard to the importance of providing Zone-related services or products, such services and/or products are, in terms of [FTZ Corp's] services as the Zone Project Administrator, entirely distinct and separate. If [FTZ Corp] derives income from providing services to participants within [the zone], then the income derived from those services and products is to its benefit. Likewise, the resources - including personnel, expenses, and overhead - are entirely the responsibility of [FTZ Corp]. With regard to its services as the Zone Project Administrator, those remain the same whether or not [FTZ Corp] has any clients from among the population of [the zone's] participants. Accordingly, [FTZ Corp] remains entirely responsible for providing the resources necessary to serve the Zone project. Under the Zone Project Administration Agreement between [FTZ Corp] and the Grantee, [FTZ Corp's] income is dependent on its success in seeing that members of the trade community

FTZ Corp's websites for its consulting services and its software also appear to provide a clear indication of the firm's interest in offering/providing zone-related products/services to zone participants. Specifically, the firm's websites state that "Foreign-Trade Zones are not simply part of our business. They are our business" and characterize FTZ Corp as "the only nationally recognized firm that limits its practice to Foreign-Trade Zone consulting and software."<sup>20</sup> Given that FTZ Corp's sole line of business is "Foreign-Trade Zone consulting and software," it would be difficult to characterize as insignificant FTZ Corp's "involvement or interest" in offering or providing zone-related products/services to participants in FTZs 82, 83 and 92. Further, the greater FTZ Corp's interest in selling its products/services to participants, the greater the risk of FTZ Corp using its proposed role of assessing zone participants' compliance on behalf of the grantee as a means of encouraging companies to choose FTZ Corp's products/services over competing providers of products/services.

In characterizing the "range of services and solutions" that FTZ Corp offers to zone participants, the home page of the company's website for its consulting services cites five specific examples: "Foreign-Trade Zone Board applications, activation with Customs and Border Protection, FTZ operations, administration, and FTZ software." Of those five examples, "activation with Customs and Border Protection," "FTZ operations," and "software" all relate directly to CBP's requirements for operators' conduct of FTZ operations. Specific to "FTZ Activation with U.S. Customs and Border Protection," FTZ Corp's website for its consulting services states that FTZ Corp will use its expertise "to ensure its client's operations and procedures" are "compliant" with CBP's requirements. In addition, FTZ Corp's webpage promoting its "Foreign-Trade Zone Compliance Reviews" characterizes those reviews as "allow[ing] an FTZ operator to recognize and address compliance issues." Further, the website for FTZ Corp's software characterizes that software as a "FTZ compliance solution" and states that its software "practically compels FTZ inventory compliance."

#### There is a Risk of Implied Pressure to Purchase FTZ Corp's Services

As indicated above, the *Preamble* to 15 CFR 400.43(f) states that, for a decision on whether to approve a waiver, "a key factor the Board will consider is whether a grantee's specific arrangement presents a significant risk that zone users will experience implied pressure to procure a particular private party's services as a condition of obtaining access to the federal FTZ program." FTZs 82, 83 and 92 each are requesting a waiver in order to have FTZ Corp on behalf of the grantee "review the compliance of prospective or existing Zone Operators" with CBP's requirements for the handling and tracking of merchandise in FTZs. Further,

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successfully utilize Zone procedures. At the same time, individual Zone participants are free to use Zone-related services and products from whomever they may choose."

<sup>20</sup> See <http://www.ftzcorp.com/> and <http://ftzsoftware.com/>.



based on the information above from FTZ Corp's website, ensuring compliance with CBP's requirements for such FTZ users' operations is also a primary focus of core products/services that FTZ Corp attempts to sell to zone users.

The "arrangement" for which FTZs 82, 83 and 92 each request a waiver – *i.e.*, for FTZ Corp to act on behalf of the grantee in conducting compliance checks on zone users while FTZ Corp also may offer/provide compliance-related products/services to those same users – can easily be seen as presenting "a significant risk that zone users will experience implied pressure to procure [FTZ Corp's] services as a condition of obtaining access to" the zones in question.

One of the grantees requesting a waiver has expressed that a provision of 15 CFR 400.42 "protects Zone participants from being forced to use any particular service provider for other Zone-related services<sup>21</sup>," leading that grantee to "see no impediment to" approval of its requested waiver. However, in adopting the default bar in 15 CFR 400.43(d) on key categories of persons undertaking key functions on behalf of grantees, the Board cited "that a zone grantee often has a monopoly in its region for valuable access to the federal privilege of FTZ use (with zone participants reluctant to make uniform treatment-related complaints to the FTZ Board because of a perceived risk of jeopardizing key relationships with grantees or with third parties undertaking key functions on behalf of grantees)"<sup>22</sup> (emphasis added). The Board's concern about the reluctance of zone participants to make uniform treatment-related complaints is not neutralized by the bar in 15 CFR 400.42 on a grantee requiring zone participants "to utilize or pay for a particular provider's zone-related products or services" – the enforcement of which would logically rely to some extent on complaints from zone participants if they were to perceive violations.

In addition, in situations where a specific zone has a monopoly on access to the FTZ program, companies seeking to use the zone may have no viable alternatives by which to access the federal program. Therefore, even the fact that a zone is active with multiple zone participants is not a guarantee that those zone participants have not or will not in the future experience implied pressure to procure a particular provider's products or services. Similarly, although the requesters have noted that their zones do not require zone participants to procure a specific provider's products or services, and that zone participants are free to procure a service provider of their choice, the risk that those zone participants could face implied pressure remains.

In response to the arguments that the zone can operate in such a way that FTZ Corp may offer/provide zone-related products/services to zone participants and also conduct

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<sup>21</sup> Specifically, 15 CFR 400.42 establishes that, "[o]ther than the uniform rates and charges assessed by, or on behalf of, the grantee, zone participants shall not be required (either directly or indirectly) to utilize or pay for a particular provider's zone-related products or services."

<sup>22</sup> *Preamble*, 77 FR at 12131.

compliance reviews on behalf of the grantee, and that such a system “is consistent with the aims of the [FTZ] Board in assuring easy access to the Zones program,” it is worth noting that in fact, a primary aim of the FTZ’s Board’s 2012 regulation on uniform treatment was to ensure that companies are able to access the federal FTZ program *without facing requirements or pressure to procure a certain provider’s zone-related products or services*. Even if a grantee is the sole authority that controls a zone participant’s access to the zone, there may still be a risk that a party acting on behalf of the grantee could assert implied pressure on the zone participant to procure zone-related products or services. In general, the 2012 regulations were implemented with the intent of encouraging and promoting the freedom of a company to choose its own zone-related service providers, even in situations where a local or regional public entity that serves as grantee might have a relationship with a separate service provider.

Accordingly, I do not recommend approval of the requested waivers. Such waivers would provide “an unacceptable risk that the waiver would result in non-uniform treatment being afforded” to participants in the zones in question tied to whether those participants opt to buy the products/services that FTZ Corp tries to sell to them.

#### There Are Differences between the Prior Waiver Requests and These Waiver Requests

After considering the earlier requests of FTZs 82, 83, 134 and 158 for waivers specific to the key function of 15 CFR 400.43(d)(1)(ii) – *i.e.*, “Approving, or being a party to, a zone participant’s agreement with the grantee (or person acting on behalf of the grantee) pertaining to FTZ authority or activity (including activation by CBP)” – the Board in 2014 was able to approve waivers with several conditions/limitations<sup>23</sup> to eliminate an unacceptable risk of non-uniform treatment.<sup>24</sup> As already noted, the waiver requests currently pending

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<sup>23</sup> 15 CFR 400.43(f) states that “[t]he Board may attach to individual waivers such conditions or limitations (including, for example, the length of time a waiver is to be effective) as it deems necessary.”

<sup>24</sup> The conditions/limitations of the 2014 waiver approvals were as follows:

1) *FTZ Corp is limited to providing the following products/services:*

*a) Offering or providing its FTZ inventory-management software and software-support services to zone participants, whether or not it has an existing arrangement with a zone participant;*

*b) Continuing to provide zone-related products/services (in addition to inventory-management software and support services cited in provision 1.a above) or representation to customers with which it already has existing arrangements;*

*2) The waivers will be effective for an initial period of five (5) years, with the possibility of renewal upon request; and,*

*3) The FTZ Board staff will monitor participants in the zones in question. If checks were to reveal abuse of position in undertaking the key function on behalf a zone grantee, as determined by the Board in its sole discretion, the Board could “discontinue” the waiver pertaining to that zone under 15 CFR 400.43(f). Examples*

from FTZs 82, 83 and 92 pertain to a different key function – “Overseeing zone participants’ operations on behalf of a grantee” (15 CFR 400.43(d)(1)(iii)) – and more specifically to FTZ Corp conducting reviews of zone participants’ regulatory compliance on behalf of the grantees. Given that regulatory compliance would be the focus of those reviews and that regulatory compliance is a primary focus of the products/services that FTZ Corp would attempt to sell to zone participants it would be reviewing, approval of the pending waiver requests would create an even more “significant risk that zone users will experience implied pressure to procure” FTZ Corp’s products/services relative to the circumstances presented in the prior waiver requests. Those prior waiver requests pertained to the key function of FTZ Corp’s being a party to each zone’s agreements with its operators and therefore, unlike with the waiver requests now pending, there was no obvious nexus – such as compliance with CBP’s regulatory requirements – between the key function FTZ Corp would undertake for the grantees and the products/services that FTZ Corp would attempt to sell to participants in the zones in question.

