DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

15 CFR Part 400

[Docket No. 090210156-1664-02; Order No. 1815]

RIN 0625-AA81

Foreign-Trade Zones in the United States

AGENCY: Foreign-Trade Zones Board, International Trade Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Foreign-Trade Zones Board (the Board) hereby revises its regulations issued pursuant to the Foreign-Trade Zones (FTZ) Act of 1934, as amended (the Act), concerning the authorization and regulation of foreign-trade zones and zone activity in the United States. The rule is comprehensive and constitutes a complete revision, replacing the present version of 15 CFR part 400. The changes simplify many of the Board's procedures, including those for users to obtain authority related to manufacturing and value-added activity, and include new rules designed to address compliance with the Act's requirement for a grantee to provide uniform treatment for the users of a zone. The new rules improve flexibility for U.S.-based operations, including export-oriented activity; enhance clarity; and strengthen compliance and enforcement. The revisions also reorganize the regulations in the interest of ease-of-use and transparency.

EFFECTIVE DATE: ***[Insert date 60 days after the date of publication in the Federal Register]***, except for §§400.21-400.23, 400.25 and 400.43(f) which contain information collection requirements that have not yet been submitted for OMB review. The Board will publish a document in the *Federal Register* announcing the effective date.

FOR FURTHER INFORMATION CONTACT: Andrew McGilvray, Executive Secretary, Foreign Trade Zones Board, International Trade Administration, U.S. Department of Commerce, 1401

Constitution Avenue NW., Room 2111, Washington, DC 20230, (202) 482-2862 or Matthew Walden, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Room 4610, Washington, DC 20230, (202) 482-2963.

SUPPLEMENTARY INFORMATION:

Background

Foreign-Trade Zones (FTZs or zones) are restricted-access sites in or near U.S. Customs and Border Protection (CBP) ports of entry. The zones are licensed by the Board and operated under the supervision of CBP (see 19 CFR part 146). Specifically, zones are physical areas into which foreign and domestic merchandise may be moved for operations involving storage, exhibition, assembly, manufacture or other processing not otherwise prohibited by law. Zone areas “activated” by CBP are considered outside of U.S. customs territory for purposes of CBP entry procedures. Therefore, the usual formal CBP entry procedure and payment of duties is not required on the foreign merchandise in FTZs unless and until it enters U.S. customs territory for U.S. domestic consumption. In fact, U.S. duties can be avoided on foreign merchandise re-exported from a FTZ, including after incorporation into a downstream product through activity in the FTZ. Zones have as their public policy objective the creation and maintenance of employment through the encouragement of operations in the United States which, for customs reasons, might otherwise have been carried on abroad.

Domestic goods moved into a zone for export may be considered exported upon entering the zone for purposes of excise tax rebates and drawback. "Subzones,” sites established for specific uses, are authorized by the Board through grantees of general-purpose zones, including where certain requirements, such as “adjacency” (distance/driving time), for general-purpose

zone sites cannot be met. Goods that are in a zone for a *bona fide* customs reason are exempt from State and local *ad valorem* taxes.

Zones and subzones are operated by corporations that have met certain regulatory criteria for submitting applications to the Board to operate zones. Under the FTZ Act, zones must be operated under public utility principles, and provide uniform treatment to all that apply to use the zone. The Board reviews and approves applications for authority to establish zone locations and to conduct certain activity within zones, and oversees zone grantees' compliance with the Board's regulations. The Board can limit or deny zone use on a case-by-case basis on public interest grounds. In response to applications and notifications, the Board can also provide the applicant with specific authority to choose whether to pay duties either on the original foreign material or on a downstream product incorporating the foreign material.

To receive approval to operate a zone, an applicant must demonstrate the need for zone services, a workable plan that includes suitable physical facilities for zone operations, and financing for the operation. Successful applicants are granted licenses to operate zones. License grantees' sponsorship of specific sites for proposed FTZ designation is based on the grantees' determinations regarding the sites' appropriateness and potential for FTZ use, and a grantee may subsequently request removal of FTZ designation from a site based on factors such as the grantee's determination that projected FTZ use has not occurred.

Through this action, the Board is updating and modifying the rules for FTZs. Continued interest in zones, on the part of both communities providing zone access as part of their economic development efforts and firms using zone procedures to help improve their international competitiveness, demonstrates zones' importance to international trade and to investment in the domestic economy. These regulations generally simplify and clarify requirements pertaining to FTZ use, while also helping to ensure compliance with specific statutory and regulatory

requirements. The regulations are also intended to improve access and flexibility for U.S. manufacturing and value-added operations, and to enhance safeguards in order to avoid potential negative economic consequences from certain zone activity.

In developing the final rule, the Board considered all of the comments received in response to its *Federal Register* notice of December 30, 2010 (75 FR 82340) proposing revisions to 15 CFR part 400. The comments received in response to the notice and the Board's positions on the points raised in the comments are summarized below. The sections listed in the headings are those of the final rule, and references are made to the previous *Federal Register* notice when appropriate.

Discussion of comments received

Based on substantive changes made in response to comments submitted (as described below), a number of sections of the proposed regulations have been renumbered and certain section titles have been modified. Key changes to section numbers include: Adopted §§400.14(b), (d) and (e) parallel proposed §§400.14(c), (f) and (g), respectively; adopted §§400.22 and 400.23 replace proposed §400.22(a); adopted §400.24 was renumbered from proposed §400.23; adopted §400.25 replaces proposed §400.22(b); adopted §400.26 replaces proposed §§400.24 and 400.25(b); adopted §400.27 replaces proposed §400.25(a); adopted §400.41(b) replaces proposed §400.44; adopted §§400.28, 400.29. 400.36, and 400.38 were renumbered from §§400.26, 400.27, 400.35 and 400.36, respectively; adopted §§400.44, 400.45, 400.46, 400.47, 400.48 and 400.49 were renumbered from proposed §§400.45, 400.46, 400.47, 400.48, 400.49 and 400.38, respectively; and adopted §400.63 was renumbered from proposed §400.64.

*Section 400.1 - Scope*

*Section 400.1(a)*

*Comment*: One commenter proposed adding a sentence regarding the Board's policy objective of encouraging activity in the United States that might otherwise be conducted abroad.

*Board position*: The policy objective in question is addressed in the Preamble. Duplication in this section is not warranted.

*Section 400.1(c)*

*Comment*: Numerous commenters proposed inserting language regarding the status of FTZs and zone merchandise relative to certain trade agreements and program(s), and deleting a phrase regarding production activity.

*Board position*: It is not necessary to address or describe in the Board's regulations trade agreements and trade programs, which may change during the effective period of the regulations. The phrase regarding production activity has been retained because it clarifies that production activity is the mechanism through which a product emerging from a zone could differ from the material admitted to the zone. Retaining the phrase helps reinforce that production activity is subject to specific requirements in these regulations.

*Section 400.2 - Definitions*

*Comments*: Numerous commenters proposed adding definitions for the following terms: activation; administrator (to replace the term "agent"); alternative site framework (ASF); Board Order; domestic status; free trade agreement; general-purpose zone; inverted tariff; modification; NAFTA; non-privileged foreign status; privileged foreign status; service area; Special Tariff Treatment Program; traditional site framework; grantee; and zone restricted status. One or more commenters stated that the proposed definition of agent is or may be too broad, may potentially extend beyond the statutory reach of the Board, and appears to be focused on an agent of the grantee although there are other agency relationships in the FTZ program.

*Board position*: We have added definitions for the terms alternative site framework, Board Order, inverted tariff, modification, and service area in response to comments submitted. We have not defined either "agent" or "administrator." We have not adopted the term "administrator" as a substitute for the proposed term "agent" because the final provisions of section 400.43 instead simply refer to a party that undertakes a function "on behalf of a grantee" (thereby eliminating the need to use or define any more specific term(s) such as agent or administrator). Regarding addition of a definition for "grantee," the proposed regulations already contained a definition of "zone grantee." We have retained that term and definition to help clarify that the zone grantee is the overall sponsor of the zone and recipient of the authority from the FTZ Board, and that zone participants are not also "grantees" of some sort.

The terms, activation, domestic status, non-privileged foreign status, privileged foreign status, and zone restricted status are defined in CBP's FTZ regulations (19 CFR Part 146), and CBP is the primary agency using these terms. Defining these terms in two agencies' separate regulations would significantly complicate any potential refinement or redefinition of them that might prove necessary in the future. In addition, the commenters' proposed definition of activation differs from the definition of that term in the FTZ regulations of CBP, the agency responsible for activation. For these reasons, we have not added definitions of the terms in question.

It is not clear we need to add definitions for the terms free trade agreement, NAFTA, and Special Tariff Treatment Program. These terms are not used elsewhere in the Board's regulations. Further, these terms may be defined by other agencies that make use of the terms, so that any definition adopted by the Board could create a risk of inconsistency with the other agencies' definitions. Therefore, we have not added definitions for these terms.

We have not added a definition for general-purpose zone because the specific use of this term is tied to comments submitted regarding the need to simplify the Board's structure and processes for designating zone sites. In a subsequent rule, we intend to evaluate adding a definition of this term in concert with simplifying the parallel site-designation frameworks that currently exist, as noted in response to comments on §400.11. As a result of our intent to simplify the site-designation frameworks, the specific implications of a definition of traditional site framework might evolve. Therefore, at this point we have not added a definition of traditional site framework for this final rule.

*Comments*: Numerous commenters proposed revising the definitions for the following terms: foreign-trade zone; grant of authority; person; port of entry; site; subzone; zone; zone operator; zone participant; zone project; zone site; and zone user. One commenter stated that the definition of zone operator should not be limited to an entity physically on-site at the zone or subzone.

*Board position*: We have modified the definitions of foreign-trade zone, grant of authority, and person in response to comments submitted. For the term "port of entry," commenters proposed adding "customs station" to the definition, but did not explain the implications or impact of their proposed change. The term "port of entry" has long had a specific meaning, but the meaning of the proposed additional phrase is unclear and not explained by the commenters. In that context, we have left the definition of port of entry unchanged.

In response to comments submitted and taking into account changes adopted elsewhere in these regulations in response to comments (*e.g.*, §400.24(c) allowing designation of general-purpose zone space as a subzone, where warranted), we have revised the definition of subzone. Our tying subzone designation to a specific use should provide some additional flexibility relative to commenters' suggested language tying a subzone to a specific company.

Our definition also reflects our agreement with commenters that a subzone can have multiple sites. The definition of a subzone may also be addressed in a subsequent rule simplifying the parallel site-designation frameworks that currently exist, as noted in response to comments on §400.11. In harmony with changes adopted elsewhere in these regulations (*e.g.*, §400.36(f)), we have also adopted a definition of "activation limit." Key implications of that term are examined in response to comments on §400.36.

For the terms "zone" and "zone user," we have retained the definitions we proposed because changes suggested in comments did not, in our view, improve clarity or usability. For the term, "zone participant," we have simplified the definition to improve clarity, in response to comments submitted. However, we have retained "property owners" within the definition because the provisions of these regulations in which the term "zone participant" is used have relevance to property owners as well as to operators and users. We have also replaced the definition of "zone project" with a definition of "zone plan" (a term previously referenced within the definition of zone project) based on the zone plan's function as the benchmark that the Executive Secretary must use in gauging whether a modification is major or minor under §400.24(a)(2).

Based on the comments received, we have combined the definitions of zone site and site under the former term, so that the two terms will be interchangeable. We have also adopted a suggested change to replace the phrase, "organized as an entity," with the phrase, "organized and functioning as an integrated unit." Based on comments submitted, we have also added "contiguous" to the definition but have modified it with "generally" to allow for unusual circumstances in which parcels are in close proximity to each other and appropriately constitute a single site, although they are not actually contiguous.

We have not added suggested language to the definition of zone operator because the language could have the unintended effect of reducing flexibility in local zone oversight and

related arrangements at individual zones. However, given the elimination of proposed §400.43(b)'s requirement for agreements to be made directly with a zone's grantee, we have modified the definition of zone operator to reflect that an operator's activity could be under the terms of an agreement with a third party that acts on behalf of a grantee. With regard to the comment that a zone operator should not be limited to an entity physically on-site at the zone or subzone, the comment accurately characterizes the intent of the definition of zone operator for purposes of the Board's regulations. Nothing in that definition should be construed as requiring a zone operator to be an entity physically on-site at the zone or subzone site being operated. Finally, we have modified the definition of private corporation (adding the words "operating and maintaining") to parallel the statutory definition of that term.

*Comments*: Two commenters supported the proposed definition of production, while numerous commenters suggested various revisions to the proposed definition.

*Board position*: We have revised the definition of production based on comments submitted, including those expressing concerns about defining companies' authorized production entirely on the basis of customs classifications. Our revised definition of production therefore incorporates language from the definition of manufacturing in the FTZ Board's prior regulations but also includes language from our proposed definition of production and from comments submitted. This revised definition is intended to reinforce the fact that any operation engaged in manufacturing activity authorized under prior FTZ Board regulations would not need to request new authority based solely on this revised definition. Further, the requirements in other sections of these regulations pertaining to application and notification documents (*e.g.*, §§400.23 and 400.24) maintain the Board's existing practice of requiring a description of materials, components, and finished products (accompanied by the 6-digit HTSUS category that constitutes the best match for the material, component, or finished product). Therefore, the

changes reflected in this and other production-related provisions have no effect on a zone operation's existing scope of authority in terms of materials, components, and their associated finished products described in a notification or application authorized by the Board. The Board may address through a subsequent notice-and-comment rulemaking process a further simplified definition of production.

*Comment*: One commenter requested clear definitions of capacity and fraudulent intent, and also asked whether convenience of commerce and public interest are interchangeable and whether it is possible to define one of those terms and apply it uniformly.

*Board position*: We have not added definitions of "capacity" and "fraudulent intent." Capacity has a commonly understood meaning, and only one commenter requested addition of a specific definition to this section of the regulations. Further, our revised approach to production authority no longer incorporates capacity as an ordinary element of a production operation's scope of authority. In this context, there is no need to include a definition of capacity. The sole use in the proposed regulations of the phrase "fraudulent intent" was in the section allowing for prior disclosure of violations. That section has been eliminated from these regulations for the reasons delineated in response to comments on §400.62, thereby eliminating any need to define fraudulent intent. The terms "convenience of commerce" and "public interest" appear in distinct contexts in the FTZ Act, and are by no means interchangeable. Public interest is a commonly used concept (*i.e.*, it exists in many contexts outside the FTZ Act) that is associated with the well-being of the general public. Convenience of commerce is a distinct phrase in the FTZ Act that pertains to whether the needs of businesses engaged in international trade are adequately served by zones.

*Section 400.3 - Authority of the Board*

*Comment*: Numerous commenters proposed adding a section stating that the Board has the authority to award the lowest available duty rate including trade agreement preferences and deleting language stating that Board decisions must be by unanimous vote and be recorded.

*Board position*: We have not made the proposed change pertaining to trade agreement preferences. The Board does not have the authority to "award" a duty rate. The Board may allow activity to occur in a zone that results in the entry of a finished product with a customs classification that is different than the customs classification of a component admitted to the zone. The applicability of duty rates specific to one or more particular trade agreements to entries from a zone is statutorily determined rather than a matter for decision by the Board. Finally, we have retained language stating that Board decisions must be by unanimous vote and be recorded. Recording Board votes is essential to proper record-keeping for the program. However, based on the comments submitted and in light of changes to other sections (such as the adoption of the process for notifications under §400.37), we have deleted the provision stating that Board decisions in proceedings will take the form of Board Orders.

*Comment*: One commenter stated that the authority to fulfill the Assistant Secretary for Import Administration's responsibilities when that position is vacant should be clarified.

*Board position*: The authority to carry out actions for the Assistant Secretary for Import Administration is not a matter of Board policy, but rather of delegation carried out within the Department of Commerce. That delegation could be subject to change over time, and is not an appropriate matter for delineation within the FTZ Board's regulations.

*Section 400.4 - Authority and responsibilities of the Executive Secretary*

*Comment*: Numerous commenters suggested adding a neutrality requirement and general authority to give temporary approvals pending Board action.

*Board position*: We have not adopted the specific suggested revisions which, in our view, would not improve the clarity or effectiveness of the regulations. However, the Board has given a relatively narrow authority to the Executive Secretary to allow production activity to occur on an interim basis in certain circumstances (see §400.37(d)).

*Comment*: One commenter proposed defining a process and timeline for issuance of forms and other documents pertaining to the submission of applications.

*Board position*: As noted in response to a comment on §400.21, in these regulations, the Board has allowed an application format to remain in use for a period of one year after it has been superseded by a revised format. That period provides zone users with significantly more time to adapt than the 30-day period proposed by the commenter. Further, as originally proposed, any revised application format would be published in the *Federal Register*. That requirement should provide the written notice sought by the commenter.

*Section 400.5 - Authority to restrict or prohibit certain zone operations*

*Comments*: Numerous commenters proposed changing the order of this section's two subsections, as well as changing one word within one subsection. One commenter suggested adding a word to clarify that the section would only apply to "zone" operations in a zone.

*Board position*: We have reordered the content of the subsections, added the word "zone" as proposed, and combined the subsections.

*Section 400.7 - CBP officials as Board representatives*

*Comment*: Numerous commenters proposed adding a section explaining the CBP port director's role as the Board's representative, including timeframes for the port director's response to a request from the Board and for activation of a zone operation that the Board has expedited for public policy reasons. Those commenters also proposed revising the definition in these regulations of the term "port director."

*Board position*: We have adopted the commenters' proposal for a separate section specifically concerning CBP's role as the Board's representative. This section substantively parallels and replaces the content of the sentence in §400.41 of the proposed regulations pertaining to the role of the CBP port director. We have revised the language proposed by the commenters for this section (and made adjustments to other sections which had references to the port director) to reflect the fact that the specific official within CBP with responsibility for a particular matter may vary over time for CBP operational reasons. Therefore, we have adopted language making a general reference to CBP, and we have eliminated from these regulations a definition of port director. We have not incorporated into the section commenters' proposed timeframes. Timeframes for responses to requests for FTZ authority are already addressed in the application-specific sections of the regulations. Details of the activation process are addressed by the customs regulations, and therefore are not appropriate for inclusion in the FTZ Board's regulations.

*Subpart B*

*Comment*: Numerous commenters proposed changing the word "ability" to "authority" in the title of Subpart B.

*Board position*: We have not adopted the proposed change. Subpart B addresses matters pertaining to whether parties are able to apply to establish a zone or subzone. Therefore, the word "ability" is appropriate for the title.

*Section 400.11 - Number and location of zones and subzones*

*Comment*: Numerous commenters proposed that adjacency-related measurements be conducted by the grantee or zone participant with the concurrence of the CBP port director.

*Board position*: Based on the comments received, we have modified the language of this section to allow the CBP official with oversight authority to concur on a measurement of adjacency.

*Comments*: One commenter suggested eliminating the distinct concept of subzone and allowing the adjacency standard specifically proposed for subzones to be applied to any zone site. Another commenter proposed eliminating the term "subzone," and treating authority for production activity as a distinct matter from designation of a site. In response to a comment submitted, one commenter objected to the idea of eliminating the subzone concept, because of potential CBP operational advantages for subzones and the dependence of a number of grantees on the subzone mechanism so long as those grantees remain under the traditional site framework. One commenter stated that both subzones and ASF usage-driven sites should be treated equally in a manner that minimizes burden and facilitates administration of the facilities in question.

*Board position*: The Board received several comments pertaining to various sections of the regulations indicating that current distinctions between types of zone sites may not constitute the most efficient and effective mechanism for facilitating zone use. Given those considerations and the importance of adopting the least burdensome mechanism to accomplish the Board's regulatory objectives, the Board plans to simplify the parallel site-designation frameworks in a subsequent rule. Further, recognizing the overall functional equivalence between subzones and ASF usage-driven sites, and the importance of enabling zone users to maximize operational efficiencies, we have changed the minor modification provision (§400.24(c)) so that an existing or potential usage-driven site could be designated as a subzone if such designation would better meet the needs of the zone grantee and zone participant(s).

*Section 400.12 - Eligible applicants*

*Comment*: Numerous commenters proposed modifying the standard for applications to be "not inconsistent" with the applicant's charter or organizational papers rather than "consistent."

*Board position*: We have made the proposed change to state that applications must be "not inconsistent" with the charter or organizational papers. This language reflects the reality that many grantees' charters or organizational papers provide for broad powers; a requirement to demonstrate consistency would be excessively burdensome in that context.

*Section 400.13 - General conditions, prohibitions and restrictions applicable to authorized zones*

*Comments*: Numerous commenters proposed the following revisions to this section: changing the order of certain subsections; removing the concurrence of the CBP port director from the subsection pertaining to erection of buildings; applying the five-year lapse provision on a site-specific basis; requiring expedited review of any application to reestablish designation at a lapsed zone; stating that private ownership is allowed of a zone "site" rather than zone "land;" adding evidentiary standards for Board actions to prohibit or restrict activity; and adding a paragraph allowing certain activities to take place at an operator's site under the operator's responsibility. One commenter stated that the five-year lapse provision does not take into account the three-year "sunset lapse" for usage-driven sites designated under the ASF.

*Board position*: Based on comments received, we have reordered certain of the subsections and modified the reference to the CBP port director to clarify that concurrence only applies to activated zone space. We have not adopted the proposal to expedite reviews of applications to reestablish FTZ designation at lapsed zones because it is appropriate for the Board to evaluate the individual circumstances prior to determining whether to give priority to a particular application to reestablish a zone that has lapsed. However, we have added a specific reference to Board Order 849, which addresses conditions for "reinstatement" of FTZ authority. We have made minor language changes pertaining to the procedures and the standards for Board actions

to prohibit or restrict activity, including to reflect the revised approach to production authority adopted in §400.14(a). However, we have not accepted most of the proposed changes because the statutory authority is broad and the proposed language could inappropriately preclude the Board from addressing future situations in circumstances that no one can currently foresee.

We have not accepted the proposed substitution of the word “site” for the word “land,” because we want to emphasize that no one may own the FTZ designation associated with a particular parcel of land. The FTZ Act states that zone designation is a privilege that the Board authorizes. The Board’s authorization of designation for a piece of land, therefore, belongs to no one. The regulatory provision at issue simply clarifies that FTZ designation may be authorized for privately owned land under certain conditions.

The Board plans in a subsequent rule to simplify the lapse provision, which commenters proposed be applied on a site-specific basis, and that one commenter claims fails to take into account the three-year “sunset lapse” for usage-driven sites under the ASF. This simplification is expected to encompass questions of lapse and sunset provisions. Until we issue a final rule on that issue, the lapse provision will continue to apply as it has since its institution in 1991 to a zone (or individual subzone) based on activation. The lapse provision that applies to an overall zone (or individual subzone) on a one-time basis is distinct from the “sunset” time limits that the Board has commonly imposed via Board Order as a site-specific condition on approval of new sites of a zone. A sunset limit automatically removes zone designation from a site at the end of the sunset period if the site has not been used for zone activity during the period.

Finally, for activity that does not require specific Board authorization, questions of whether the activity may be conducted  at an operator’s site under the operator’s responsibility fall within the jurisdiction of CBP. Therefore, a provision pertaining to such activity would not be relevant for inclusion in the Board’s regulations.

*Comment*: One commenter stated that under the Board's authority to review zone activity and prohibit or restrict activity found not to be in the public interest, an existing zone operation previously approved by the Board would be at risk of losing its authority.

*Board position*: Inherent in the Board's ability to review and restrict or prohibit ongoing FTZ activity is the possibility that an existing zone operation approved by the Board could lose its authority. Given that it is impossible to foresee every type of circumstance at the time that the Board evaluates an application, it could be necessary at some later point in time for the Board to restrict or prohibit the activity in question. However, such circumstances have been extremely rare in the history of the FTZ program. Further, based on comments received on other sections of the proposed regulations, we have incorporated in certain sections of the regulations additional language designed to appropriately balance the interests of zone users and of parties that might be concerned about negative impacts from certain zone uses.

*Section 400.14 - Production - requirement for prior authorization; restrictions*

*Comments*: We received a broader range of comments on this section than on any other. Commenters were concerned with numerous aspects of the production-related provisions and, as discussed below, we have significantly modified this section based on their comments. Although the comments are numerous and diverse, we summarize them all here because they are all related to §400.14.

Numerous commenters proposed a major overhaul of this section to require FTZ users apply for and the Board issue on an expedited basis approvals for production activity. Those commenters stated that applicants' and FTZ users' uncertainties should be minimized, and that advance approvals are necessary in most cases because use of zone procedures requires significant up-front investment. They proposed requiring that a Board Order approving production activity for export be issued within 30 days of the submission of an application, and that the Board Order be

published within 15 days after issuance. Those commenters also proposed the following changes: authorizing the Executive Secretary to approve certain other production-related benefits on an interim basis pending Board action; eliminating the Board's proposed provision for production changes; and delegating authority to the Executive Secretary to approve production activity when 1) the applicant demonstrates the activity could be conducted under CBP bonded procedures, 2) the sole benefit is for scrap/waste, or 3) the activity is the same in terms of intermediate/finished products as activity recently approved by the Board and similar in circumstances. One commenter supported authorizing the use of any components needed to make the intermediate or finished products approved by the Board unless certain categories of components are excluded by the Board, with the Board listing excluded components on its website for compliance by all operators/users. One commenter supported the proposed regulations' approaches to advance approval requirements and authority to review and restrict activity.

Numerous commenters suggested shifting the proposed delegation of authority for certain approvals from the Assistant Secretary for Import Administration to the Executive Secretary, as well as adding a provision largely paralleling prior §400.32(b)(1)(i), which pertained to activity that is the same as activity recently approved by the Board. Three commenters indicated that, for interim approval of production authority, it is not necessary to have the CBP port director concur since the port director's approval would be required for activation of the operation in question. One commenter specifically supported the interim authority provision as proposed. One commenter stated that companies will not make decisions to invest in production activity based on temporary or interim approvals from the Board, so the Board should shorten its docketing and review times for applications.

One commenter stated that the production-change provisions in proposed §§400.14 and 400.37 seem unnecessarily complicated and difficult to administer. That commenter proposed simply allowing FTZ users to notify the Board of any component not subject to an AD/CVD or Section 337 order, and that deadlines should be the same for notifications of production changes and capacity increases. Numerous commenters proposed eliminating the proposed procedures for notifications and adopting a different approach to authority for production activity focused on intermediate and finished products (rather than specifying inputs to be used in production activity). Those commenters state that §400.37 as proposed would create a significant new burden both initially and quarterly. One commenter indicated that the proposed notification provision would be unmanageable and proposed that the Board focus production authority on end products. For any required notifications of a new input, the commenter proposed a *de minimis* standard tied to FTZ savings associated with the new input, with changes below the *de minimis* threshold reported to the Board in the zone's annual report. One commenter stated that the requirement for prior approval of a 4-digit HTSUS list for use of the notification provision is not practical, and that the public comment period following any notifications would allow for adequate oversight. The commenter also expressed concern that the retrospective nature of the notifications would create uncertainty for FTZ manufacturers, given that there would be a real potential for denial of the FTZ benefits, and a possibility that duties would be applied retroactively. One commenter requested clarification of the meaning of "production change," and proposed shifting reporting from a quarterly basis to an annual basis. Several commenters stated that the requirements for the proposed annual reporting of production activity should be clarified and take into account that companies do not necessarily track foreign-sourced components that are in domestic (duty-paid) status.