Beyond the more “significant risk that zone users will experience implied pressure to procure [FTZ Corp’s] services as a condition of obtaining access to” FTZs 82, 83 and 92, as outlined above, our analysis of the circumstances associated with the pending waiver requests reveals key distinctions relative to the prior waiver requests and the Board’s conditional approval of those requests. In our analysis for the Board’s May and July 2014 conditional approvals of the prior waiver requests, we took into account “facts specific to the FTZ inventory-management software produced and sold by FTZ Corp...”<sup>25</sup> In particular, we stated that “[p]reserving ‘freedom of choice’ (as cited by FTZ 83 regarding inventory-management software) in the context of the particularly limited range of options for such software in the marketplace is a factor that warrants serious consideration, as the FTZ regulations are intended to help promote, and not prohibit, commerce and competition.”<sup>26</sup> We concluded that “[i]n the unique context of the market for FTZ inventory-management software... it appears that the risk of non-uniform treatment can be mitigated to a satisfactory degree by the FTZ Board staff’s monitoring of activities in the zones in question pertaining to uniformity of treatment for zone participants.”<sup>27</sup>

On the other hand, our analysis of currently available evidence indicates a different relationship between FTZ Corp’s software product and the key function that FTZ Corp would

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*of potential abuse are effectively requiring zone participants to purchase FTZ Corp’s software product(s)/service(s), requiring zone participants to pay higher prices for such software product(s)/service(s) relative to other zones, or using a software contract as a vehicle for providing non-software services otherwise not allowed under the waiver.*

<sup>25</sup> See memoranda from Andrew McGilvray to Paul Piquado and Timothy E. Skud, dated May 28, 2014, at pages 7-8, and dated July 22, 2014, at page 6.

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

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

undertake for the grantees and a broader range of firms with a significant presence or profile in the marketplace for such software. Regarding the relationship between the software product and the proposed key function, both FTZ Corp's inventory-control software and the reviews that FTZ Corp would undertake for the grantees relate to ensuring compliance with CBP's regulatory requirements, whereas the key function at issue in the 2014 waiver approvals was not focused on ensuring compliance with CBP's regulatory requirements. The pending waiver requests propose that FTZ Corp would serve as the sole contractor engaged by each grantee to review participants' operations in FTZs 82, 83 and 92 for compliance with CBP regulatory requirements, while FTZ Corp would also be marketing its compliance-focused FTZ software to the same group of zone participants.

Therefore, in contrast to the 2014 waiver requests which sought authorization for FTZ Corp to be a party to each zone's agreements with its participants, the current waiver requests appear to present a greater "risk that zone users will experience implied pressure to procure [FTZ Corp's compliance-oriented software] as a condition of obtaining access to" the zones requesting waivers because both the software that FTZ Corp attempts to sell to zone participants and the reviews that FTZ Corp would conduct as the grantees' sole contractor are intended to help ensure compliance with CBP regulatory requirements.

According to information available to the FTZ Board staff, there is an increasingly broad range of firms which offer commercially available FTZ inventory-management software. In early 2015, SAP – the dominant vendor of supply-chain management software, with a 25.8% worldwide market share in 2014<sup>28</sup> – introduced FTZ inventory-management functions in its Global Trade Services (GTS) 11.0 software.<sup>29</sup> Beyond SAP's entry into the market for FTZ inventory-management software, we are aware that a wide range of competing firms are now also actively marketing such software to FTZ users. For example, the website, documents and events of the National Association of Foreign-Trade Zones (NAFTZ)<sup>30</sup> show that a number of firms are investing resources in establishing or maintaining a significant presence or profile in the marketplace for FTZ inventory-management software: At NAFTZ's Annual Conference held in September 2015 – which drew more than 420 attendees – six vendors of such software each paid for one or more of the twenty booths in

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<sup>28</sup> See <http://www.forbes.com/sites/louiscolombus/2015/05/18/gartner-supply-chain-management-market-share-update-sap-dominates-with-25-8-share/>.

<sup>29</sup> See, e.g., <http://news.sap.com/latest-release-of-sap-global-trade-services-introduces-new-foreign-trade-zone-and-screening-capabilities/> and <https://www.asug.com/discussions/servlet/JiveServlet/previewBody/41215-102-1-60253/1860%20Leveraging%20Foreign%20Trade%20Zones%20to%20Drive%20Bottom-Line%20Benefits.pdf>.

<sup>30</sup> NAFTZ is "a trade association of more than 600 members representing public and private organizations involved in the foreign-trade zones program... including zone grantees, operators and users" (see <http://www.naftz.org/4658-naftz-joins-business-group-call-for-prompt-passage-of-customs-bill/>). To the knowledge of the FTZ Board staff, NAFTZ is the sole association dedicated to the FTZ industry.

the conference's exhibit hall (listed in order by booth number)<sup>31</sup>: Amber Road<sup>32</sup> (2 booths); GT Konnect<sup>33</sup>; QuestaWeb<sup>34</sup>; Integration Point (2 booths)<sup>35</sup>; SAP; and FTZ Corp. Integration Point, Amber Road and QuestaWeb also have paid to sponsor NAFTAZ's website, and GT Konnect and Integration Point both appear among the paid sponsors of NAFTAZ's December 2015 "Zones Report" newsletter and NAFTAZ's January 2016 "Fundamentals of FTZs" seminar.<sup>36</sup>

Internet research has also revealed yet another software product oriented to meet FTZ users' inventory-management needs: MIC CUST FTZ.<sup>37</sup> Further, we are also aware that, according to certain sources, potential zone users may be able to modify their existing systems to track FTZ inventory in a manner compliant with CBP's requirements, rather than purchase an additional software product to facilitate such tracking of inventory.<sup>38</sup> In sum, our analysis has shown that an increasingly broad range of software alternatives is offered by vendors other than FTZ Corp, and that it is also feasible for companies to modify their own systems without purchasing additional software. Accordingly, in 2016, there appears to be a large enough number of alternatives to FTZ Corp's inventory-management software such that a company can successfully function as a FTZ operator without purchasing inventory-management software marketed by a firm that will also be conducting compliance reviews of that operator on behalf of the zone's grantee.

The nature of the activities that FTZ Corp would undertake as proposed in the pending waiver requests – *i.e.*, undertake reviews of participants' compliance with CBP regulatory requirements on behalf of each grantee – leads us to a conclusion that there is a significant risk that participants in these zones, in general, would "experience implied pressure to

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<sup>31</sup> See <http://www.naftz.org/4233-naftz-hosts-successful-2015-annual-conference-in-los-angeles/> and [http://www.naftz.org/wp-content/uploads/2015/08/2015\\_Annual\\_Program-081415.pdf](http://www.naftz.org/wp-content/uploads/2015/08/2015_Annual_Program-081415.pdf).

<sup>32</sup> See, *e.g.*, <http://www.amberroad.com/enterprise/foreign-trade-zone/>.

<sup>33</sup> See, *e.g.*, <http://www.gtkonnect.com/ftz.html>.

<sup>34</sup> See, *e.g.*, <http://questaweb.com/solutions/integrated-suites/foreign-trade-zone/>.

<sup>35</sup> See, *e.g.*, <http://www.integrationpoint.com/products/foreigntradezones.html>.

<sup>36</sup> See <http://www.naftz.org/>, <http://www.naftz.org/wp-content/uploads/2015/12/ZRDecember2015.pdf> and <http://www.naftz.org/events/ftz-fundamentals/>.

<sup>37</sup> See, *e.g.*, <https://www.mic-cust.com/software-solutions/global-customs-management/special-customs-procedures-with-economic-impact/foreign-trade-zone-ftz/>.

<sup>38</sup> See, *e.g.*, <http://www.millerco.com/Update/Website/Pages/ftzservices.html> and the pending waiver request of FTZ 92, which cites an operator which "implemented its preferred solution of enhancing its own in-house systems" for "automating its FTZ Inventory Control and Recordkeeping System" (see letter dated July 28, 2015, from Travis Lott, Jr., to Andrew McGilvray at page 2).

procure [FTZ Corp's inventory-management software] as a condition of obtaining access to the federal FTZ program" in the zones in question. As explained in our analysis for the Board's waiver decisions of May and July 2014, "the FTZ regulations are intended to help promote, and not prohibit, commerce and competition."<sup>39</sup> In the context delineated above, it appears that promoting competition would be accomplished most effectively by continuing to preclude the distortion of the marketplace for FTZ inventory-management software that could otherwise occur – through zone participants "experie[n]c[ing] implied pressure to procure" FTZ Corp's software – if waivers were authorized permitting FTZ Corp to conduct compliance reviews of zone participants on behalf of grantees while seeking to sell its compliance-oriented software to those same participants.