Three commenters stated that requiring what they characterized as a one-time re-filing of a manufacturer's scope of authority, and then quarterly reports thereafter, is excessively burdensome for users, especially because failing to re-file the scope would potentially subject users to fines. One commenter claimed that the proposed notification procedure for production changes would result in temporary/interim authorization, and that the procedure could only be used after the completion of a process that would subject all of the operation's current activity to new public review and comment. One commenter stated that quarterly filings would add to workload and the retrospective nature of notifications would create uncertainty for users. The same commenter stated that, in the context of quarterly retrospective filings, the Board should only deny FTZ benefits prospectively. Another commenter stated that what it characterized as quarterly reports should not be required. As an alternative to quarterly retrospective reporting, one commenter proposed a provision similar to the prospective notification provision in the original §400.28(a)(3), but expanded to allow for new finished products. One commenter also proposed a notification procedure for all activity not requiring advance approval, with the Board issuing written confirmation of each notification. Another commenter stated that if a Board Order is not possible for export authority, the Board should increase certainty for users and for CBP by allowing a standardized submission from the company to the Board, and for a standard response from the Executive Secretary. One commenter stated that companies must be able to obtain written confirmation of authority from the Board for CBP and other purposes.

One commenter requested clarification whether advance approval is required for all production activity and, in the context of production activity already authorized by the Board, for new inputs used to produce an approved product, for new part numbers associated with a component under an approved HTSUS category, and for new inputs under HTSUS categories not already approved but used to produce an approved product. Several commenters stated that reliance on

HTSUS numbers to track which components are authorized for a production operation is too burdensome or impractical. One commenter stated that even the use of 6-digit HTSUS categories is impractical. Another commenter proposed that the Board provide public access to a database of components and finished products for approved production operations.

Numerous commenters proposed eliminating the Board's proposed provision concerning capacity increases and eliminating capacity as an element of production authority. One commenter proposed that, if capacity cannot be eliminated as a constraint on ongoing production activity, the Board should adopt an annual reporting requirement for capacity increased beyond a specific threshold. Another commenter proposed that capacity be reported to the Board annually. One commenter proposed including a clear statement that production only for export would generally not require application to and authorization by the Board. One commenter proposed including a provision concerning the Board's temporary/interim manufacturing (T/IM) procedure.

One commenter proposed that foreign components subject to AD/CVD orders be exempt from the requirement for advance approval when they are used in production for export, maintaining that to do otherwise would run contrary to what the commenter claimed is longstanding Board policy that admission to zones of merchandise subject to AD/CVD orders is non-controversial. The commenter further stated that the Board's proposed approach for production activity involving a component subject to an AD/CVD order will significantly complicate the Board's proceedings, requiring more extensive factual records and decision documents, create additional burden for the Board, and substantially increase complexity and costs for zone users. One commenter stated that the Board should not require new approval due to changes in the HTSUS or due to imposition of an AD/CVD order on a component already approved by the Board. One commenter also questioned the practicality of requiring further Board approval when

an AD/CVD order is imposed on a component already approved by the Board, and suggested that quarterly retrospective notifications may be adequate in such circumstances.

One commenter stated that because merchandise subject to an AD/CVD order must be admitted to a zone in privileged-foreign status, requiring an approval process for ongoing production involving such merchandise adds no benefit and is excessively burdensome. Another commenter stated that the Board's prior regulations adequately provided for approval and ongoing oversight of changes in AD/CVD status of components already authorized or changes in duty rates and capacity, and that the proposed regulations could result in duplicative public comment processes and evaluating activity already approved by the Board. One commenter stated that the prior regulations' requirement for election of privileged-foreign status on admission of merchandise subject to AD/CVD orders reflected an appropriate balance of avoiding circumvention of AD/CVD orders while enabling export-oriented activity to take place in FTZs. Another commenter stated that the privileged foreign-status requirement for merchandise subject to AD/CVD orders should be adequate to address potential concerns pertaining to ongoing activity, and proposed a blanket Board Order authorizing any production for export provided the components are placed in privileged-foreign status prior to the production activity.

Several commenters supported the proposed requirement for advance approval from the Board for any new production activity involving a component subject to an AD/CVD order. Those commenters also supported the proposed requirement that a production operation with existing authority obtain additional approval from the Board to use any component subject to an AD/CVD order that was not in effect at the time of the Board's prior authorization action. One commenter proposed that the requirement for additional approval from the Board be extended to a component 1) not identified at all – or not identified as being subject to an AD/CVD order – in the production operation's original application; or 2) identified but not sourced from a country

subject to an AD/CVD order at the time of the application, and that will now be sourced from a country subject to an AD/CVD order. Several commenters also proposed requiring reporting and related procedures to ensure notice to affected parties. Certain commenters further proposed modifying practices to ensure compliance with authority approved by the Board. One commenter proposed requiring applicants for production authority involving a component subject to an AD/CVD order to demonstrate that the authority would not adversely affect the AD/CVD relief in place.

One commenter stated that provisions requiring further approval from the Board if a component already used by a zone manufacturing operation becomes subject to a new or increased rate of duty, a new AD/CVD order, or a new order of the International Trade Commission pursuant to 19 U.S.C. 1337 (section 337)), would be disruptive to current zone operations, and that there should be a transition rule. Another commenter indicated that notification should not be required as envisioned in §400.14(a)(4) for new AD/CVD or Section 337 orders and that, if necessary, zones' annual reports could be used to report the information in question. One commenter stated that the absence of an advance approval process for production activity would mean the Board might be unaware of merchandise subject to certain Department of Agriculture requirements and be unable to alert the grantee or operator to those requirements.

In response to other comments submitted, one commenter supported only requiring advance approval for production activity involving inverted tariffs. That commenter also supported the provision for advance approval of a broad list of categories to enable future notifications, but opposed other commenters' proposals to modify the application process to focus purely on intermediate and finished products. One commenter stated that a proposal from other commenters requiring the Board to issue an Order approving export activity within 30 days of receiving an application should not apply to activity involving a component subject to an

AD/CVD order. That commenter stated that the Board has recognized that such activity may raise public-interest concerns and that the proposed 30-day process would eliminate all of the procedural safeguards in the proposed regulations. The commenter opposed another commenter's proposal that no advance approval be required for production for export involving a component subject to an AD/CVD order, stating that the change would negate the Board's ability to evaluate whether such activity would undermine trade relief measures in effect. That commenter also disagreed with another commenter's claim that the Board's proposed approach for production activity involving a component subject to AD/CVD order will significantly complicate proceedings, create additional burden for the Board and increase complexity and costs for zone users.

In response to other comments submitted, multiple commenters supported the requirement for advance approval for any production activity involving a component subject to an AD/CVD order, with one of those commenters supporting such a requirement when a component previously authorized for a zone production operation becomes newly subject to an AD/CVD order. One commenter stated that concerns expressed by only a few commenters should not lead the Board to adopt unduly burdensome processes for applications and management of ongoing operations. The commenter stated that the proposed processes would be detrimental to many program users, discourage overall FTZ use, discourage domestic manufacturing for both the U.S. and export markets, and also create significant burden for the Board's staff. One commenter stated that there is no reason to impose additional conditions or restrictions on the use in production of material subject to AD/CVD orders beyond those already proposed by the Board. That commenter cited Executive Order 13563 as instructing agencies to achieve policy goals through the least burdensome means.

One commenter opposed the proposal from other commenters requiring advance approval for production involving a component subject to an AD/CVD order, and stated that the requirement for the election of privileged-foreign status at the time merchandise is admitted to a zone is adequate to ensure that AD/CVD duties are not circumvented. One commenter opposed any requirement for company-specific advance approval of production for export. That commenter also recommended the Board retain what the commenter claimed was the prior regulations' presumption that production for export is in the public interest.

*Board position*: After considering all comments submitted and the importance of adopting the least burdensome mechanisms to accomplish the Board's policy objectives, we have modified this section (with related changes in other sections, including §§400.22 and 400.37) to implement a revised approach to authorizing production activity. The foundation for the revised approach is a simple notification process in advance of any new production activity (including use of new materials/components at a previously approved production operation). This approach also incorporates a more extensive application process for circumstances where the Board reviews a notification and determines that further review is warranted.

Among other considerations, the revised procedures balance the need expressed by many commenters for generally shorter timeframes for action on requests for production authority and the perspective emphasized by other commenters that potentially affected parties must be able to provide comments to the Board regarding the impact of proposed production activity.

Although the FTZ Act does not require companies to obtain approval prior to conducting production (manufacturing) activity in zones, the Act authorizes the Board to prohibit activity that "in its judgment is detrimental to the public interest, health, or safety" (19 U.S.C. 81o(c)). Since 1972, the Board has required either notification or application in advance of the conduct of manufacturing activity (this type of requirement was first implemented through conditions of

individual Board Orders and then adopted in the Board's 1991 regulations). The revised approach continues to require zone users to obtain approval in advance from the Board before conducting manufacturing activity. Consistent with the many comments submitted regarding the need for simplified, expedited processes, our revised approach generally reduces both the burden associated with a company's standard submission to the Board requesting authorization to conduct production activity and the standard timeframe for processing that request.

This rule's simple notification process is akin to that suggested in certain comments, and incorporates a standard 120-day timeframe for the Board to process notifications received. That timeframe cuts by two-thirds the one-year standard timeframe in both the prior regulations and the proposed regulations to process applications for manufacturing (production) authority. This revision also significantly reduces the information burden associated with authorizing production activity. As noted above, these regulations also include a detailed application process for cases that are determined to warrant further review as a result of the initial notification. Further, unlike the application process suggested by many commenters for certain categories of production activity, all notifications for production authority would be subject to a public comment period before any potential Board action to authorize the activity. Allowing public comments on all proposed production activity is the cornerstone of procedures designed to ensure that production activity conducted in FTZs is in the public interest. Recognizing the time-sensitive nature of some requests for authority to conduct production activity, we have also adopted a provision enabling authorization on an interim basis until the Board is able to complete its processing of a notification. Unlike the Board's prior process for giving temporary/interim manufacturing (T/IM) authority, the new provision is not constrained by a requirement that activity meet a specific standard for similarity to previous applications; the adopted provision therefore should be more flexible and more useful than the T/IM procedure.

The procedures adopted in this section are designed to simplify and increase certainty of the procedures for approving production authority. The prospective nature of the notification process – in contrast to the retrospective process delineated in the proposed regulations – enables the Board to eliminate the proposed requirement for advance approval of a list of 4-digit HTSUS headings within which future notifications would be made. In addition, the basic notification process for all production activity should generally enable zone users to obtain a formal decision on authorization of the activity within 120 days of requesting it, thereby accelerating certainty in order to better meet the needs of zone users. We have not made provision for extensions of comment periods on notifications because the review procedures are designed to allow the Board to determine within the 120-day timeframe which notifications warrant further review. (Further review requires submission of a detailed application and then a period for public comment on the application, which is subject to requests for extensions.) Therefore, if concerns about notifications arise – including as a result of comment submissions explaining why additional time is needed for public comment or for affected parties to assess the impact of proposed activity – the Board would be able to conduct further review and trigger the more extensive requirements for such a review.

By requiring FTZ users to provide us with information through the notification process, we can eliminate the reporting requirement we proposed in this section (although production activity will remain subject to the general requirements of §400.51). The requirement for prospective notifications and the associated publication of a *Federal Register* notice for each notification also effectively addresses the concern raised by one commenter that eliminating public notice could lead to compliance problems pertaining to certain Department of Agriculture requirements. Finally, it should be noted that the adopted procedures create no new requirements for activity approved under the prior regulations (*i.e.*, approved activity that was the subject of prior

applications and notifications remains authorized, as limited by any restrictions associated with the specific proceedings in question).

We have also added a subsection (§400.14(c)) mandating that information regarding authorized production operations be made available on the Board's website. This provision will enhance the transparency of the FTZ program and enable parties to assess whether changed circumstances exist that would warrant review by the FTZ Board under §400.49(a). Requiring advance approval from the FTZ Board for authority to continue activity whenever certain circumstances have changed (such as proposed §§400.14(a)(4)(i)-(iii)) is not the least burdensome means for the Board to accomplish its policy objectives of enhancing U.S. competitiveness through the availability of zone procedures, while ensuring that zone activity remains in the public interest.

With regard to materials or components subject to AD/CVD orders or proceedings, these regulations provide no special application-related procedures. We have determined that the standard procedures applicable to any material/component for which authorization is requested will allow the Board to address concerns about negative impacts from the proposed activity. Therefore, we have adopted neither 1) the approaches proposed by certain commenters to eliminate any advance approval process for export-oriented activity involving materials/components subject to AD/CVD orders/proceedings, or to make a presumption in favor of authorizing such activity, nor 2) provisions proposed by certain commenters to create new carve-outs from the general framework for production authority, with additional procedural burdens imposed with respect to those carve-outs. Under the new rule, materials/components cannot be used in a zone production operation without specific prior authorization through the notification process (and subsequent application process, where warranted), including publication of a notice in the *Federal Register* and invitation for public comment. The adopted procedure substantively parallels the requirements of the Board's prior regulations, which did

not permit any manufacturing activity without Board approval. The Board's prior regulations also contained a standard provision for a public comment period on applications requesting manufacturing authority, so that the Board could evaluate the comments of potentially affected parties in determining whether to approve a given application. Practice has shown those types of requirements to be adequate to enable the Board to determine whether negative impacts would result from proposed zone activity.

*Section 400.14(b) - Scope of authority*

*Comments*: Numerous commenters proposed focusing the scope of authority for a production operation on intermediate and finished products rather than the components used in the operation, with any component used to make an authorized intermediate or finished product considered within the scope of approved authority. One commenter proposed clarifying that this provision's reference to inputs is limited to imported inputs. One commenter stated that the Board should not use HTSUS numbers to define a production operation's scope of authority because HTSUS numbers are subject to change beyond the company's control, with such changes potentially leading to non-compliance with approved scope and requiring further FTZ Board processes to rectify. Two commenters expressed concerns about other commenters' proposals to focus applications for production authority on intermediate and finished products without specifying the components to be used in such production, stating that the change would defeat the purpose and undermine the effectiveness of the advance approval requirement.

*Board position*: We have not adopted commenters' proposal to define a zone user's authorized scope for production activity based on intermediate and finished products, with no delineation of the materials or components to be used in producing the intermediate or finished products. We agree with the commenters that stated that this change would defeat the purpose and undermine the effectiveness of the advance approval requirement. As a general matter, the

potential impact of proposed production activity on U.S. producers of materials or components is tied to the identities of the specific foreign-status materials/components that would receive the benefits of zone use. Identifying only the intermediate or finished products would not allow affected parties or the Board to assess the impact of the proposed zone activity, because the component or input materials would be unknown.

Based on comments received, we have clarified that this section only applies to imported materials or components admitted in foreign status for a production operation in a zone. With regard to the use of HTSUS numbers to define scope of authority, these regulations focus scope of authority first on the written descriptions of the materials, components and finished products, with HTSUS numbers primarily serving to supplement the written descriptions. This approach continues the Board's existing practice and reflects our recognition of the practical difficulties that shifting to an HTSUS-driven approach would create for zone users.

Based on the comments submitted, we have eliminated the provision on notification of increases in production capacity (as well as inclusion of production capacity as a standard element of scope of authority). Since 1991, FTZ users have had to obtain the Board's prior authorization to manufacture beyond the level of capacity already approved by the Board for the operation in question. However, in the twenty years that the requirement has been in effect, actual increases in capacity have not proven to be controversial or to result in negative impacts. Consequently, there is no justification for requiring companies ordinarily to provide a capacity level to the Board for authorization, and then requiring additional authorization for subsequent activity at higher capacity levels. If zone activity ultimately raises public interest concerns, the Board retains the ability to conduct reviews pursuant to §400.49.

*Section 400.14(e) - Restrictions on items subject to antidumping and countervailing duty actions*

*Comments*: Numerous commenters proposed adding a requirement that the Board approve production activity for exports of products incorporating components subject to antidumping duty or countervailing duty (AD/CVD) orders whenever it finds that there would be a positive impact on U.S. competitiveness, and that similar activities are authorized in other countries. Two commenters stated that the additional language proposed for this section by certain commenters would undercut the Board's policy of preventing the use of zones to circumvent AD/CVD orders and negate the standards the Board applies in determining whether proposed zone activity is in the public interest.

*Board position*: We have not adopted the suggested additional language for this section, which could result in applications involving components that are subject to AD/CVD orders benefiting from an evaluative standard more favorable than the standards applied to all other types of cases involving production activity. The proponents of that approach have not presented a substantive justification for giving preferential treatment to activity involving components subject to AD/CVD duties.

*Section 400.15 - Production equipment*

*Comments*: Numerous commenters proposed modifying this section to apply to all zone activity (rather than only production activity) for reasons of the Congressional intent claimed by the commenters. One commenter stated that such a modification would result in all zone operators being treated uniformly. Numerous commenters proposed adding a subsection providing for expedited temporary approvals of zone designation to enable use of the production equipment benefit (with zone designation to be terminated once entry is made on the production equipment). One commenter supported the proposed provision as published.

*Board position*: We have not adopted the changes proposed in these comments. In September 2010, the Executive Secretary examined the applicability of the production equipment provision

in depth, and issued a memorandum to FTZ grantees detailing the analysis and findings. The memo has been available on the Board's website since its issuance. No arguments have been presented to alter the memorandum's fundamental findings that the clearest indications based on the record associated with the passage of the statutory provision are that Congress intended the provision to apply to equipment used in production (as the term is commonly understood) in zones. Further, the proposed provision to allow expedited temporary zone designations to enable use of the production equipment provision appears to envision obtaining FTZ benefits on the assembly of equipment that will then be used for non-zone activity. Our position is that the statutory provision is intended to provide benefits solely on equipment that will be used in zone activity.

*Section 400.16 - Exemption from state and local ad valorem taxation of tangible personal property*

*Comments*: Numerous commenters proposed revising this provision to simply repeat the statutory provision. Two commenters suggested reviewing this provision based on a concern that the meaning could be more restrictive than the statutory provision, and potentially confuse affected parties. Two commenters proposed specific revised language for this section to clearly harmonize its meaning with §400.1(c) of the prior regulations and eliminate any confusion.

*Board position*: Given the concerns raised in comments, we have modified this section to use the statutory language *verbatim*.

*Section 400.21 - Application to establish a zone*

*Comments*: Numerous commenters proposed changes that: characterize the section as applying only to the establishment of new general-purpose zones; indicate that applications will conform to instructions and guidelines set out in the regulations; require application letters and resolutions to be dated no more than six months prior to submission of the application; remove

language specific to explanation of the degree to which a proposed site duplicates types of facilities at other sites, to environmentally sensitive areas, and to encouraging submission of draft applications; and add certain language pertaining to the ASF. Several commenters stated that the ASF should be detailed in the regulations. One commenter stated that the requirements and distinctions of the ASF relative to the traditional site framework should be delineated in the regulations and that both frameworks should be maintained. One commenter agreed that applications should comply with instructions and related documents published in the *Federal Register* and made available on the Board's website, but suggested requiring a 30-day minimum written notice before implementing such changes in cases where notice in the *Federal Register* is not warranted. One commenter stated that full information about the ASF should be included in the regulations, that application processes should be defined, and that there should be some control on the web-based application guidelines developed by the Board.

*Board position*: This section establishes general requirements for applications to the Board, with variations specific to certain types of authority described in subsequent sections. Based on the comments received, we have made several changes to this section. In reference to the dating of the application letter and the resolution, we replaced the words "currently" or "current" with language allowing for the documents to be dated up to six months prior to submission of the application.

We have also added basic references to key concepts under the ASF in recognition of the certainty that grantees and program users seek as they consider or use the ASF. However, given that the ASF had only recently become part of the Board's practice at the time that the proposed regulations were drafted, no attempt was made to incorporate the details of the ASF in the proposal. Comments have not only proposed that the regulations include details of the ASF and contrast the ASF with the traditional site framework (TSF), but have also proposed

simplifying the parallel ASF and TSF approaches within the Board's practice. As noted in response to comments on §400.11, recognizing that codifying the intricacies of current practice in regulations may not be the least burdensome means to accomplish the Board's policy goals, the Board plans to propose simplifying the site-designation frameworks in a subsequent rule. We have retained the proposed approach of having the Executive Secretary develop formats for individual types of applications based on the regulations' requirements. This provision is specifically designed to enable us to adopt user-friendly question-and-answer formats while also allowing occasional adjustments to those formats if certain questions prove unsuccessful in eliciting the needed information from applicants. Recognizing potential concerns about transparency and parties' need to ensure that a particular application format will be accepted by the Board, the provision also stated that application formats will be published both in the *Federal Register* and on the Board's website. The provision for publication in the *Federal Register* was specifically designed to maximize transparency. However, based on one comment noted above, and to ensure that changes in formats do not impose undue burdens on applicants, we have specifically stated that the Board will continue to accept applications for a period of one year after a given format has been superseded; this is a significantly longer period than the 30 days suggested by a commenter, and should provide zone users with ample time to adapt to any format revision. We also have not made suggested changes that would have further burdened applicants by adding elements to the requirements for application letters or application contents. Finally, we have not followed suggestions that we remove language specific to explanations of the extent to which facilities at a proposed site duplicate the types of facilities at other sites, to environmentally sensitive areas, and to encouraging submission of draft applications. Except for sites designed to serve specific, existing tenants, any proposal to add a new site to a zone should include a justification of the need for the site when there are already sites authorized for

the zone. There are a significant number of entirely unused FTZ sites nationwide. Such sites appear to constitute a large majority of all FTZ sites. Given that each such site was approved by the FTZ Board based on information from the grantee that the site was needed to serve trade-related needs, it is entirely appropriate for the FTZ Board to require that a proposal for a new site explain the services or amenities to be provided by the new site that are not provided by the grantee's existing sites. Separately, given the commercial and industrial uses that FTZs serve, there appears to be no need to make allowance for the inclusion of environmentally sensitive areas within designated FTZs. Finally, submitting a draft application can be a useful tool for any organization that is preparing an application, and it is appropriate for the regulations to provide for that tool.

*Section 400.23 - Application for production authority*

*Comments*: Numerous commenters proposed establishing a stand-alone section concerning applications for production authority. Those commenters proposed replacing most of the proposed §400.22 with the Board's current application format for establishing manufacturing subzones and for obtaining manufacturing authority for existing zone space. Addressing the requirement in proposed §400.22 for certain information regarding products or materials/components, one commenter proposed that zone users be allowed to notify the Board of the HTSUS chapters within which new products or components fall. For any application for production authority involving a component subject to an AD/CVD order, one commenter supported requiring that the application state that the proposed authority involves a component subject to an AD/CVD order. That commenter also proposed requiring that the applicant demonstrate that its requested authority would not reduce the effectiveness of the AD/CVD remedy.

*Board position*: In response to comments received, we have created new §§400.22 and 400.23 specifically setting forth requirements for notifications and applications for production authority (distinct from requirements for subzone applications in §400.25, which only pertain to approving FTZ designation for a specific location without addressing the separate matter of production authority). As with §400.25, we have not incorporated in this section questions from the current application format for manufacturing subzones, in part for the reasons noted in our response to comments on §§400.21 and 400.25. We have not adopted the proposed change to notifications of new products or components because comments submitted have led us to adopt a revised approach to the application process for production authority. Finally, for both notifications and applications for production authority under revised §400.14, we have maintained the requirement that the applicant state whether any component is subject to an AD/CVD order. We have not adopted the proposed requirement that the applicant address whether its proposed activity under FTZ procedures would reduce the effectiveness of the AD/CVD remedy because that requirement would increase the burden on applicants even in situations where the activity may not be of concern to an AD/CVD petitioner. The Board would be able to assess the potential impact on AD/CVD remedies if public comments in response to a notification or application for production authority raise concerns about proposed FTZ production activity.

*Section 400.24 - Application for expansion or other modification to zone*

*Comment*: Numerous commenters indicated that they proposed significant changes to this section (which those commenters also proposed renumbering to become §400.25); however, the proposed text provided by those commenters was in fact identical to the text proposed by the Board, with the sole exception of the deletion of the original *Federal Register* citations for the Board's adoption of the ASF. As noted above regarding §400.11, one commenter indicated that there are potential CBP operational advantages for subzones relative to usage-driven sites

(which are most commonly designated through a minor-modification process). One commenter stated that the Board should clarify that there is no functional distinction between subzones and usage-driven sites under the ASF. Another commenter stated that both subzones and ASF usage-driven sites should be treated in an equal manner that minimizes burden and facilitates administration of the facilities in question.

*Board position*: We have retained the ASF-related *Federal Register* citations because, as detailed in response to comments on §400.21, we have not attempted to incorporate details of the ASF in these regulations given the need that has emerged for the Board to simplify the site-designation frameworks in a subsequent rule. However, as noted in response to comments on §400.11, we have modified §400.24(c) to allow an actual or potential usage-driven site to be designated as a subzone if such designation would better meet the needs of the zone grantee and zone participants. The modification recognizes the overall functional equivalence between subzones and ASF usage-driven sites and the importance of enabling zone users to maximize operational efficiencies. However, for the reasons described in response to comments on §400.36, allowance for designation of a usage-driven site as a subzone is contingent on the subzone's remaining subject to the Board-established, zone-wide activation limit that applied to the usage-driven site.

*Section 400.25 - Application for subzone designation*

*Comments*: Numerous commenters suggested limiting proposed §400.22 to applications for subzones and establishing a separate section for applications for production authority. Those commenters suggested removing most of the language proposed by the Board and instead incorporating language from the Board's current application format for establishing manufacturing subzones and for obtaining manufacturing authority for existing zone space. One commenter proposed simplifying application requirements for subzones that would not be used

for production activity based on what that commenter characterized as a dissimilar treatment under the proposed regulations for similar types of operations in subzones versus general-purpose zone sites.

*Board position*: In response to comments submitted and in recognition of the complete separation of production authority from subzone designation under these regulations, we have limited this section to subzone applications and have further simplified the application requirements. We have also made minor changes in other sections in order to implement this section properly. New §§400.22 and 400.23 are specific to the separate requirements for notifications and applications for production authority, as described in our response to comments on §400.14. We have not incorporated into this section questions from the current application format for manufacturing subzones for the reasons noted in our response to comments on §400.21, in part. A number of those questions pertain only to applications involving manufacturing (production) activity and therefore would be irrelevant to the many subzones that are used solely for distribution-related activities. Finally, several of those questions duplicate the requirements set forth in §400.21. We have opted to include such requirements by reference rather than repeat the language in full.

*Section 400.26 - Criteria for evaluation of proposals, including expansions, subzones or other modifications of zones*

*Comments*: Numerous commenters proposed the following changes: eliminating reference to the port of entry area in proposed §400.24(a); eliminating reference to compatibility with a master plan or economic development goals in proposed §400.24(d); modifying proposed §400.24(e) to consider views of those materially affected by FTZ benefits; and renumbering the section to become §400.26. Those commenters also proposed replacing the separate criteria for subzone proposals in proposed §400.25(b) with the criteria in proposed §400.24, which would

apply to both zone and subzone proposals that do not involve production activity. One commenter proposed modifying the criteria applicable to subzones (other than proposals involving production) to focus on disapproval if the proposed activity were not permissible under the FTZ Act, U.S. law, or a specific Board Order. Two commenters recommended that the Board no longer consider in evaluating subzone proposals whether the activity could be accommodated in multi-purpose FTZ facilities serving the area.

*Board position*: Based on the comments received, we have eliminated the separate criteria for evaluating subzone proposals (including whether activity could be accommodated in multi-purpose FTZ facilities serving the area). This change reflects a recognition that the types of distribution activities conducted in non-production subzones are indistinguishable from the types of activities that can be conducted in general-purpose sites (separate criteria will apply to applications for authority involving production activity). The separate criteria proposed for evaluation of subzone proposals did not represent the least burdensome means to accomplish the Board's policy objective of facilitating FTZ use in order to maximize the creation and retention of domestic economic activity and employment.