## CONCLUSIONS AND RECOMMENDATION

As noted, 15 CFR 400.43(f) states that "[i]n its assessment [of waiver requests], the Board shall consider the specific circumstances presented, including the nature and extent of the person's involvement in undertaking a key function(s) listed in paragraph (d)(1) of this section. In general, the more significant the requester's involvement or interest in the undertaking of a key function(s) listed in paragraph (d)(1) of this section or activity(ies) identified in paragraph (d)(2)(i) of this section, the greater the risk will be that non-uniform treatment will be afforded and, thus, the less likely it will be that a waiver will be granted." Further, the *Preamble* states that "a key factor the Board will consider is whether a grantee's specific arrangement presents a significant risk that zone users will experience implied pressure to procure a particular private party's services as a condition of obtaining access to the federal FTZ program."<sup>40</sup>

As outlined above, providing zone-related products/services is FTZ Corp's sole line of business and FTZ Corp is the sole firm engaged by each of the zones to conduct reviews of zone participants' compliance with CBP's requirements on behalf of the grantee. In that context, our analysis does not support a finding that FTZ Corp's involvement or interest in undertaking the key function at issue or in providing zone-related products/services to participants in FTZs 82, 83 and 92 is insignificant.

As also outlined above, the pending waiver requests encompass FTZ Corp – on behalf of the zones' grantees – reviewing each zone participant's activity to verify compliance with CBP requirements while FTZ Corp also offers/provides to those same participants its products/services oriented towards ensuring such compliance. Our analysis indicates that those arrangements by FTZs 82, 83 and 92 present "a significant risk that zone users will experience implied pressure to procure a particular private party's services [*i.e.*, FTZ Corp's

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<sup>39</sup> See memoranda from Andrew McGilvray to Paul Piquado and Timothy E. Skud dated May 28, 2014 at page 8 and dated July 22, 2014 at page 6.

<sup>40</sup> *Preamble*, 77 FR at 12131.

products/services] as a condition of obtaining access to the federal FTZ program [*i.e.*, FTZs 82, 83 and 92].”

This analysis is not specific only to FTZ Corp, but would apply to any company in FTZ Corp’s situation. Any contractor engaged exclusively by a grantee to review each participant in the grantee’s zone for compliance with federal regulatory requirements could easily be perceived by those participants as having authority and influence over the degree to which participants are able to successfully use the zone. If a contractor attempted to sell its products and services – including those designed to ensure regulatory compliance – to the same zone participants on which the contractor is conducting compliance checks, it would not be surprising for the contractor’s perceived authority and influence to affect (distort) decision-making by the zone participants on whether to procure specific zone-related products/services from the contractor (versus not procuring such products/services from any source or procuring them from alternative vendors). Further, the greater such a contractor’s involvement or interest in selling its products/services to participants in a given zone, the greater the risk that the contractor would, in some manner, abuse its perceived authority/influence, to the disadvantage of existing and possible future competitors and to incite participants in the zone to procure products/services that they otherwise would not opt to purchase.

Given the facts and analysis outlined above, it appears there is an unacceptable risk that approval of the proposed waivers for FTZ 82, 83 and 92 could result in the affording of non-uniform treatment to different private parties. Therefore, I recommend that the requested waivers not be approved.

## Appendix 2



September 23, 2016

Mr. Andrew McGilvray  
Executive Secretary  
Foreign-Trade Zones Board  
U.S. Department of Commerce  
1401 Constitution Avenue, NW  
Room 21013  
Washington, DC 20230



Re: New Evidence and Response to August 26, 2016 FTZ Board Waiver Decision

Dear Mr. McGilvray:

I am writing in response to the FTZ Board's August 26 Waiver Decision. This response also includes new evidence for your evaluation.

As you are aware, each Zone grantee's responsibilities are expressed in the Foreign-Trade Zones Act, each grantee's Grant of Authority, the regulations of U.S. Customs and Border Protection. These responsibilities are also apparent in the goals and objectives of each Zone project. The City of Mobile understands that its Zone project must be operated as a public utility, and that the City, and any party who provides Zone-related services to the City, must afford "uniform treatment under like conditions" to zone participants. The City of Mobile also understands that it has a responsibility to protect the Customs revenue.

The City understands that a public utility is a business that furnishes an everyday necessity to the public at large. The City also understands that utilities may be publicly or privately owned, but most are operated as private businesses.

The goals and objectives of our Zone project are a reflection of the City's mission statement, which is shown below:

"We respect the dignity and worth of our citizens and value the diversity of culture, heritage and history within our community. We pledge to strive to improve the quality of life and opportunity for economic prosperity of all our residents by working to attract more visitors and industries and assuring all of our citizens a clean, safe, economically viable and progressive city that is responsive to changing needs." - See more at: [http://www.cityofmobile.org/cityofficials/mission\\_statement.php#sthash.jnaFq5RX.dpuf](http://www.cityofmobile.org/cityofficials/mission_statement.php#sthash.jnaFq5RX.dpuf)

Essential to the mission of the City of Mobile are its capabilities to contribute to the welfare of its citizens, to provide services to its citizens, and to meet its fiduciary responsibilities in doing so.

The model for our current FTZ management structure was invented by private citizens of the city of Mobile under the auspices of Leadership Mobile. The mission of Leadership Mobile is to seek, train and empower leaders who are committed to supporting and leading community growth and progress through networking and collaborative problem solving. Our FTZ management structure and arrangements allows for entrepreneurship that is consistent with operation as a public utility, and it ensures that the Zone is operated in a manner that respects the dignity of Zone participants, attracts more investment and employment, and is responsive to the changing needs of the business community. In short, our Zone project exists to serve the public. In accordance with this aim, our "arrangement" with the Mobile FTZ Corp provides that the Mobile FTZ Corp's service to the City can be terminated without cause at any time by the City.

After receiving your letter of August 26, we are further convinced that our arrangement with Mobile FTZ Corp currently meets the regulatory objectives of the Uniform Treatment regulations, and poses no risk to the interests of Zone participants. In responding to the FTZ Board's August 26 waiver decision, we have reviewed all of our Annual Reports submitted via OFIS in order to identify any and all zone participants who "could" have had any possibility of purchasing services from the Mobile FTZ Corp or FTZ Corp. After consulting with Mobile FTZ Corp and FTZ Corp, and surveying the aforementioned zone participants, we found the following:

There are three zone participants who, prior to their start-up, purchased services from Mobile FTZ Corp. Those services consisted of one application to obtain subzone status, two to obtain FTZ manufacturing authority, and three instances of assistance in developing FTZ procedures prior to activation. The most recent instance in which these types of services were provided was in 2004. (There is one very recent instance in which an activated Zone user has obtained a subscription to FTZ Corp's software service, however, that Zone user did so after its approval for activation by CBP and prior to conducting any Zone-related operations. This Zone user has not yet conducted any Zone-related operations; accordingly, it has yet to submit any Annual Report.)

A survey of all zone participants who have conducted Zone-related operations over the past five years revealed that subsequent to their actual use of Zone procedures, none have paid to the Mobile FTZ Corporation or the FTZ Corporation fees for any Zone-related products or services (i.e. for FTZ consulting or software). (This also holds true for all companies who have ever conducted Zone-related operations associated with Mobile's Zone project. A copy of the survey is attached hereto and provided as "additional evidence.")

Prior to adoption of the current FTZ Board regulations, the City's arrangement with Mobile FTZ Corp provided for FTZ Operator Agreements between each Operator and Mobile FTZ Corp. This structure was adopted in order to streamline access to the FTZ program by avoiding potential delays inherent in the process of having each Operator Agreement submitted for City Council approval. This process worked well for all concerned, including the one company who preferred to have its Operator Agreement

directly with the City. (In that single instance, an interim Agreement with Mobile FTZ Corp enabled the company's activation to proceed, and that interim Agreement was subsequently superseded by a two-party Operator Agreement between the company and the City.) After FTZ Board's decision regarding the City's waiver request of June 4, 2014, the City changed its Operator Agreement structure so that all subsequent Operator Agreements are two-party Agreements between each Operator and the City. The City's Agreement with Mobile FTZ Corp and its Zone Schedule have been changed in order to make this structural change readily apparent to one and all.

In reviewing the Board's decision regarding the City's waiver request of March 6, 2015, it is readily apparent that both the rules and the analytical processes underlying the Board's decision constitute nothing more than a solution in search of a problem.

With regard to the rules, it is clear that the standard by which the Board made its decision – that is, “whether a grantee's specific arrangement presents a significant risk that zone users will experience implied pressure to procure a particular private party's services as a condition of obtaining access to the federal FTZ program” – is the result of a regulatory tool (the waiver process itself) which was adopted without any opportunity for public participation or an open exchange of ideas. This directly violates Executive Order 13563 (see attached copy) which orders that our regulatory system “must allow for public participation and an open exchange of ideas.” The FTZ Board's failure to offer an opportunity for public comment after it had invented the waiver process (and its standard of evaluation for adjudicating requests under the newly-invented waiver process) is undeniable.

Nevertheless, the City hopes that the information that we are herein providing will help the FTZ Board serve the mandate within E.O. 13563 which orders that our regulatory system “must measure, and seek to improve, the actual results of regulatory requirements.”

Clearly, the analysis within the FTZ Board's August 26 waiver decision concerns what “could” happen after Mobile FTZ Corp conducts a compliance review on behalf of the City.

By definition, a compliance review can only take place after a zone participant has already obtained access to the FTZ program. (As noted above, access to the program is obtained by entering into an Operator Agreement with the City.)

Under our existing “arrangement,” access to the FTZ program is obtained exclusively through the City.