With regard to the specific text of proposed §400.24, we have retained the reference to the port of entry area because the establishment of a zone under the FTZ Act is tied to the proposed zone's adjacency to a port of entry. We have also retained the reference to compatibility with master plans or economic development goals because it is relevant for the Board to consider the degree to which a zone proposal is linked to, and consistent with, official documents pertaining to a community's economic development planning. We have adopted the substance of the proposed change to consider the views of those "materially affected" rather than those merely "affected" by a proposal because the original, lower standard would potentially impose a burden on applicants to respond to comments from any person claiming to be affected by an

application regardless of whether there would be a material impact on that person. We have also made a minor modification to the section's title to improve clarity.

*Section 400.27 - Criteria applicable to evaluation of applications for production authority*

*Comments*: Numerous commenters stated that proposed §400.25 (which they would renumber to become §400.24) should apply only to production activity. Those commenters proposed requiring the Board to consider companies' ability to conduct the same activity offshore, the precedential effect of prior Board decisions, and the effect on the U.S. economy, as well as revising the statement of Board policy to include reference to promoting U.S. competitiveness. Those commenters also proposed deleting a reference to ongoing activity in §400.25(a)(1) and deleting the word "significant" from §400.25(a)(3). One commenter stated that the Board should equalize tariff treatment for U.S. manufacturing operations relative to offshore alternatives, and should not give differential treatment to competitors within an industry or else potential users may no longer view the FTZ program as a viable option. That commenter also stated that U.S.-based manufacturing and exports are inherently in the public interest and should be treated as such, absent direct evidence of a net negative economic effect.

*Board position*: In response to comments received, we have limited this section to criteria for evaluating applications involving production activity and have required the Board to take into account companies' ability to conduct the same activity offshore and the effect on the U.S. economy. We have also added references to analyses carried out in connection with prior Board actions. We have not referred to the precedential effect of prior Board actions because such language could, *inter alia*, create a mistaken impression that the situation within a given industry inherently remains static over time. We have not modified the statement of Board policy to include a reference to promoting U.S. competitiveness, because the focus of the section is emphasizing that the Board's actions are consistent with broader trade-related public policy. For

similar reasons, we have retained the statement that Board policy applies to “ongoing” activity in addition to proposed activity. We also have not modified the requirement that an application for production authority demonstrate a “significant public benefit.” However, the significance of the public benefit may be relative, depending on the size and employment level of the facility involved, so this standard is not inherently discriminatory against smaller facilities.

With regard to other comments received, the FTZ program can be used to equalize tariff treatment relative to offshore alternatives. However, obtaining authority for a given FTZ production use cannot be guaranteed. Rather, the Board’s function continues to be ensuring that zone activity is in the public interest; assessing a range of factors is appropriate in making that determination. As for differential treatment for competitors in a given industry, the Board naturally seeks to avoid such differential treatment. However, one factor that some observers may fail to take into appropriate account is the cumulative effect of FTZ applications from multiple participants in a given industry, which could differ from the effect of an application from a single participant. The Board must continue to base its decisions on the facts and circumstances present at the time that a given decision is made.

Finally, while the changes to the production-related sections of these regulations should dramatically simplify and expedite the process of obtaining Board authorization for production authority in most cases, the regulations maintain appropriate procedures to ensure that the activity conducted is in the public interest. The Board does not need to shift presumptions about production activity for there to be an appropriately simplified and expedited process, as noted above.

*Section 400.28 – Burden of proof*

*Comments*: Numerous commenters proposed dividing this section into three subsections (general, comments, and rebuttal), requiring opponents of FTZ activity to demonstrate standing

and submit evidence that would meet a specific standard that closely resembles the standard for applicants' responses to opponents' submissions, and eliminating the word "significant" preceding "public benefit." One commenter stated that, for applications involving manufacturing or exports, the burden of proof should be shifted to any opponents.

*Board position*: As a result of the comments received, we have divided this section into four subsections: in general; comments on applications; requests for extensions of comment periods; and, responses to comments on applications. We have stated that parties submitting comments on FTZ applications should submit evidence that meets a standard closely resembling the standard for applicants' responses to such submissions. However, we have not adopted the suggested requirement that parties opposing FTZ applications demonstrate standing. Although the suggested standing requirement involved the addition of only a few words, the requirement could significantly complicate the processing of FTZ applications, and would appear to add more complexity and burden than can be justified based on the procedural benefits it might bring. We also have retained the full phrase "significant public benefit" to mirror the standard retained in §400.27; that standard was addressed in response to comments on that section. Finally, the definitive wording of this section reflects a balancing of the standards applicable to both applicants and parties submitting comments on applications. It would not be appropriate to abandon that evenhanded approach for certain types of applications.

*Section 400.31 - General application provisions and pre-docketing review*

*Comments*: Numerous commenters proposed reducing standard timeframes to require the Board ordinarily complete its action on applications involving production authority within six months, and that Board action on other applications ordinarily be completed within five months. Those commenters also proposed the following changes: 30-day periods for responses from zone participants contacted by the Executive Secretary, and for the Executive Secretary to

complete pre-docketing review after receiving additional information from an applicant; and returning pre-docketing applications to the applicant rather than discarding the application if noted deficiencies have not been corrected within 30 days. In response to other comments, two commenters stated that the suggestion to reduce timeframes for Board action was unreasonable. Those commenters stated that the reduced timeframes would impede potentially affected parties from receiving proper notice or having an adequate opportunity to comment, and would also prevent the Board from adequately developing a factual record, analyzing comments, and performing a thorough analysis of the application in question.

*Board position*: Based on the comments received and recognizing the need to provide expedited processing of requests, we have made a number of changes to procedures and timeframes. As noted in comments on §400.14, we have adopted a revised approach to requests for authority to conduct production activity that incorporates a standard notification process designed to take no more than 120 days (including a 40-day comment period). However, the revised approach also retains the full application process delineated in the proposed regulations, which would apply to any notification that is determined to require further review, as set forth in §400.37. Given that such applications will tend to involve complex or controversial circumstances, we have retained in this section an ordinary 12-month timeframe to process such applications.

Based on changes to the subzone application requirements in response to comments received, we have also significantly modified the procedures for processing subzone applications. Those modified procedures are delineated in §400.35. Based on the inherently less complex analysis associated with a single-user subzone proposal as compared with proposals to establish or expand general-purpose zones, §400.35 sets forth simplified procedures designed to facilitate expedited processing of subzone applications. Expedited processing for subzone applications, like notifications for production authority, focuses on operations in existence or under

construction that are or will be engaged in international trade-related activities. Establishing and reorganizing zones under the ASF similarly enables grantees to gain quick, simple access to FTZ procedures for operations actually engaged in such activities. In contrast, evidence indicates that other types of applications tend to be more speculative with regard to actual zone use. The procedures and timeframes contained in these regulations prioritize resources toward actual trade-related operations in order to maximize their positive competitiveness and employment impacts.

We have not made other changes to this section to reflect comments received because the changes proposed would not improve the efficiency of the overall application process. In particular, we have retained the provision for discarding an application if corrections are not made within the allotted timeframe, because it is appropriate to eliminate the burden associated with returning applications as one element of optimizing resource use towards rapid processing of docketed applications.

*Section 400.32 - Procedures for docketing applications and commencement of case review*

*Comments*: Numerous commenters proposed changes which would: provide that untimely comments would not be considered; limit the number of parties that may submit rebuttals; broaden references to the applicant to include zone participants; limit the timeframe within which hearings could be arranged to 60 days after the end of the initial comment period on an application; and modify the timeframe for CBP's input on a pending application. One commenter proposed a reduction in the standard comment period for applications to either 15 days or 30 days, while another commenter proposed eliminating the public comment period for subzone applications. For any application for production authority involving a component subject to an AD/CVD order, one commenter proposed requiring the component be identified in the notice announcing review of the application, and that the applicant provide the names and addresses

of each known U.S. producer of the component and send notice of the application to each such U.S. producer. Another commenter proposed that *Federal Register* notices announcing applications for production authority indicate the grantee of the zone and the nature of the activity but omit the identity of the zone user.

*Board position*: As a result of the comments received, we have added a requirement that a *Federal Register* notice announcing an application for production authority include information regarding any component subject to a trade-related measure or proceeding (such as an AD/CVD order). However, we have not adopted the proposed requirement that applicants provide the names and addresses of each known U.S. producer of the component in question and to send notice of the application to each such U.S. producer. This approach creates transparency through the enhanced requirement for information in *Federal Register* notices without imposing the potentially significant new burdens associated with the other proposed requirements. We also have not adopted the proposal that *Federal Register* notices of proposed production authority omit the identity of the zone user because such identifying information can be useful to other parties that wish to gauge the potential competitive impacts of the proposed authority.

We have not eliminated the public comment period on subzone applications, as proposed by one commenter. The ordinary procedure to designate a subzone, therefore, will differ in this regard from the procedure to designate usage-driven sites under the ASF (with the exception of situations under §400.24(c) in which a site clearly eligible for usage-driven designation is instead being designated as a subzone based on the circumstances presented). Usage-driven sites can only be designated within a specific service area already authorized for the zone grantee through a Board process that includes a public comment period. However, in response to another comment, we have reduced the standard length of the comment period for subzone

applications from 60 days to 40 days (the same duration as comment periods on notifications for production authority pursuant to §400.37). The standard length of comment periods on other types of applications remains 60 days. The shorter comment period for subzone applications reflects the fact that these applications focus solely on designating the zone space needed for a single operation. Other types of applications inherently are broader in focus and, therefore, it is appropriate to allow additional time for the public to develop comments on such applications. In response to comments submitted, we have set the standard deadline for CBP comments on an application to match the end of the period for public comment; however, the wording of this provision reflects a recognition that additional time may be needed in exceptional circumstances.

To help ensure the proper balance between the interests of applicants and the interests of parties potentially opposed to applications, we have not adopted the proposed limit on the types of parties that may submit rebuttal comments. For the same reason, we have revised this section to refer to the standard that applies to submitted comments under §400.27(b), and to further clarify that new evidence, new factual information, and written arguments submitted by parties, other than the applicant, after the comment period will not be considered. As noted in this section, new evidence or information submitted by the applicant could trigger the (re)opening of a comment period. We also have not imposed a limit on the period of time during which a hearing may be arranged. Although the need for such a hearing is generally rare, it is appropriate for the Board to clearly retain the flexibility to arrange a hearing at any point in time regarding any matter pending before the Board.

We have not adopted the proposed changes that would broaden references to the applicant to include zone participants. Such changes would inappropriately shift the emphasis away from the applicant. Further, for a given application, the number of zone participants could be significant

(for example, if the zone operator that is the subject of the application has a significant number of users). Therefore, the number of parties that would be involved in the process as a result of the proposed changes could represent an exponential increase in burden on the Board staff without necessarily leading to an improved outcome. Any applicant remains free to coordinate with zone participants on the matters addressed in this section.

*Section 400.33 - Examiner's review - application to establish or modify a zone*

*Comments*: Numerous commenters proposed reducing the timeframe for an examiner's development of a report and recommendations from 120 days to 60 days after the close of the comment period and removing explicit allowance for further comments from the CBP port director, when necessary.

*Board position*: In general, we have not adopted the proposed reduction in the timeframe for an examiner to develop a report and recommendations. Rather, in concert with changes to the timeframes for action on applications involving production authority, we have set the timeframe for development of the examiner's report/recommendations at 150 days (with the exception of reorganizations of zones under the ASF, for which we are setting the timeframe at 75 days in recognition of the generally simpler analysis involved and the greater potential for direct positive effects resulting from approval). The overall impact of adjustments to this section is to generally maintain the prior overall 10-month standard timeframe to process the cases subject to this section (with a general 75-day reduction in that timeframe for ASF reorganizations). As noted above in response to comments on §400.31, this approach reflects a necessary prioritization of overall resources towards cases involving production authority and subzone designation, or which would facilitate future usage-driven designations, all of which tend to involve more significant direct positive competitiveness and employment effects.

We have retained explicit allowance for further comments from CBP because such a step may be warranted in certain cases. In that context, we believe that it is important to include a specific provision addressing that procedure (although the Board's broad, general authority would allow for such a step to be taken, when necessary, even in the absence of a specific regulatory provision).

*Section 400.34 - Examiner's review - application for production authority*

*Comments*: Numerous commenters proposed the following changes to §400.34(a): reducing the general timeframe for an examiner's development of a report and recommendations from 150 days to 75 days after the close of the comment period; adding language regarding taking into account consistency with prior decisions; and replacing provision for industry surveys with language regarding conduct of independent and objective research. For §400.34(b), those commenters proposed the following changes: deleting the reference to ongoing activity in §400.34(b)(1); adding a sentence from prior regulations regarding the process by which the net economic effect is determined; and adding language stating the objective of preventing competitive disadvantages between companies in the same industry as a result of Board actions. One commenter stated that the Board should reject changes proposed by other commenters that would skew the application process in favor of applicants for production authority.

*Board position*: We have not reduced the general timeframe for development of an examiner's report and recommendations consistent with the revised approach to proposed production authority established in §400.14(a). Under that approach, applications subject to this section will involve circumstances that have been determined to warrant further review. Such applications will tend to be complex or controversial in nature. In that context, reducing our proposed standard timeframes would be inappropriate. Further, we have explicitly noted that certain

circumstances (such as when the applicant or another party has obtained a time extension for a particular procedural step) may result in the processing of the application extending beyond the ordinary timeframe.

We have revised the provision on requests to parties for additional information to emphasize its broad potential reach, depending on the circumstances of an individual case. We have also broadened the provision to allow both industry surveys and industry research to be used as tools in evaluating potential impacts of proposed production activity. We have not stated that research or surveys would be independent and objective, because those qualities inherently are objectives for all of the work carried out by the Board and its staff. Nor have we referenced consistency with prior Board decisions, because such language could create a mistaken impression that the situation within a given industry inherently remains static over time. For similar reasons, we have not referred to potential competitive disadvantages as a result of Board actions, because the language of the proposed rule already contains an adequate provision establishing that prior decisions would be considered. We have retained the reference to "ongoing activity" because the provisions of this section may at times be used for reviews of ongoing activity. Finally, we have not adopted the suggested reinsertion of a sentence from the prior regulations regarding the process of determining the net economic effect. That sentence was intentionally removed in the proposed rule because we believe that weighing positive and negative effects is inherent in the definition of a "net" economic effect, thereby rendering the suggested sentence superfluous.

*Sections 400.33 and 400.34 – Examiner's reviews of applications*

*Comments*: For both §§400.33 and 400.34, numerous commenters proposed the following changes: broadening references to the applicant to include zone participants; allowing requests to extend the period for response to a preliminary negative recommendation, with such an

extension not unreasonably withheld; and removing explicit allowance for notice and public comment on preliminary recommendations.

*Board position*: We have modified §§400.33 and 400.34 to allow an applicant to request extensions of the period of time to respond to a preliminary negative recommendation, with such extensions not unreasonably withheld. We have continued to allow notice and public comment on preliminary recommendations because such a step may be warranted in certain cases. In that context, we believe that it is important to include specific provisions addressing such allowance (although the Board's broad, general authority would allow for such a step to be taken, when necessary, even in the absence of specific regulatory provisions).

We have not adopted the proposed changes that would broaden references to the applicant to include zone participants. Such changes would inappropriately shift the emphasis away from the applicant. Further, for a given application, the number of zone participants could be significant (for example, if an affected zone operator has a significant number of users). Therefore, the number of parties that would be involved in the process as a result of the proposed changes could represent an exponential increase that would create new burden without necessarily providing for an improved outcome. Any applicant remains free to coordinate with zone participants on the matters addressed in this section.

*Section 400.36 - Completion of case review*

*Comments*: Numerous commenters proposed the following changes: adding a deadline for CBP headquarters to concur with proposed Board actions, and to assume concurrence if it is not received by the deadline; notifying the grantee and directly affected zone participants and allowing for a meeting request if a Board decision is not favorable, or if the Board is not able to reach a unanimous decision; adding a reference to affected zone participant for failure to timely provide necessary information; allowing an extension of the period to provide necessary

information when requested by the applicant or an affected zone participant, with such an extension not unreasonably withheld; deleting the provision allowing for termination of review if the Board is unable to reach a unanimous decision; when circumstances presented in an application are no longer applicable, limiting termination to situations where the applicant or an affected zone participant has notified the Board; and confirming termination of review in writing to the applicant and affected zone participant. Several commenters indicated that the applicant should always be notified (in writing) of the intent to terminate a review, with 30 days allowed for a response from the applicant. One commenter also stated that the term "material change" should either be defined or deleted. One commenter indicated that it did not understand the reason for allowing the review of an application to be terminated and, in particular, where the Board is unable to reach a unanimous decision.

*Board position*:

In response to these comments, we have added a specific timeframe for CBP headquarters to provide its comments on applications to the Board. We have not adopted the proposal for CBP headquarters' concurrence to be assumed after 30 days have elapsed. There is no evidence of any actual need for that suggested provision.

The Board may only approve an application for Board action on a unanimous decision of the Board's members. If the Board is unable to reach a unanimous decision, approval is not possible. In those circumstances, it is more appropriate to terminate the review of the application than to maintain the application as technically pending before the Board. Similarly, if the overall circumstances presented in an application no longer exist as a result of a material change (*e.g.*, when the zone participant on whose behalf the application was submitted has subsequently vacated the facility), it would not be appropriate for the Board to consider approving the application. Therefore, if the applicant does not opt to withdraw the application, it

would be appropriate to terminate the review of the application. For these reasons we have maintained the proposed provisions pertaining to such termination actions, but we have adopted certain changes to the language of this section in response to comments submitted.

Based on comments submitted, we have included a provision requiring notification to the applicant and allowing for a meeting at the request of the applicant if the Board is not able to reach a unanimous decision. That provision accords basic procedural rights in such a circumstance. However, we have not extended that provision to cover unfavorable decisions by the Board because §§400.33-400.35 already include procedural rights for the applicant in that circumstance (*i.e.*, when a case examiner has made an unfavorable recommendation on which the Board will be basing a decision). We have also retained the requirement that an applicant be notified of the Board's intent to terminate a review, clarified that such notification would be in writing, and continued to allow a 30-day period for a response. We also have adopted the substance of suggested changes pertaining to allowances for extending the period to provide necessary information and for confirming termination of a review in writing to the applicant.

We have not extended the provisions of this section to apply to zone participants because, as noted in response to comments on §400.33, such changes would inappropriately shift the emphasis of the Board's procedures away from the applicant. Further, for a given application, the number of zone participants could be significant. Therefore, the number of parties that would be involved in the process as a result of the proposed changes could increase exponentially and create substantial new burden without necessarily providing for an improved outcome. Any applicant remains free to coordinate with zone participants on the matters addressed in this section.

Based on a public comment, we have also delegated authority to the Executive Secretary to approve applications for subzone designation. However, we have limited that delegation to the

circumstance where an approved subzone will be subject to the overall activation limit for the sponsoring zone as established by prior Board action (with certain language also added to §400.24(d) specific to the establishment or modification of such activation limits). That limitation reflects the FTZ Act's requirement that "[a]ny expansion of the area of an established zone shall be made and approved in the same manner as an original application." The meaning of the term "zone" in the FTZ Act is the physical space in which zone procedures are in use. For example, "[f]oreign and domestic merchandise… may, without being subject to the customs laws of the United States… be brought into a zone and may be stored… and be exported, destroyed, or sent into customs territory of the United States therefrom… but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise" (section 3 of the Act, 19 U.S.C. 81c). Given the separation in the 1970's of the FTZ Board zone-site designation process from the U.S. Customs Service (now CBP) process of activating portions of designated zone sites, the term "zone" as used in the FTZ Act now only applies to physical space that has been both designated and activated. In that context, designating a subzone would only require action by the Board if the subzone were not subject to an existing Board limit on the amount of space that could be activated (*i.e.*, used as a "zone" under the FTZ Act) within the zone in question. It should be noted that a similar analysis of the significance of the term "zone" in the FTZ Act was a basis for the FTZ Board's adoption of the ASF in 2008. The ASF allows designation of additional sites for specific operators/users without Board action provided that the additional sites will remain subject to a specific limit set by the Board on the overall amount of space that can be activated (thereby preserving the Board-approved "area" that functions as a "zone").

Finally, the Board received a number of comments pertaining to various sections of the regulations indicating that existing processes and distinctions between types of zone sites may not constitute the most efficient and effective mechanism for facilitating zone use. As noted in our response to comments on §400.11, a streamlining of the existing site-designation frameworks is a matter that the Board plans to address in a subsequent proposed rule.

*Section 400.38 - Procedure for application for minor modification of zone*

*Comments*: Numerous commenters proposed that, when the CBP port director's concurrence does not accompany a request for a minor modification, the Executive Secretary should notify the port director of the request, and 15 days should be allowed for the port director's concurrence. One commenter stated that the 20-day timeframe for CBP port directors' reports provided in the prior regulations (15 CFR 400.27(f)(2)) should be maintained.

*Board position*: In response to these comments, we have incorporated a specific timeframe for CBP input on requests (*i.e.*, the 20-day period provided in the prior regulations). In addition, in this section and similar sections, we have used the general term "comments" in place of the more specific terms "concurrence" or "report" to reflect that any CBP input pertaining to a request may vary in nature and scope depending on the type of request and the specific circumstances involved.

*Section 400.41 - General operation of zones; requirements for commencement of operations*

*Comments*: Numerous commenters proposed the following revisions to this section: changing the requirement for a grantee's approval for activation to a requirement for the grantee's concurrence; removing the reference to the grantee from the requirement that permits be obtained from governmental authorities; adding a reference to administrators; and removing the reference to CBP port directors due to those commenters' proposed creation of a separate section specific to the port director's role as a representative of the Board.

*Board position*: This section now combines proposed §400.41 (“Operation of zones; general”) and proposed §400.44 (“Requirements for commencement of operations in a zone”). Combining the two sections does not affect the substance of the provisions contained therein. Regarding changes proposed by commenters, we have not added a reference to administrators in this section. Although a grantee may engage a third party to conduct certain functions on its behalf, it remains the grantee’s responsibility to ensure that the reasonable zone needs of the business community are served by the grantee’s zone. We have modified this section to indicate that a grantee may either approve or concur on activation. That change is consistent with other regulations pertaining to the activation process. We have eliminated the reference to the grantee’s obtaining permits because meeting any requirements concerning activity in a given zone operation should be the direct responsibility of the operator. We have retained the reference to the role of CBP because it usefully reinforces the language of new §400.7.

*Section 400.42 - Operation as public utility*

*Comments*: Numerous commenters expressed concerns about what they characterize as significant new requirements in proposed §400.42, indicating that the requirements would demand additional staffing and funding at grantee organizations at a time when such resources are scarce, and that the requirements could lead to grantees’ relinquishing their roles due to the added burden. Those commenters proposed the following specific changes: using the phrase “public utility principles” to clarify that zones are not public utilities; deleting the word “agent” in general; adding the word “administrator” in several contexts; removing language indicating that grantees’ fees recover costs incurred by those grantees; removing a requirement that any cost passed on to a zone participant based on a function that a grantee contracts to a third party must be based on going rates for such a function; and removing a requirement for fees to be paid directly to grantees (or public entities).

One commenter indicated that greater specificity on the public utility requirement was overdue and essential. One commenter agreed that rates and charges should be fair and reasonable and based on costs incurred by the grantee in the administration of the zone. One commenter stated that return on investment should be able to take into account past subsidies that an economic development organization provided to keep a zone active and viable.

One commenter stated that proposed §400.42 appears to impose excessive burden and give rise to an inordinate amount of scrutiny over the internal management of a zone, and that each grantee should be allowed to operate in a way that best suits its zone. Another commenter stated that the regulations cite public utility as the basis for proposed changes, but that the FTZ program today is very different from the time when Congress originally envisioned the program (when the public utility concept made sense). The commenter stated that the proposed section takes away from grantees the authority to develop zone financing plans, that the Board should not try to take such authority away from grantees, and that a zone should be paid for by its users. That commenter also stated that the proposed regulations assume that zone users themselves must be allowed to act as operators, but that the assumption is not balanced against the interests of the grantee.

Addressing the proposed requirement that fees and penalties related to grantee functions be payable only to a zone's grantee (or a public agency under contractual arrangement), certain commenters stated that the provision should allow payment to private non-profit organizations under contractual arrangement, or to an "administrator" engaged by a grantee. Addressing the payment of fees and penalties to a zone's administrator, certain commenters stated that such an arrangement reduces a grantee's burden, provides incentive to the zone's administrator, and allows for provision of technical help to users. Those commenters concluded that precluding the payment of fees and penalties to an administrator needlessly intrudes on a grantee's

management of its zone. One commenter stated that the changes proposed in §400.42 would do more harm than good.

Additionally, one commenter proposed stating that each zone be operated as a public utility, and that the referenced rates and charges are specific to zone use and must be uniform. The same commenter indicated that there are many formulas that a grantee should be able to use to develop its fees, that basing fees on the benefits derived by a user should be an acceptable formula, and that there is no basis for authorizing the Board to decide which formula(s) are correct.

One commenter disagreed with the proposed approach in §400.42, stating that it is contrary to Executive Order 12866, which requires agencies to assess available alternatives to regulations, and that the proposal would require grantees to establish rates based only on costs without taking into account funding sources available. The commenter stated that the provision would reduce a grantee's flexibility to set up an independent rate structure based on the area's economic development strategy. That commenter recommended giving grantees the flexibility to establish rate structures allowing distinct rates for pilot projects, target industries, or differing types of zone operations.

Regarding a grantee's development of its fees, one commenter suggested that the Board provide clearer guidance on the time period over which costs could be recovered and how often the grantee would need to recalculate its fees. It specifically suggested allowing the grantee to recalculate fees at five-year intervals. The commenter proposed applying the "going rate" standard only to administrative service contracts due to difficulties in determining going rates for occasional, more specialized activities or functions. That commenter also sought Board guidance on acceptable methods for apportioning costs across users, noting that various grantees currently appear to use differing methods. The same commenter proposed that a

grantee be allowed to discount its fees based on a range of circumstances, as long as the criteria for such discounts were published in the grantee's zone schedule and applied uniformly. In response to other comments, one commenter stated that technical or other services are sometimes included or bundled into the fees paid by a zone user, that such services carry a real cost and that zone users should not, in effect, be required to contract with a particular technical expert in order to be able to operate within a zone.

*Board position*: We have made a number of revisions to this section based on public comments. We have retained the language stating that "each zone shall be operated as a public utility" because that language was drawn *verbatim* from the FTZ Act. We have also slightly modified the remainder of the sentence following the reference to the public utility requirement, so it now is also drawn *verbatim* from the FTZ Act.

In addition, in response to comments on uniform treatment and related issues, and the comment that zone users should not effectively be required to contract with a particular technical expert, we have stated that users may not be required to use or pay for a particular provider's zone-related products or services. Any effective requirement for a user to pay for additional products or services in order to be permitted to use the zone would be inconsistent with the principles associated with the Act's public utility requirement. This bar extends both to a direct requirement to procure a product or service and to an indirect requirement for such procurement (*e.g.*, through including costs associated with the availability of technical expertise as part of the zone's mandatory fees, or through favorable treatment given by, or on behalf of, the grantee to purchasers of a product/service from a particular vendor).