In order to assist the FTZ Board in complying with E.O. 13563 we are providing you with a “measure” of the number of instances in which zone participants have paid to the Mobile FTZ Corporation or the FTZ Corporation fees for any Zone-related products or services (*i.e.* for FTZ consulting or software) after the Mobile FTZ Corporation has conducted a compliance review on behalf of the City. That number is zero. Accordingly,

September 23, 2016

Page 4

the Mobile FTZ Corporation and/or the FTZ Corporation have never used the compliance review process to “improve” the “business position” of either.

Because the compliance review process only occurs after the Zone participant has already obtained access to the FTZ program, it is logically impossible for the compliance review process to be used in any way that might be construed as use of Mobile FTZ Corp’s use of its position to apply “improper pressure” on zone users to contract with it or FTZ Corp “in order to obtain zone privileges.”

Our understanding is that the FTZ Board’s decision on any waiver request is dependent upon whether a grantee’s specific arrangement presents a significant risk that zone users will experience implied pressure to procure a particular private party’s services as a condition of obtaining access to the federal FTZ program. Our understanding is that the waiver process itself exists so that the FTZ Board may “respond to individual circumstances,” and thereby “avoid the ‘one-size-fits-all’ impact” that the Uniform Treatment regulations might otherwise have on an individual Zone project. The attached survey provides clear, measurable evidence that none of our Zone participants have experienced “implied pressure” to purchase services from any party as a result of compliance reviews conducted on behalf of the City. Accordingly, if the FTZ Board is to comply with E.O. 13563’s order to “measure, and seek to improve, the actual results of regulatory requirements,” it must approve our waiver request and enable the City to choose the party upon whom it wishes to rely in conducting compliance reviews on its behalf.

Respectfully submitted,



Ricardo A. Woods  
City Attorney

Attachments

cc: Mr. Paul Piquado  
Mr. Timothy Skud  
Mr. Ronald Lorentzen  
Hon. Richard Shelby



4. If your answer to Question 3 was "Yes," please describe the nature of the services purchased.

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\_\_\_ Not Applicable

**Part 2 – SURVEY RESULTS:**

- A: Number of Zone Users surveyed: 10
- B: Number of responses: 10
- C: Distribution of responses to each question:

Question 1: "Yes" – 0 "No" – 10

Question 2: "Yes" – 0 "No" – 0 "Not Applicable" – 10

Question 3: "Yes" – 0 "No" – 0 "Not Applicable" – 10

Question 4: "Not Applicable" – 10

The survey was conducted via an e-mail Questionnaire from Lindsay Zogby, Executive Assistant to Paul Wesch, Executive Finance Director, City of Mobile. The questionnaire was sent to Zone users on September 13, 2016. All responses were received by September 14, 2016.

## Attachment:

# Executive Order 13563 -- Improving Regulation and Regulatory Review

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. General Principles of Regulation. (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Sec. 2. Public Participation. (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Sec. 3. Integration and Innovation. Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.

Sec. 4. Flexible Approaches. Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Sec. 5. Science. Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies,

"Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

Sec. 6. Retrospective Analyses of Existing Rules. (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 7. General Provisions. (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

THE WHITE HOUSE,  
January 18, 2011.



## Appendix 3



September 23, 2016

Mr. Andrew McGilvray  
Executive Secretary  
Foreign-Trade Zones Board  
U.S. Department of Commerce  
1401 Constitution Avenue, NW  
Room 21013  
Washington, DC 20230

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Re: Response to Waiver Decision of August 26, 2016

Dear Mr. McGilvray:

I read with great interest your memorandum and recommendation concerning our waiver request of January 14, 2015. I find your analysis, and your Conclusions and Recommendation – especially the penultimate paragraph of the document – to be most enlightening. They further reinforce my current belief that the standard by which waiver requests are evaluated is flawed, that the standard by which waiver requests are evaluated contradicts President Obama’s Executive Order on Improving Regulation and Regulatory Review, and that the waiver process is essentially a sham.

Nevertheless, I want to give you and the FTZ Board every opportunity to demonstrate that my belief is in error. Accordingly, I am submitting this response and additional Business Confidential evidence to you.

**BACKGROUND**

The Huntsville-Madison County Airport Authority (Airport Authority) is the grantee of Foreign-Trade Zone 83. For more than 25 years, the Airport Authority has contracted with the Huntsville FTZ Corporation (one of the companies collectively referred to as FTZ Corp) to assist it in meeting its responsibilities as a Zone grantee, including its responsibility to deliver the FTZ program to our trade community, to protect the revenue of the United States, and to reduce potential Customs liability of the Airport Authority.

Mr. Andrew McGilvray  
Page Two  
September 23, 2016

FTZ 83 has three active subzone operators. Each operator conducts its own Zone operations under its own management, without those operations being overseen by either the Airport Authority or FTZ Corp. Each operator is approved to conduct Zone procedures by the local office of U.S. Customs and Border Protection (CBP) in Huntsville, Alabama, and has an FTZ Operator's bond in force. CBP supervises Zone operators under CBP's Audit Inspection methodology.

The Airport Authority received its grant of authority pursuant to FTZ Board Order 209, issued in February, 1983. The Grant of Authority specifically states, "The grant is further subject to settlement locally by the District Director of Customs and the Army District Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States ..." It also states, "Activation of the foreign-trade zone shall be commenced by the Grantee within a reasonable time from the date of issuance of the grant ..."

Like most Zone grantees, the Airport Authority does not directly operate or supervise Zone operations; instead it allows Zone and subzone operators to conduct their own daily operations under contract through FTZ Operator Agreements. Central to these Agreements is the concept that each Operator will comply with all operating standards established by the FTZ Board and CBP. Another key concept is that each Operator will protect and indemnify the Grantee from various forms of potential liability, including any liability from "fines, fees, penalties, damages, claims, expenses or causes of action of any nature whatsoever to the extent arising out of any act, omission or incident of Operator or its' officers, representatives, agents, employees, contractors, subcontractors, licensees or invitees, including, but not limited to, such fines, duties, liquidated damages or penalties as might be assessed by CBP."

Even though the Airport Authority does its best to divest itself from potential Customs liability through FTZ Operator Agreements, both its Grant of Authority and the CBP regulations themselves make clear that the Airport Authority maintains the ultimate responsibility for Operator compliance.

The language in our Grant of Authority has been stated above, so I will not repeat it here. 19 CFR Part 146. 6, which sets forth the documentary requirements by which each Operator is approved by CBP for activation, states, "Execution of the bond by an operator does not lessen the liability of the grantee to comply with the Act and implementing regulations." (See 19 CFR 146.6 (e).)

Mr. Andrew McGilvray  
Page Three  
September 23, 2016

The CBP regulations themselves, which were promulgated in T.D. 86-16, also address this issue in clear and direct fashion. The second paragraph of the “Background” section of the “Supplementary Information” includes the following statement:

“Part 146, Customs Regulations (19 CFR Part 146), governs the admission of merchandise into a zone; the manipulation, manufacture, destruction, or exhibition in a zone; the exportation of merchandise from a zone; and the transfer of merchandise from a zone into the Customs territory.”

In response to requests for “clarification of the respective liabilities to Customs of grantee, operators, and users of zones,” T.D. 86-16 offers the following:

“As the privilege of establishing, operating, and maintaining a zone is given to a grantee, Customs is of the opinion that all liabilities to Customs involving zone activities reside ultimately with the grantee of the zone. If the operator is not the grantee, these liabilities can be minimized by the operator's being named as principal on the zone operator's bond. There is no liability to Customs on the part of zone users, other than users that are also operators. It is the grantee or the grantee and operator who have responsibilities to Customs with the attendant liabilities. Grantees are free to make whatever contractual agreements regarding indemnification with operators and users that they choose. Furthermore, Customs is not aware of any way that a grantee can divest itself of all liability, or limit its liability, in the event of loss or damage to Customs resulting from zone activities.”

All of this makes it clear that it ~~is~~ incumbent upon the Airport Authority (as it is with all Zone grantees) to exercise due diligence with regard to the compliance with Customs regulations and the protection of the Customs revenue of the United States. Our solution is to utilize experts of our choice to review the compliance of Zone operators with their contractual obligations to the Airport Authority to comply with FTZ Board and CBP requirements. (Please note that we have read, understand, and comply with the FTZ Board's regulations concerning the avoidance of potential liability “that would not otherwise exist.” I am concerned about dealing with potential Customs liability that does exist.)

### **THE STANDARD BY WHICH THE FTZ BOARD ISSUED ITS DENIAL OF OUR WAIVER REQUEST**

As noted in your Conclusions and Recommendations, the standard by which waiver requests are evaluated is “whether a grantee's specific arrangement presents a significant risk that zone users will experience implied pressure to procure a particular private party's services as a condition of obtaining access to the federal FTZ program.”

Mr. Andrew McGilvray  
Page Four  
September 23, 2016

There are only two conditions of obtaining access to the federal FTZ program through FTZ 83:

1. The execution of an FTZ Operator Agreement between the Operator and the Airport Authority; and,
2. The compliance of the Operator with that Agreement.

That's all. We make it a practice to inform each prospective Operator as such.

Accordingly, there is nothing that a zone user can in reality experience that would in any way affect its ability to obtain access to the federal FTZ program through FTZ 83. We understand how our former practice of obtaining the signature of FTZ Corp was perceived by the FTZ Board to be a "condition" for obtaining access to the FTZ program; therefore, despite the fact that our former practice of three-party Operator Agreements made FTZ Corp directly liable for observing certain interests of each Operator, we abandoned this practice in response to the FTZ Board's decision on our initial waiver request of September, 2013. We also understand how our former practice of waiving the start-up fee for operators who chose FTZ Corp for professional assistance in the CBP activation process – even though we believe it made no sense for FTZ Corp to be paid to verify the completeness of its own work – "could" have been "perceived" as "implied pressure;" therefore, we abandoned this policy a number of years ago. (I believe that I apprised you of this in our previous correspondence. If my recollection of this is incorrect, I hereby inform you of this fact now.)

So what are we left with? In real-world terms, we are left with the Airport Authority's "arrangement" with FTZ Corp, and with our Operators' experience under that arrangement.

My recollection is that you asked for and received a copy of our contractual Agreement with FTZ Corp. If my recollection is incorrect, please let me know and I will send you a copy. The very first Section of our Agreement with FTZ Corp provides:

"Either party shall have the right to terminate this Agreement, for any reason, by giving the other party one hundred eighty (180) days' advance written notice of such termination ..."

For any service provider of any kind, this provision serves as a stark reminder that any sort of monkey business would result in its termination without recourse. Given the aforementioned contract provision, further reinforced by more than 25 years of experience, it is impossible for me to imagine how FTZ Corp would be unwise enough to do anything that would impinge on the Airport Authority's ability to promote the economic development of the Tennessee Valley region; therefore, as an economic development professional who is also responsible for the comfort and safety of the traveling public, it is utterly inconceivable to me how our

Mr. Andrew McGilvray  
Page Five  
September 23, 2016

“arrangement” with FTZ Corp would in any way pose a “significant risk that zone users will experience implied pressure” to procure the services of FTZ Corp.

However, in reading your analysis, and your Conclusions and Recommendation, I am left to deal with a decision that is based on a flawed standard derived from a flawed process, applied in a contradictory and flawed manner. I will explain.

The standard for evaluation of waiver requests is not contained in the FTZ Act. The FTZ Act says that each Zone shall be operated as a “public utility.” Public utilities routinely obtain services from service providers who also provide services to users of those same public utilities.

The standard for evaluation of waiver requests did not even make it into the regulations themselves, but are contained in the Preamble.

The standard for evaluation of waiver requests has clearly been inspired by a single sentence from a public comment that was submitted more than two months after the close of public comments, and, because of the truncated process by which the final regulations were adopted, was never subject to further public comment or discussion.

More egregious still, is that the standard for evaluation of waiver requests is clearly distinct from the clear meaning of the aforementioned sentence contained in the tardy comment.

I would, at this point like to offer a word about the process for adopting the existing uniform treatment regulations. You may choose to ignore it if you like, because what I’m about to share with you does not constitute additional “evidence” regarding our waiver request; however, if you choose to ignore it, you can only do so by continuing what I see as a pattern of ignoring the intent and meaning of President Obama’s Executive Order 13563 – Improving Regulation and Regulatory Review.

First, the assertion that the notice-and-comment process for adopting the existing uniform treatment regulations was “extensive” is, in my estimation, insufficient at best, possibly descending to the level of mischaracterization. Certainly, the effort to revise the FTZ Board regulations was extensive in terms of the overall breadth of the revisions; however, if the word “extensive” is intended to also imply the concept of “thorough,” then the reader is misled. The uniform treatment regulations as proposed in December, 2010 were the subject of only one round of public comment. The regulations pertaining to the waiver process, and the “key factor” by which waiver requests are evaluated (as set forth in the Preamble of the regulations as adopted) were never subject to any public comment before being adopted.

Mr. Andrew McGilvray  
Page Six  
September 23, 2016

A process that was thorough as well as what has been described as extensive, would have included a second round of proposed rule and public comment, with an opportunity to comment on new concepts and proposed rules. The bottom-line is that what you describe as “an extensive notice-and-comment process,” extended to only one round of public comment followed by a final rule, which insured that none of the changes inspired by the one opportunity for public comments were ever subjected to subsequent public examination and discussion before those changes were adopted as part of the final rule.

Likewise, the sentence that has clearly inspired the standard by which waiver requests are evaluated deserves some comment. In a letter submitted by Kelley Drye & Warren, dated June 27, 2011 (well after the April 8, 2011 deadline for submission of public comments) contains the following sentence in which the term “implied pressure” is used:

“Subzone operators should have choice in whom they select for a particular service and should not be forced, or feel any implied pressure, to pay for consulting or expert services as a condition of participating in a federal program.”

Had there been a second round of public comments, I would have asserted that I wholeheartedly agree with the concept that Zone participants should have unfettered choice in whom they select for a particular service and should not be forced or pressured to pay for consulting or expert services as a condition of participating in the FTZ program. I would have commented that the words “feel” and “implied pressure” belong in psychology textbooks, not government regulations that pertain to any federal trade program; however, I can tell you right now, that if the regulations as now adopted had in fact contained the above sentence, and dispensed with the whole waiver process, our Zone project would today be in full compliance.

How can I make this assertion? It’s easy. Because instead of using the sentence from Kellye Drye and Warren’s letter to set forth a “performance objective,” “rather than specifying the behavior or manner of compliance that regulated entities must adopt” (See the above referenced Executive Order), the standard upon which your recommendations are based is predicated on whether or not “implied pressure” – which is an entirely subjective “experience” – “could” be felt by a Zone participant or “may” have some risk of occurring based on nothing more than the “arrangement” between a grantee and a service provider.

If this is the standard by which the “public utility” requirement of the FTZ Act is supposed to be enforced, then more than the “key functions” as set forth in the uniform treatment regulations would be affected. For example, many Zone projects charge an “application fee.” Many times this fee is charged in order to offset the grantee’s cost of having some sort of review of an application performed by a service provider of the grantee’s choice prior to that application’s submission. Is the payment of such a fee “a condition of participating in a federal program?” Of course it is. Is it possible that a Zone participant “could” “feel” “implied” “pressure” to utilize

Mr. Andrew McGilvray  
Page Seven  
September 23, 2016

the grantee's service provider in preparing its application? If "could" is the applicable standard, then the answer is yes. If so, then a number of grantees "may" at some point, have a problem. (You may have noted that we do not charge an application fee, even though FTZ Corp reviews applications prior to their submission. Our reason for this is that we prefer not to impose a charge or fee simply for the privilege of petitioning the FTZ Board for FTZ site designation.)

Before I move on to our additional evidence, I would, for the sake of your edification, offer one more comment about your analysis, and your Conclusions and Recommendation. During your waiver evaluation process, you asked a number of follow-up questions and asked for certain documents. As these follow-up questions were asked, I kept asking myself, "Why the absence of questions about how we actually go about our business?" Your analysis, and your Conclusions and Recommendation now make it clear that what actually happens appears to be of no value. Instead, what "could" or "may" happen appears to be the basis for waiver decisions. If so, then the entire uniform treatment section of the regulations appears to be a fatally flawed concoction of applying rules based on speculation and subjective criteria. I hope that your response to the attached Additional Evidence demonstrates otherwise.

#### **ADDITIONAL EVIDENCE**

Attached as Business Confidential Information are two e-mail strings between one of our Zone project's users and FTZ Corp.

As you can see, the communication was initiated by the Zone user after a review of FTZ Corp's website by the Zone user, and that the Zone user wanted to know if FTZ Corp provided a certain specific type of service that was not specifically mentioned on its website. I believe this to be significant because it clearly indicates that FTZ Corp did not solicit or even advertise the requested service.

As you are aware, all of our current Zone users also utilize the FTZ program in other Zone projects. You can see that the immediate response of FTZ Corp was to ask whether or not the company's Huntsville location might be involved in the services requested.

You can see from the response of the Zone user that it was looking for Zone-related services company-wide.

You can also see that there was no response from FTZ Corp. I have confirmed that the reason for this is that even though FTZ Corp can, under the existing uniform treatment regulations, perform the requested services for the company, it would be prohibited from performing a compliance review on behalf of the Airport Authority for any user of Huntsville's FTZ project for a 12-month period following the completion of the services that the Zone user was requesting – unless our pending waiver request was approved.



Mr. Andrew McGilvray  
Page Eight  
September 23, 2016

As you can see from the first e-mail in the second e-mail string, the Zone user did not let the matter drop. The company asked more specific questions about the nature of the services that might be available.

You can see that FTZ Corp provided the answers to the Zone user's questions, but its response was met by a suggestion that, if acted upon, would clearly result in occasional re-starts of a 12-month moratorium on conducting compliance reviews on behalf of the Airport Authority. Given the 12-month period re-start issue, FTZ Corp responded by suggesting a solution that would enable it to conduct compliance reviews on behalf of the Airport Authority, then immediately thereafter provide the requested services to the Zone user; however, FTZ Corp then deferred any real movement towards the actual engagement by the Zone user for the services it was inquiring about.

I have confirmed that the Zone user has vetted other avenues for providing the specific services it desires, and that it still wants to have more in-depth discussions with FTZ Corp about it. I have also confirmed that FTZ Corp has made clear that it is reticent to do so, and that this reticence is NOT due to any prohibition against providing the services to the Zone user imposed by the uniform treatment regulations. It is due solely to the FTZ Corp's reluctance to put the Airport Authority at a disadvantage in fulfilling its fiduciary responsibilities as the Grantee of FTZ 83 by providing the services requested by the Zone user.