In response to the comment claiming that the evolution of the FTZ program has made the public utility concept less relevant, it is important to emphasize that the law continues to require that "[e]ach zone shall be operated as a public utility" (section 14 of the Act, 19 U.S.C. 81n); the

Board has no discretion to authorize the operation of the program in a manner inconsistent with that requirement. The Board has never been a “rate making” agency (*i.e.*, it does not try to set specific fees of individual grantees). However, given the public utility requirement of the Act and grantees’ specific requests for guidance on the implications of that requirement, it is appropriate to delineate in the regulations the general principles embodied in the requirement. We have modified the provision on recovery of costs through fees to clarify that fees may be imposed to recover costs, but that a grantee is not obligated to impose fees to recover its costs. The public utility requirement has the effect of setting a ceiling on grantees’ fees at a general level that allows for recovery of costs associated with the grantee function plus a reasonable return on investment but not monopoly profit-taking (by the grantee or by a party contracted by the grantee for a zone-related function). The public utility requirement in no way mandates that a grantee collect fees for all or part of the costs associated with the grantee function if the grantee would prefer to subsidize that function or has alternate funding sources available to defray those costs.

Because cost recovery is at the heart of the public utility concept, we have retained the prohibition on a grantee’s basing its fees on the benefits derived by those who make use of the zone. The public utility concept is inherently driven by the sponsoring organization’s being able to recover the costs it incurs in making the zone available to users through fees paid by those users. Basing users fees on the level of benefit those users derive from the program is an entirely different model that is not inherently cost-based, and that is inconsistent with the Act’s public utility requirement.

Certain commenters raised the issue of acceptable methods for a grantee to apportion costs to different categories of users. The Act’s requirement that a grantee afford users uniform treatment under like conditions can also have implications for the apportionment of costs. Based

on the public utility and uniform treatment requirements, a grantee may legitimately establish different levels of fees for (*i.e.*, apportion costs differently to) different categories of zone participants based on certain criteria (*e.g.*, an operator's square footage of activated FTZ space, the value of the operator's merchandise admitted to the zone in a given year, whether the operator qualifies as a small business under Small Business Administration (SBA) criteria, or whether the operator is in an industry sector targeted for attraction based on community economic development plans) so long as the criteria are applied uniformly to each zone participant, and the resulting fee structure is published in the grantee's zone schedule (see §400.44). However, consistent with the provision 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," different fees may not be applied to zone participants by (or on behalf of) a grantee based on whether a given zone participant has engaged a particular third party to provide FTZ-related services. Applying different fees on that basis would effectively require zone participants to procure products or services from a particular third party in order to qualify for a lower fee imposed by (or on behalf of) the grantee, which would be inconsistent with the principles established in section 3 of the Act (19 U.S.C. 81n). Within a legitimately differentiated category of zone participants (*e.g.*, those that qualify as small businesses under SBA criteria), a single level of fee(s) must be applied.

In response to comments, we have removed references to "agent" in this section but have not incorporated certain commenters' proposed references to "administrator." Instead, where appropriate, we have simply mentioned that certain actions can be performed "on behalf of" a grantee. We also have removed both the requirement that third party costs passed on to zone participants be based on going rates, and the requirement for fees to be paid directly to grantees (or public entities). Both of those requirements were intended to bolster enforcement of

the public utility requirement, but they do not represent the least burdensome means to accomplish the Board's policy goals. Combined with provisions such as §400.45, which allows complaints pertaining to public utility, this section should be sufficient to ensure compliance with that the Act's public utility requirement.

We agree with commenters that return on investment may take into account past subsidies that a grantee provided to sustain its zone. It does not seem appropriate to delineate a specific maximum period of time for cost recovery. Only one comment suggested a specific time period, and specifying a period in a regulation could affect a large number of grantees (the vast majority of which have not addressed this point). However, the five-year interval proposed by one grantee for recalculating its fees (which could include recapturing prior subsidies by the grantee to sustain the zone over that five-year period) is one reasonable approach. The fees in the resulting zone schedule could incorporate the recovery of costs incurred over the five-year period in question.

Finally, contrary to one commenter's assertion, the proposed regulations were not based on an assumption that zone users must be allowed to operate for themselves (rather than leaving the possibility open for the grantee to serve as operator). However, multiple comments on §400.43 proposed providing potential and existing users the right to operate their own zone sites directly or through one or more contractors. We believe that this issue is properly within the realm of the Act's public utility requirement but, because it was not directly addressed in the proposed rule and is of potential interest to numerous parties, the Board intends to address it through a subsequent rule.

*Section 400.43 - Uniform treatment*

*Comments*: Numerous commenters supported the general concept of uniform treatment delineated in §400.43, but expressed concerns about negative impacts that would result from

specific provisions (especially the preclusion of conflicts of interest in §400.43(e)). They perceived, *inter alia*, that grantees' ability to obtain needed zone-related advice and services would be adversely affected. Those commenters proposed an alternative approach that would require conflicted parties to disclose the conflict of interest and recuse themselves from decisions. The same commenters also proposed the following range of changes: adding the term "administrator" accompanying "grantee;" stating that zone participants include only operators and users, with property owners treated as a distinct category; including the right to modify standard contractual terms and stating that those terms should be specific to zone participation; replacing the requirement for standard contractual provisions to be included in a grantee's zone schedule with a requirement that standard provisions be provided to the public and the Board on request; modifying the provision on neutral criteria to be applied by grantees in evaluating proposals for FTZ sponsorship; adding that users may not be required to use or pay for zone-related products or services that they do not elect to procure; and allowing potential and existing users the right to operate their own zone sites directly or through one or more contractors. Two commenters stated that a grantee should not be forced to sponsor any project proposed for its zone. One commenter indicated a need for authority or a directive to require modification of operators' agreements that would be non-compliant under proposed §400.43.

One commenter stated that regulations directing how a grantee manages services associated with its zone are likely to be counterproductive at both the local and national level. That commenter proposed revisions including that, in a given zone, there could not be a requirement that zone participants purchase zone-related services (such as inventory control systems, application preparation, or customs-related brokerage or consulting) from the zone's administrator or any other specific party. Another commenter stated that proposed §400.43

appears to impose excessive burden and create inordinate scrutiny of the internal management of a zone, and that each grantee should be allowed to operate in a way that best suits its zone.

Two commenters stated that the regulations should continue to allow operator's agreements between the operator and the zone's administrator, with one commenter indicating that this existing type of arrangement can be more responsive to operators' needs when the grantee is a public agency with inherently time-consuming internal processes. One commenter indicated that the regulations should not preclude payment of fees to the zone's administrator rather than the grantee, stating that a public agency may prefer not to mingle zone-related fees with broader public finances.

One commenter stated that the Board's approach in §400.43 reflects a failure to enforce existing law and punish wrongdoers, with the Board instead proposing to deny numerous rights and protections embodied in law and equity through an approach that is discriminatory, arbitrary and capricious. The commenter further states that §400.43 contravenes the FTZ Act, claiming that the FTZ Act requires the Board to provide "uniform treatment" to those who "participate in" a zone. The commenter also states that the proposed provision would have a negative impact on the entire FTZ program.

One commenter stated that the proposed approach to uniform treatment ignores the positive role that third-party expertise has played in the success of various zones, and instead proposes all-encompassing mandates that would cripple grantees' abilities to adjust to local circumstances. Another commenter proposed to address uniform treatment by simply requiring contracts include a stipulation that all participants will be treated fairly and equally under the uniform treatment and public utility requirements of the FTZ Act.

One commenter stated that many grantees may not currently have evaluation criteria for reviewing FTZ proposals, and that the subsection on neutral criteria for evaluating proposals

would seem to require grantees to develop such criteria, creating a burden that is unnecessary given other protections proposed in §400.43, and also creating potential additional risks or liability for grantees.

One commenter supported the enhanced enforcement provisions proposed in this section but stated that the Board should not limit the conflict-of-interest preclusion to the proposed list of grantee functions.

*Board position*: The FTZ Act establishes a core requirement that a zone grantee afford "uniform treatment under like conditions" to zone participants. Therefore, a grantee may not manage its zone in any manner that it chooses. Management of a zone is constrained by the uniform treatment requirement (as well as other requirements of the Act, such as to operate the zone as a public utility). Given that grantees must comply with the law, it is beneficial to grantees for the Board's regulations to provide detail regarding the operational implications of the FTZ Act's requirements. Nevertheless, in response to comments submitted, we have simplified this section and removed several provisions. This section establishes requirements for 1) the application of uniform treatment in the evaluation of proposals from zone participants by grantees (and other parties acting on behalf of grantees, where applicable), in §400.43(b), and 2) justification for any differing treatment afforded, in §400.43(c). The range of functions targeted in proposed §400.43(e) has been narrowed, and the provision has also been supplemented by allowing the Board to authorize waivers (see discussion below specific to adopted §400.43(d) and in response to several additional comments). Therefore, as adopted, this section substantively addresses the concerns expressed about potential impacts on the ability of grantees or zone participants to procure zone-related services while maintaining safeguards to ensure the integrity of the FTZ program.

In response to multiple commenters' proposals that the regulations state that users may not be required to use or pay for zone-related products or services that they do not elect to procure, we have inserted a new final sentence in §400.42(a). We have also reinforced that principle by stating that treatment of a zone participant may not vary depending on whether the zone participant has procured any particular product or service, including from a particular supplier.

In response to a comment, we have eliminated the requirement that a grantee apply neutral criteria in evaluating proposals from zone participants. The requirement seemed to imply that each grantee must establish such criteria, but many grantees in fact may not currently have specific criteria they apply. Developing those criteria would create a significant burden for grantees. Rather than impose such a new requirement on grantees, our revised approach focuses on gauging performance rather than dictating behavior.

We also have eliminated the requirement that agreements be made solely with the zone's grantee. That proposed provision would have affected a number of existing contractual arrangements and increased burden on a number of zone grantees. The provision did not represent the least burdensome means to accomplishing the Board's policy objectives. In concert with changes made elsewhere in these regulations, we also have substituted a reference to "any person undertaking a zone-related function(s) on behalf of the grantee" for the term "agent" in §400.43(h).

We have retained the requirements for agreements to be made in writing. Evidence indicates that the vast majority of agreements between zone grantees and zone participants are already in writing, but a limited number of examples of purely oral agreements exist. The Board's ability to gauge the uniformity of treatment afforded by a grantee depends on agreements being in writing. This provision as adopted will also establish a foundation for enabling the Board to consider proposing in a subsequent rule a requirement that a grantee disclose to a zone

participant contractual provisions concluded with other zone participants that differ from the provisions in effect or being offered to the zone participant in question.

As requested, we have retained the statement in §400.43(b) that uniform treatment does not require acceptance of all proposals by zone participants. That subsection also requires that the bases for a grantee's decision on a proposal must be consistent with the uniform treatment requirement. However, we have not adopted in this section and in the definition section (at §400.2(x)) commenters' proposed limitation of the term zone participant to exclude property owners. Given the role of the grantee (and other party acting on behalf of the grantee, where applicable) in evaluating proposals from property owners for participation in a zone, uniformity of treatment under like conditions should not be limited to zone operators and zone users.

*Comment*: Regarding the proposed requirement for a grantee to have standard contractual provisions that if offers to zone participants, one commenter stated that a grantee should have some limited latitude to change standard contract provisions through negotiation with individual zone participants and should make all participants aware of the provisions for which the grantee is willing to make changes. The commenter also stated that Board guidance would be helpful regarding which types of provisions should not be subject to negotiation.

*Board position*: We have eliminated the requirement for a grantee to have standard contractual provisions because of the new burden that it could create for a number of grantees. Further, grantee negotiations with zone participants regarding contractual provisions are commonplace, with the provisions of actual contracts often diverging in some manner from the standard provisions offered to zone participants. That divergence reflects the reality of the business environment, but also renders pointless a requirement for grantees to offer standard contractual provisions. As noted above, the Board will instead consider proposing in a subsequent rule a requirement that grantees disclose to zone participants contractual provisions concluded with

other zone participants that differ from the provisions in effect or being offered to the zone participant in question. That requirement would be targeted directly to the disclosure of actual differences in treatment afforded to zone participants, thereby enabling them to evaluate whether a grantee's contracting practices violate the uniform treatment requirements of the FTZ Act and of these regulations.

*400.43(d) - Avoidance of non-uniform treatment*

*Comments*: Numerous commenters opposed the proposed provisions in §400.43(e) ("preclusion of conflicts of interest") for reasons including: likely reduction or elimination of grantees' ability to obtain needed professional advice and assistance; causing more harm than good; the Board should establish principles rather than attempt "one-size-fits-all" solutions; zone users are capable of defending their own interests without government interference in the guise of protection that is not actually needed; the provisions would limit freedom of choice for users and have a negative impact on grantees' operational costs and efficiencies; and the most talented and experienced experts would find representing users more lucrative than representing grantees, leaving grantees with either lower quality representation or higher costs to obtain quality representation. Certain commenters recommended that the Board find an alternative approach to ensuring uniform treatment. One of these commenters stated that legitimate concerns about uniform treatment should be addressed by stating clear performance objectives, with grantees and contractors given discretion as to how they meet those objectives. One commenter stated that this provision is not consistent with the basic regulatory philosophy and principles expressed in Executive Order 12866, which requires consideration of the costs to grantees and users, a focus on performance objectives rather than specific behavior, and narrow tailoring to impose the least burden.

One commenter indicated that §400.43(e) was drafted too broadly and proposed an alternative approach in which the Board could review situations believed to be problematic and, after notice and appropriate due process, potentially restrict identified activities on a case-by-case basis. The commenter provided specific language that could be used to implement its approach.