## **DISCUSSION AND CONCLUSION**

It is clear that in the situation described above, the Zone user's interaction with FTZ Corp in the process of FTZ Corp's due diligence activities has made a positive impression upon the Zone user. Did it influence the Zone user's decision to inquire about certain consulting services that FTZ Corp might offer? Obviously so.

Did the Zone user experience "implied pressure?" Obviously not. Its inquiry was about services that it was not sure that FTZ Corp even provides.

Does the company feel that its use of FTZ 83 is conditional upon retaining FTZ Corp for the services in question? Obviously not. As you can see from our 2015 Annual FTZ Board Report, the company is an activated Zone user. Its only requirement for continued use of the Zone is its compliance with its FTZ Operator Agreement. (Note: In accordance with our revised business model, the Operator Agreement is a two-party agreement between the Airport Authority and the Zone user. I will be happy to furnish a copy upon request if I have not already done so.)

I believe that the Zone user should have full freedom of choice in obtaining professional Zone-related services, including the choice of FTZ Corp. I also believe that the Airport Authority should have complete freedom of choice in determining which professional organization should

Mr. Andrew McGilvray  
Page Nine  
September 23, 2016

help it meet its fiduciary responsibilities as a grantee by confirming that Zone users are meeting their contractual obligation of compliance with Customs regulations. I believe that the Airport Authority should be able to utilize such professional services to confirm Zone user compliance when the need may arise, without time delays of up to 12 months as imposed by the existing uniform treatment regulations.

I believe that Zone participants should have choice in whom they select for a particular service and should not be forced or pressured to pay for consulting or expert services as a condition of participating in the FTZ program. What I have described above is in complete harmony with this belief.

From what I can glean from your Conclusions and Recommendation, it may well be that the real-life situation I have described and documented is exactly what you intend to prevent. If so, then the timing of what may or may not occur and when such activities may or may not occur is entirely backwards as set forth in the uniform treatment regulations themselves. The existing uniform treatment regulations do not prohibit FTZ Corp from immediately commencing and performing the services desired by our Zone user. The regulations only prevent the Airport Authority from utilizing FTZ Corp to confirm the compliance of Zone users (at no cost to anyone) for a 12-month interval after its services to the Zone user has most recently occurred. Accordingly, if your aim is to prevent FTZ Corp from providing services to the Zone user in question, the uniform treatment regulations do not do so. It is only the desire of FTZ Corp to protect the interests of the Airport Authority that constrains it from doing so.

I hope this improves your understanding of why the Airport Authority is seeking this waiver, and why I have been so insistent on the matter. If you have any concern whatsoever that FTZ Corp may pose an unacceptable risk in arm-twisting the Airport Authority or any member of the trade community that it serves, I hope that this additional evidence and our interaction with you will help you understand that the Airport Authority will not be bullied, nor allow its constituents in the trade community to be bullied.

Finally, I would like to note that an important sentence in the FTZ Board Regulations' Preamble follows the sentence which states that a key factor the Board will consider is whether a grantee's specific arrangement presents a significant risk that zone users will experience implied pressure to procure a particular private party's services as a condition of obtaining access to the federal FTZ program. That sentence reads:

“In total, the adopted provisions will allow the Board to respond to individual circumstances, and should avoid the ‘one-size-fits-all’ impact about which some commenters expressed concern.”

Mr. Andrew McGilvray  
Page Ten  
September 23, 2016

The opening sentence in the penultimate paragraph of your Conclusions and Recommendation reads:

“This analysis is not specific only to FTZ Corp, but would apply to any company in FTZ Corp’s situation.”

I invite you to re-read the two sentences quoted above. After doing so, I hope you can understand my assertion that the waiver process is a sham.

This is not a new belief on my part. As you know, our first waiver request was aimed at our continuance of three-party Operator Agreements, with FTZ Corp as one of those parties. It was apparent to me that the basis of the decision which has rendered the three-party structure obsolete was, “a potential new operator in any of these zones is unable to achieve FTZ financial benefits unless FTZ Corp signs an operator’s agreement with the company.” (Never mind that it would be a matter of commercial suicide were FTZ Corp to refuse to do so.) Clearly, our original waiver request was based on our desire to have FTZ Corp as a party to our Operator Agreements in order to give the Airport Authority further protection from potential liability, and, to provide additional clarity to the Zone Operator regarding the roles and responsibilities of all parties (and do it in a single document). The essential reason for the “conditions or limitations” which rendered the purported approval of our original waiver request moot was that in order to be a party to an Operator Agreement, FTZ Corp had to actually sign the blasted thing. This certainly meets my threshold for judging the entire waiver process a sham.

I find the idea expressed in your analysis of our current waiver request – that is, the analysis would apply to any company in a particular situation – to be, in a waiver process that purports “to respond to individual circumstances,” further evidence that the waiver process itself is a sham.

I hope this new evidence and the accompanying discussion will enable you to prove me wrong.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Richard Tucker". The signature is fluid and cursive, with the first name "Richard" being more prominent than the last name "Tucker".

Richard Tucker  
Executive Director

RT/lb

Attachment

Mr. Andrew McGilvray  
Page Eleven  
September 23, 2016

Copies to:  
Paul Piquado  
Timothy Skud  
Scott McBride  
Richard Shelby  
Katie Britt  
Bill Sullivan  
Morgan Carter  
Kolo Rathburn  
Ronnie Flippo  
Vicki Wallace  
Ronald Lorentzen  
Greg Jones

# ATTACHMENT: PUBLIC VERSION

## Initial E-mail string concerning inquiry from an existing Zone user

**From:** [Name and e-mail address redacted]  
**Sent:** Thursday, March 26, 2015 8:47 AM  
**To:** Greg Jones  
**Subject:** FTZ Training

Greg,

Does FTZ Corp have any information on their training? We are looking for some formal training we could use for a group (probably 5 to 8), geared for manufacturing subzones, that would cover the overall regs for subzone operations as well as the daily management of the FTZs.

I looked on the website and I didn't see anything.

[Name redacted]

**From:** Greg Jones [<mailto:GregJones@ftzcorp.com>]  
**Sent:** Thursday, March 26, 2015 9:58 AM  
**To:** [Name and e-mail address redacted]  
**Subject:** RE: FTZ Training

Hi [Name redacted],

We do, indeed.

Were you thinking about the Huntsville operation, or did you have something different in mind?

Best regards,

Greg

**From:** [Name and e-mail address redacted]  
**Sent:** Thursday, March 26, 2015 10:46 AM  
**To:** Greg Jones <[GregJones@ftzcorp.com](mailto:GregJones@ftzcorp.com)>  
**Subject:** RE: FTZ Training

Greg,

I'm looking for something we can use across the board for all our zones, specific enough for the FTZ specialist and staff that have responsibility for the zone operations and our Trade Compliance staff @ the corporate level... We had one of our specialist go through a "FTZ School" (I'm sure you know the company offering this) and she gave it a high rating. Truthfully, it sounds good from her feedback, but it seems to be a little pricey, especially for a group. I discussed it with my management and they wanted us to look around and see if anyone else is offering a comparable training and the cost.

[Name redacted]

# PUBLIC VERSION

## Second E-mail string concerning inquiry from an existing Zone user

**From:** [Name and e-mail address redacted]  
**Sent:** Monday, April 20, 2015 12:34 PM  
**To:** Greg Jones  
**Subject:** FTZ Training

Hey Greg,  
Does FTZ Corp have a training program for FTZ Operators (specifically subzones)? If yes, is there a standard curriculum or is it more ad hoc? And could it be conducted via the web?  
Thanks,  
[Name redacted]

**From:** Greg Jones [<mailto:GregJones@ftzcorp.com>]  
**Sent:** Monday, April 20, 2015 4:03 PM  
**To:** [Name and e-mail address redacted]  
**Subject:** RE: FTZ Training

Hi [Name redacted],

We typically offer a presentation that covers the general types of Zone-related movements and transactions that day-to-day practitioners are involved with. I'm sure that we could arrange to have a web-based event; I'm pretty confident that it could be done in a manner that accommodates questions and answers. We can also offer follow-up assistance aimed at dealing with the exceptions that sometimes occur in a manufacturing environment.

Best regards,

Greg

**From:** [Name and e-mail address redacted]  
**Sent:** Monday, April 20, 2015 3:13 PM  
**To:** Greg Jones  
**Subject:** RE: FTZ Training

Thanks Greg...we are trying to setup some formal training for our FTZ Operators that can help them understand the subzone from cradle to grave. We want to do this in a group setting, maybe every other year or so to help with cross training and refresher when needed.  
Thanks for the feedback,  
[Name redacted]

**From:** Greg Jones [<mailto:GregJones@ftzcorp.com>]  
**Sent:** Monday, April 20, 2015 4:19 PM  
**To:** [Name and e-mail address redacted]  
**Subject:** RE: FTZ Training

Hi [Name redacted],

As I may have mentioned to you, we have our own in-house folks who do the day-to-day operation for Zone Operators. It might be a good idea to think about a program that enables your day-to-day folks to interact with our day-to-day folks.

Perhaps we should both think about this.

Best regards,

Greg

**From:** [Name and e-mail address redacted]  
**Sent:** Monday, April 20, 2015 4:00 PM  
**To:** Greg Jones <[GregJones@ftzcorp.com](mailto:GregJones@ftzcorp.com)>  
**Subject:** RE: FTZ Training

Greg,  
Maybe we can brainstorm a little when we can arrange a few minutes...  
[Name redacted]

## Appendix 4



# HAILEY, McNAMARA, HALL, LARMANN & PAPALE, L.L.P.

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September 26, 2016

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‡ TEXAS

## VIA EMAIL

Andrew McGilvray, Executive Secretary  
The Foreign-Trade Zones Board  
United States Department of Commerce  
Washington, DC 20230

RE: Response to Waiver Decision of August 26, 2016

Dear Mr. McGilvray:

On July 28, 2015 Mississippi Coast Foreign Trade Zone, Inc. (MCFTZ), grantee of FTZ 92, submitted a waiver request which is aimed at enabling Foreign-Trade Zone Corporation (FTZ Corp) to conduct compliance reviews on behalf of MCFTZ without any restrictions that might be imposed by the Foreign Trade Zones (FTZ) Board's uniform treatment regulations. MCFTZ received notification dated August 26, 2016 that its waiver request has been denied.

## Prior to Waiver Request

Bruce Frallic and I attended the National Association of Foreign Trade Zone (NAFTZ) Annual Conference held in September, 2011 in New Orleans.

During your presentation at the Conference, you acknowledged that the FTZ Board was required to comply with President Obama's 2011 Executive Order, "Improving Regulation and Regulatory Review."

Mr. Frallic and I also attended the FTZ Board's Grantee Outreach held in New Orleans on September 15, 2011.

During the Outreach session, you noted concerns on uniform treatment issues involving third-parties contracted by Zone Grantees, who you characterized as "gatekeepers." You also stated that you thought it unlikely that when Congress created the FTZ program in 1934, it envisioned any private company "taking over" a Zone project and "enriching" itself by using the "leverage"

Andrew McGilvray, Executive Secretary  
September 26, 2016  
Page 2

of getting people to buy its private services instead of other people's private services. You offered that the FTZ Board cannot ignore the issue and needs to deal with "inappropriate influence."

In response to my discussion concerning due process in promulgating new regulations to address uniform treatment concerns, you agreed that the Board should adopt the least burdensome approach, and that the Board has to weigh the various comments. You then noted that the Board had received potential solutions in public comments to the proposed regulations; then you again asked the rhetorical question: Should private commercial pressure exist within a federal program? You then noted that the Board has to "strike the right balance" in resolving the issue.

Mr. Bruce Frallic, Executive Director of the Gulfport/Biloxi Airport Authority and member of the Executive Committee of the Mississippi Coast Foreign-Trade Zone, addressed you. He noted that as members of the Grantee organization, the various public entities along the Mississippi Coast are well aware of their responsibilities of fulfilling the public utility concept – not only in the context of the FTZ program, but in their regular dealings with the public. "We *are* public entities," he said.

The final regulations, which introduced the waiver procedure (without the opportunity of public comment), were adopted on February 28, 2012.

I wrote a letter to you on April 13, 2012 which asked about the timing for submission of waiver requests. This letter was written with a clear understanding that the regulations permit a third-party to provide Zone-related services to Zone participants without restriction, but in the absence of a waiver are prohibited from performing certain "key functions" on behalf of a Grantee if that third-party "currently engages" in, or which has during the previous twelve months engaged in, offering/providing a zone-related product/service to or representing a zone participant in the Grantee's zone." My inquiry was aimed at avoiding, if possible, a situation in which the MCFTZ – by virtue of waiting until a problem actually existed before filing a waiver request – would be stuck for an indeterminate amount of time without the ability to avail itself of whatever service from FTZ Corp to MCFTZ which might be regarded as a "key function."

In a letter of May 2, 2012, you responded that a waiver request could be submitted and reviewed before a situation in which a waiver would be required comes into being.

In a letter to you dated June 28, 2012, I made specific inquires as to whether or not certain fundamental structural changes to FTZ Corp – specifically, a divestiture in which one of its two current shareholders, who is the step-father of the other shareholder -- could allow it, under a separate, unrelated corporate entity, to perform "key functions" on behalf of MCFTZ without the necessity of first obtaining a waiver from the FTZ Board or, alternatively, terminating the existing marriage to his spouse.

Your response, dated September 28, 2012 failed to provide clarity. I followed up in a letter dated December 18, 2012 in an effort to obtain definitive answers to the issues raised. It was clear

from your subsequent response that, even in the event of the dismantling of FTZ Corp, either a waiver or a divorce would be required.

After review of the actual work that FTZ Corp provides to and on behalf of MCFTZ, I was comfortable that FTZ Corp did not perform any of the “key functions” as set forth in the FTZ Board’s uniform treatment regulations. This changed upon receipt of a copy of your December 29, 2014 letter to Mr. Rick Tucker of the Huntsville-Madison County Airport Authority, grantee of Foreign-Trade Zone No. 83. In that letter, you set forth the FTZ Board’s interpretation of “Overseeing zone participants operations on behalf of a grantee.” This interpretation is much more expansive than could have been imagined.

It is clear from your correspondence that in order for FTZ Corp or either of its principals to conduct a compliance review whenever the need may arise, a waiver would be required. Otherwise, FTZ Corp would have to be divided among its two shareholders, and the one shareholder would have to terminate the 39-year marriage to his spouse.

My understanding is that in February, 2015, during an informal discussion convened at your request, Mr. Scott McBride, Department of Commerce attorney, proposed to the potentially affected shareholder the submission of an “advisory” waiver request which, presumably, would enable that shareholder to conduct a compliance review on behalf of FTZ 92 whenever the need might arise, without the need of divorcing his spouse before commencing that compliance review.

As a result, MCFTZ submitted its request for a waiver.

### **Additional Evidence**

FTZ Corp has served as Zone Project Administrator for MCFTZ for more than two (2) decades. On only one occasion has one of the many participants in FTZ 92 purchased products or services from FTZ Corp. In that case, the company contacted FTZ Corp and sought its help in becoming a zone participant. Prior to the company’s outreach to FTZ Corp, FTZ Corp was unaware that the company even existed.

In the late 1990s, one of the participants in FTZ 92 approached FTZ Corp seeking an automated solution to its manual inventory tracking system. Even though FTZ Corp had developed an inventory tracking software product that was available for purchase by the participant, FTZ Corp offered to facilitate the participant in programming its own in-house solution at no charge. The participant accepted FTZ Corp’s offer and built the system itself, with feedback provided by FTZ Corp as the project progressed. The participant continues to use the in-house system today.

Had FTZ Corp desired, it could have charged for this service, or alternatively, strongly encouraged the participant to subscribe to its FTZ software product. Instead, FTZ Corp did what it deemed as in the best interest of the participant as a matter of promoting the general welfare of the MCFTZ project. Further, I have confirmed that this zone participant has never paid FTZ Corp for any zone-related services.

In another example of what actually occurs versus perceived risk, in late 2013, another participant in FTZ 92 contacted FTZ Corp upon being assessed \$1 million in penalties by U. S. Customs and Border Protection (CPB). The zone participant wanted to hire FTZ Corp to conduct a compliance review in an effort to assist it in developing more compliant zone procedures. FTZ Corp's response was that a more demonstrably objective approach would be for FTZ Corp to conduct the review on behalf of MCFTZ, the Zone grantee. FTZ Corp then reviewed the participant's existing Zone procedures, provided information regarding certain changes that the participant might want to consider in raising its level of compliance, and participated as the Grantee's representative in meetings with CPB. The zone participant improved its procedures and recordkeeping systems. Follow-up meetings which included FTZ Corp as the Grantee's representative convinced CPB to cancel the penalties. As FTZ Corp was not a hired consultant representing the participant, the participant paid nothing to FTZ Corp. FTZ Corp acted as the Grantee's representative at no additional cost to the Grantee.

Representatives of the participant have informed me that it was FTZ Corp's participation as a Grantee's representative (rather than as a hired consultant representing the participant) that had a positive effect on CPB's receptiveness to the proposition that the penalty be cancelled. The participant has further informed me that if it finds itself in a similar position in the future, it would like to take advantage of the same process in achieving a resolution.

### Discussion

In Executive Order 13563 – Improving Regulation and Regulatory Review (January 18, 2011), President Obama ordered federal regulators to use the “least burdensome tools for achieving regulatory ends.” The President further ordered that federal agencies “specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.” In its analysis of the FTZ Board's proposed rule on uniform treatment, the Grantee Task Force of NAFTAZ posited that the proposed rule “may force a number of Grantees to withdraw from the zone's program as they do not have the human resources or the financial ability to meet and maintain the new requirements.” The Task Force expressed that “the Board's concerns over the actions of the very small number of Grantees and parties providing services to these Grantees should not require such radical change but rather can be effectively dealt with under the transparency and enforcement provisions of the new Regulations.”

Access to FTZ 92 is solely dependent on a zone participant's execution of an Operator Agreement and approval by CPB. All FTZ Operator Agreements have always been 2-party agreements between the Grantee and each operator. When FTZ Corp began working for MCFTZ in the mid-1990s, it was asked if it preferred to be a party to MCFTZ's Operator Agreements. Its response was that it preferred not to. FTZ Corp has never served as a “gatekeeper.”

Any described activities that FTZ Corp conducts are done AFTER the zone participant obtains access to the FTZ program. Accordingly, under the “arrangement” between FTZ 92 and FTZ Corp it is impossible for zone participant's use of FTZ 92 to in any way be conditioned upon the use of FTZ Corp's services.

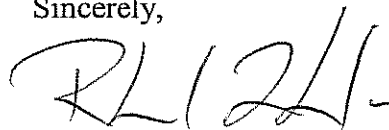
There is a long history which indicates that MCFTZ's arrangement with FTZ Corp does not force zone participants to utilize the services of any private party, that there is no "implied pressure" to do so, and that FTZ Corp has actually declined opportunities to be paid for services when zone participants have made an offer to do so. This affirmatively demonstrates that FTZ Corp does not pose an "unacceptable risk" for abusing its relationship with MCFTC.

The existing arrangement results in what is good for both users and grantee. Throughout its relationship with MCFTZ, FTZ Corp has always served at the pleasure of MCFTZ's Board of Directors, with the MCFTZ maintaining the right of termination without cause. The idea that FTZ Corp could, or would, be allowed to "take over" the MCFTZ project is completely alien; indeed it is preposterous. Furthermore, the Board's approval of our waiver request would do nothing more than assure that FTZ Corp can conduct a compliance review on behalf of MCFTZ as an immediate need may arise. Approval of our waiver request would in no way nullify or abridge the regulatory prohibition that, "zone participants shall not be required (either directly or indirectly) to utilize or pay for a particular provider's zone-related products or services."

I'm sure you are aware that President Obama's Executive Order also mandates, "Before issuing a notice of proposed rulemaking, each agency where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." I'm sure that you must agree that this rule also applies to the adoption of final rules, and that you must agree that it was both feasible and appropriate to seek views of people who have been married for nearly four decades before issuing a final rule to which they are potentially subject. Given this glaring deficiency that runs contrary to President Obama's call for "equity," "human dignity" and "fairness," I respectfully proffer that the Board's unconditional approval of our waiver request is more than called-for.

Clearly, the "least burdensome" way in which the constructive relationship between and among MCFTZ, its users, and its Zone Project Administrator can be maintained – while at the same time maintaining the regulatory objective of allowing zone participants full freedom of choice in obtaining zone-related services – is through the unconditional approval of our waiver request. I look forward to the Board's favorable response.

Sincerely,



Richard B. Tubertini  
General Counsel  
Mississippi Coast Foreign Trade Zone, Inc.

RBT;jhs

Andrew McGilvray, Executive Secretary  
September 26, 2016  
Page 6

cc: Paul Piquado, Asst. Secretary of Commerce for Enforcement and Compliance  
([Paul.Piquado@trade.gov](mailto:Paul.Piquado@trade.gov))  
Timothy Skud, Deputy Asst. Secretary of the Treasury (Tax, Trade and Tariff Policy)  
([timothy.skud@treasury.gov](mailto:timothy.skud@treasury.gov))  
Ty Mabry, Office of Senator Thad Cochran ([Ty\\_Mabry@cochran.senate.gov](mailto:Ty_Mabry@cochran.senate.gov))  
Joe Lai, Office of Senator Roger Wicker ([Joseph\\_Lai@wicker.senate.gov](mailto:Joseph_Lai@wicker.senate.gov))  
Ronald K. Lorentzen, Deputy Asst. Secretary for Enforcement and Compliance, USDOC,  
ITA ([Ronald.Lorentzen@trade.gov](mailto:Ronald.Lorentzen@trade.gov))  
Scott D. McBride, Asst. Chief Counsel for Trade Enforcement and Compliance, USDOC  
([Scott.McBride@trade.gov](mailto:Scott.McBride@trade.gov))

## Appendix 5



October 13, 2016

Richard Tucker  
Executive Director  
Huntsville-Madison County Airport Authority  
1000 Glenn Hearn Blvd.  
Box 20008  
Huntsville, AL 35824

Andrew Mayo  
Office of Economic Development  
City of Birmingham  
710 20th Street North, Third Floor  
Birmingham, AL 35203

Dear Messrs. Tucker and Mayo:

I am writing to your organizations – the grantees of Foreign-Trade Zones (FTZs) 83 and 98, respectively – to provide clarification pertaining to a grantee establishing a requirement for each operator within its FTZ to obtain periodic reviews of the operator's compliance with regulatory requirements. In February 2016, the FTZ Board issued a survey to grantees that included a question about any change(s) each grantee has needed to make as a result of the FTZ Board's uniform treatment regulation (15 CFR 400.43). In response to that question, FTZ 83 stated:

*Our Operator Agreements provide that each Operator will comply with all regulations (including CBP regulations) for operating in a Foreign-Trade Zone. The only means of confirming this is to have someone with the requisite knowledge take a look and make some sort of assessment.*

*Without the permanent, unconditional approval of our waiver request of January 14, 2015 (which seeks to enable our grantee organization to choose the professional service-provider who may confirm Operator compliance, while also enabling the Operator the freedom to choose their preferred service-provider), one of the following three predicaments will be imposed upon us:*

*1. We will be unable to utilize the professional of our choice to confirm any Operator's compliance with government requirements for the use of Zone procedures;*



2. We will be unable to require any Operator to hire a 3rd party of its choice to confirm that Operator's compliance with government requirements for the use of Zone procedures without that 3rd party first obtaining a Board waiver, because, by definition, that activity will be performed on our behalf; and would be performed by that same 3rd party as a service to the Zone participant; and according to the FTZ Board's definition of "Overseeing" (See letter of Andrew McGilvray dated December 29, 2014) to include, "inspect," "subject to scrutiny," "examine," "verification that Operators are in compliance with Customs regulations," "review of proposed and ongoing FTZ processes," or "confirming that proposed or existing practices of zone participants meet applicable federal requirements," would constitute a violation of the FTZ Board's Uniform Treatment regulations;

3. We will be unable to confirm any Operator's compliance with government requirements for the use of Zone procedures except through the use of our own permanent Airport Authority employee who must be properly trained and well-versed in the complexities of FTZ regulatory and operational complexities, and is willing to work for what we can afford to pay – at least until such time as that person realizes that the real money is in being a consultant.

In its response to the same survey question, FTZ 98 stated (in part):

*[T]he FTZ Board's interpretation of its own Uniform Treatment regulations calls into question whether any third party can review the operations of a Zone Operator if that review is in the interest ("on behalf of") a Zone grantee - which, given the terms of most Operator Agreements, could be regarded as occurring every time such a review is done. It may be that the City and other zone grantees have no third party mechanisms by which to assess Operator compliance, and, it may be that Zone Operators may someday have some trouble in meeting one of U.S. Customs core elements of Informed Compliance- that is the use of third-party experts for review and assessment.*

In the context of the statements quoted above, I am writing to address the matter of a grantee setting a requirement that each operator in the grantee's zone obtain from a third party of the operator's independent choosing periodic reviews of the operator's compliance with regulatory and other governmental requirements that apply to operators' FTZ activity. Setting a requirement that an operator obtain a review by a third party of its independent choosing does not, standing alone, render the review "on behalf of" the grantee within the meaning of 15 CFR 400.43(d)(1)(iii).<sup>1</sup>

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<sup>1</sup> We also note that under 15 CFR 400.42(a), "zone participants shall not be required (either directly or indirectly) to utilize or pay for a particular provider's zone-related products or services." Any requirement set by a grantee for operators to obtain compliance reviews from third parties of the operators' independent choosing would need to be implemented in a manner consistent with 15 CFR 400.42(a).

Specific to the above quote from FTZ 83's survey response, a grantee establishing a requirement for each operator to obtain periodic compliance reviews from a third party of the operator's independent choosing does not mean that "by definition, that activity will be performed on [the grantee's] behalf." Similarly, specific to the above quote from FTZ 98's survey response, if a compliance review is "in the interest" of a grantee, it does not mean that the review is performed "on behalf of" that grantee. The above-quoted positions or concerns expressed by FTZ 83 and FTZ 98 appear to involve interpretations of the phrase "on behalf of" that extend beyond those required by the ordinary meanings of "on behalf of" (e.g., act for, act vicariously, appearing for, as agent for, be deputy for, be envoy for, be spokesman for, be the authorized agent for, be the authorized representative for, by proxy, representing, stand in for, substitute for). Such a construction would lead to the illogical conclusion that, for instance, audited financial statements are prepared "on behalf of" the U.S. Securities and Exchange Commission, rather than on behalf of the publicly held companies that procure the audits.<sup>2</sup>

In sum, a grantee is free to set a requirement for operators in the grantee's zone to obtain periodic compliance reviews from third parties of the operators' independent choosing. As expressed above, such a requirement would not make the conduct of those reviews "on behalf of" the grantee within the meaning of 15 CFR 400.43(d)(1)(iii). Therefore, a third party chosen independently by an operator to conduct such a review would not need to obtain a waiver for that activity from the FTZ Board under 15 CFR 400.43(f). I hope this information and clarification have been helpful to you. If you have questions regarding this matter, do not hesitate to contact myself or Elizabeth Whiteman at (202) 482-2862.

Sincerely,



Andrew McGilvray  
Executive Secretary/Staff Director

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<sup>2</sup> See e.g., the summary of audit requirements on the website of the U.S. Securities and Exchange Commission at <https://www.sec.gov/investor/pubs/aboutauditors.htm>