Another commenter stated that it generally supports the concept of preventing conflicts of interest, but expressed concern about the proposed provision's putting grantees at a competitive disadvantage in obtaining needed professional services. The commenter recommended modifying this provision either to define the targeted conflicts of interest more precisely or to limit the provision's effect to zones that have demonstrated actual uniform treatment problems (with the Board potentially reviewing zones' performance of key functions to determine whether non-uniform treatment exists). Another commenter stated that the proposed preclusion of conflicts of interest would unintentionally restrict business relationships that are not actually of concern to the Board. This commenter proposed a revised provision that would allow the Board to review situations that may be problematic, gather relevant facts after notice and appropriate due process, and then restrict particular activities on a case-by-case basis as warranted.

One commenter stated that this provision appears to be overreaching and inconsistent with rules pertaining to conflicts of interest that already apply to attorneys, and could interfere with a party's right to select counsel of its choice. The commenter proposed a replacement provision based on the principle of informed consent by both parties. Another commenter stated that this provision as written, in combination with the proposed definition of agent in §400.2(b), could unintentionally preclude zone operators from providing zone-related services (such as handling of merchandise or inventory management) to zone participants. Another commenter stated that the proposed provision precluding conflicts of interest is excessive and would deny operators freedom of choice in contracting for outside services.

In response to comments submitted, one commenter stated that zone users should not be forced, or feel implied pressure, to pay for consulting or expert services as a condition of participating in the federal FTZ program.

*Board position*: In response to comments, we have removed from this subsection one of the originally targeted functions ("collecting/evaluating annual report data from zone participants") and narrowed the focus of another of the targeted functions (now limited to "taking action on behalf of a grantee, or making recommendations to a grantee, regarding the disposition of proposals or requests by zone participants pertaining to FTZ authority or activity (including activation by CBP)"). To counterbalance the elimination of proposed §400.43(b)'s requirement for agreements to be made directly with grantees, we have added to this subsection the additional key function of "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)."

Finally, in response to comments received, we have added new §400.43(f) that will allow the Board to issue case-by-case waivers of the provision in §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). The adopted provision reflects the Board's intended use of a standard format for applications for waivers, but also recognizes that the Board may need to ask follow-up questions before deciding on a given application (depending on the circumstances presented in the application).

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

*Section 400.44 - Zone schedule*

*Comments*: Numerous commenters proposed the following revisions to this section: eliminating the requirement for the zone schedule to be submitted to the CBP port director; including references to a zone's administrator (where applicable); removing the name of the preparer from the zone schedule; eliminating the requirement for a grantee to make its zone schedule available on its website; and not allowing the Board to amend the requirements of this section by Board Order, if warranted.

One commenter stated that the zone schedule should be required to include a summary of the grantee's standard contractual provisions, but not to contain the grantee's contract document(s). A number of commenters proposed eliminating the requirement for zone operators' fees to be included in the zone schedule. One commenter recommended that grantees instead retain copies of their operators' rates, charges and procedures and make them available to users on request. One commenter stated that a grantee's fees for zone operations should be included in the zone schedule if the grantee is the operator of the zone.

Another commenter expressed a concern about the potential impacts of requiring publication of zone schedules on the internet. One commenter stated that it would be fair and reasonable for

the Board to post all zone schedules on the Board's website. One commenter supported both the requirement for a grantee to post its zone schedule on the grantee's website and the provision for the Board to make zone schedules available on the Board's website.

*Board position*: We have eliminated the proposed requirement for a zone schedule to include a grantee's standard contractual provisions, which was intended to help ensure that zone participants receive uniform treatment. These regulations adopt other measures designed to ensure uniform treatment that will not increase burden for all grantees, (see, *e.g.*, §400.43), unlike the proposed requirement. We also have eliminated the requirement that a grantee make its zone schedule available on its website. The Board will instead make zone schedules available on its website, which should create transparency without placing a burden on each grantee to place its zone schedule on its own website.

In response to the comments, we have eliminated the requirement for the zone schedule to be submitted to CBP. Any CBP official will be able to request a copy of a grantee's zone schedule or access that zone schedule via the internet, as needed. We have also eliminated the requirement to include the name of the preparer and have modified this section to allow for a zone schedule to contain information about any party that acts on behalf of the zone's grantee. We have not included the proposed requirement that a zone schedule's title page name a zone's administrator. The list of required elements for the title page in no way prevents a grantee from including other information on the title page. The decision regarding whether additional information is appropriate for inclusion on the title page is left to the grantee's judgment.

We have retained the provision allowing the Board to amend the requirements of this section via Board Order, if warranted. Although it currently appears unlikely that the Board would need to amend the requirements, it is important for the Board to have the ability to do so more quickly

than the rulemaking processes would allow, should the need arise. At the same time, the Board intends that any such amendment would only be made after an appropriate opportunity for the public to comment. Separately, we have added a phrase to §400.44(a) further clarifying that amendments to zone schedules will not be effective until submitted to the Executive Secretary. Finally, in response to a comment pertaining to the requirement for standard contractual provisions in proposed §400.43, the Board intends to address through a subsequent rule potential mechanisms for a grantee to disclose to a zone participant substantive variations in contracted provisions. Such a provision would provide transparency in order to enable zone participants to assess whether uniform treatment had been afforded by the grantee, and should do so in manner that is less potentially problematic and burdensome than the proposed requirement that standard contractual provisions be published in zone schedules.

*Section 400.45 - Complaints related to public utility and uniform treatment*

*Comments*: Numerous commenters proposed requiring that affected grantees (and the grantee's administrator, as applicable) receive information in a complaint and have an opportunity to respond. Those commenters also proposed adding a provision for the Board or the Executive Secretary to initiate a review for cause based on a claim that no such provision existed in the proposed regulations. The same commenters also proposed revising the first factor for reviews of fairness and reasonableness by replacing the reference to actual costs incurred with a reference to the methodology supporting the rates and charges. One commenter recommended that the Board not apply the second factor for reviews of fairness and reasonableness, which cites the rates at like zone operations at similarly situated zones, until 1) the Board has classified zones into categories that enable grantees to determine which other zones are similarly situated, and 2) grantees are able to review other grantees' zone schedules once those schedules are made available on the Board's website.

One commenter stated that the right to due process requires that a complaint be disclosed to a party before any fine or "other consequence" could be imposed on that party as a result of the complaint. One commenter stated that allowing confidential complaints could lead to incorrect or misleading information being submitted to the Board without the affected grantee being able to counterbalance it or to prevent prejudicial conclusions from being reached. That commenter stated that the provision could lead to lawsuits or undermine transparency that the Board might be seeking to create. In response to other comments, one commenter expressed concern about allowing submission of confidential complaints and stated that due process should require that the target of a complaint be able to address the complaint before being subject to an unfavorable action.

*Board position*: We have retained the proposed provision allowing for confidential complaints and have not added any requirement for the disclosure of such complaints. Given the monopoly that a zone grantee generally has on access to FTZ benefits in the region served by the grantee, zone participants may fear direct repercussions from submitting a complaint to the FTZ Board pertaining to a grantee's compliance with law and regulations. To help ensure the integrity of the operation of the FTZ program, it is important for zone participants to have the ability to submit such complaints without fear of less favorable treatment or even retribution. However, commenters also have raised valid concerns about due process if a grantee or other party were to be subject to penalties based on complaints that remained confidential (*i.e.*, unavailable for review and response). Recognizing those concerns, the Board simply intends to use confidential complaints as a basis for determining whether the actions of a particular grantee or other party should be examined in more detail. Such an examination would enable the Board to gather information in a process transparent to the grantee (or other affected party) and then use the information gathered through that process to evaluate what further action(s) by

the Board might be warranted. The Board would only use information gathered through the transparent investigation process as a basis for further Board action or restriction; information that is unknown to the affected party would not be used.

Regarding reviews of fairness and reasonableness, we have not replaced the reference to actual costs incurred. Numerous commenters proposed we reference the methodology supporting the rates and charges. The Board would indeed examine the methodology a grantee used to develop its rates and charges as part of any examination that might occur. However, the fairness and reasonableness of a rate or charge are questions that must be addressed under the public utility requirement of the FTZ Act. As described in response to comments on §400.42, the public utility concept is fundamentally based on cost recovery. As such, the actual costs incurred are appropriate for the Board to consider in evaluating whether a rate or charge is fair and reasonable. In response to comments, we have eliminated the proposed second factor for reviews of fairness and reasonableness. We have instead incorporated language enabling the Board, where applicable, to examine if a fee a party charges to a grantee for undertaking a function on the grantee's behalf (passed on by the grantee to zone participants through the grantee's fees) represents a form of monopoly rent-seeking that would be inconsistent with the statutory public utility requirement.

*Section 400.46 - Grantee liability*

*Comments*: Numerous commenters proposed eliminating the word "ordinarily" and separately adding the term "administrator" to this section. One commenter supported this section as providing welcome clarification for public sector grantees. One commenter stated that the limitations on grantee liability in this section are obscured by penalty provisions in §400.62, with the addition of penalties and the lack of clarity regarding grantee obligations leading to concern among grantees. One commenter stated that some degree of liability in specific situations is an

appropriate tool to promote compliance, but did not elaborate on what those specific situations would be. One commenter stated that a grantee must be afforded the opportunity to oversee a zone user in order to protect the grantee and other zone users. One commenter stated that the regulations need to define more clearly which oversight activities are "detailed" and which are not.

One commenter stated that the proposed provision would do more harm to grantees than to operators or users that commit violations. The commenter recommended revising this section to state that a grantee should only be liable as an operator if the grantee acts as operator under its own CBP bond and under a user agreement with the grantee's customer. The commenter distinguished that situation from one where a grantee has signed an operator's agreement with a company that acts as its own operator and operates under its own CBP bond, in which case the company should be held liable for any violations attributed to the company's actions.

*Board position*: We have modified this section based on these comments. Specifically, we have eliminated the word "ordinarily" and added language to clarify the circumstances in which the actions of a grantee (or a grantee's administrator, where applicable) could create liability that would not otherwise exist. Specifically, a grantee could create liability where it does not otherwise exist if it undertakes detailed operational oversight of or direction to zone participants. Detailed operational oversight of zone participants would place the grantee in a position to be aware of specific violations (with an obligation to ensure the violations are corrected, and liability if the violations are not), while detailed operational direction to zone participants (*e.g.*, dictating specific operational procedures) would make the grantee responsible for ensuring that the direction did not result in violations. We have included in this rule key examples of detailed operational oversight or direction, such as review of an operator's inventory-control or record-keeping systems and specifying requirements for such a system to be used by an operator.

*Section 400.47 - Retail trade*

*Comments*: Numerous commenters proposed replacing the concurrence of the CBP port director with notification to the port director, and adding statements that the retail trade provision only applies to activated zone space and does not apply to order fulfillment. One commenter proposed that the regulations define "retail trade" based on the activity covered by the North American Industry Classification System subsections pertaining to "store based retail trade." One commenter stated that if CBP will no longer issue binding rulings pertaining to retail trade, the Executive Secretary should follow precedent established by existing CBP decisions, with the principles contained in binding rulings remaining authoritative unless modified or revoked pursuant to 19 CFR 177.12 (*e.g.*, subject to notice requirements). The commenter also recommended that the Executive Secretary's decisions on retail trade be made available to the public. That commenter also stated that order fulfillment should not be considered retail trade.

*Board position*: The specific concerns raised by commenters about order fulfillment are significant. Therefore, the Board intends to propose a revised section specifically addressing order fulfillment in a subsequent rule. In the interim, we have adopted this section with changes and additions to language based on public comments. In particular, we have included language regarding the ongoing effect of decisions made by CBP and the type of procedures to be followed for any determination that might affect the impact of prior decisions. We have also provided that determinations made pursuant to this section will be available on the Board's website.

*Section 400.49 - Monitoring and reviews of zone operations and activity*

*Comments*: Numerous commenters proposed moving this section to subpart E of the regulations, which pertains to zone operations. Those commenters proposed the following additional changes:  adding a significant public detriment standard for reviews; notifying the

grantee and affected zone participants and allowing them to submit evidence in response when threshold factors result in a negative recommendation; requiring parties requesting reviews to provide evidence that is probative and substantial; requiring decisions be based on evidence on the record if the decision would be inconsistent with the original examiner's report for the operation in question; requiring negative determinations be supported by evidence on the record of direct negative impact on a U.S. manufacturer; allowing an affected zone participant to meet with the Board upon request prior to issuance of a negative Board decision; removing the ability to impose a restriction after a preliminary review; and removing the Assistant Secretary for Import Administration's authority to impose restrictions.

One commenter stated that a party's request for a review should be disclosed to the affected zone participant prior to initiation of the review. The commenter also stated that reviews should be subject to the notice and hearing requirements of §400.52. That commenter further proposed eliminating allowing restrictions to be imposed after a preliminary review or, in the alternative, making restrictions contingent on a showing that: 1) the requesting party had a substantial likelihood of obtaining a restriction following full review; 2) the requesting party would suffer irreparable injury without the preliminary restriction; 3) the preliminary restriction would not substantially harm the zone participant or other parties, and 4) the preliminary restriction would further the public interest, with the burden of proof on the party requesting the review. Finally, that commenter stated that a zone participant should be entitled to a refund of duties or fees paid as a result of the restriction imposed based on a preliminary review if the restriction is not maintained after full review by the Board.

*Board position*: In response to these comments, we have moved this section to Subpart E, as §400.49. In addition, we have modified subsection (b) to indicate that a party requesting a review should provide information that is "probative and substantial in addressing the matter in

issue." This standard mirrors the standard applied both to comments submitted on applications and to responses to those comments. We also have added a sentence to subsection (c) indicating specific procedures to be followed (*i.e.*, notification to the zone grantee and a time period for response) prior to any final action to impose a prohibition or restriction under this section. These changes are responsive to specific comments submitted, although the actual approach or language adopted may differ from those proposed by commenters.

We have not adopted other changes proposed by commenters. The added provision described above provides a basic procedural right to the grantee of an affected zone to provide a response to the Board regarding proposed final action to impose a prohibition or restriction. The additional changes proposed by commenters would either dilute the effectiveness and utility of the provision or add significant complexity. Additional complexity is contrary to the Board's and multiple commenters' desire to simplify these regulations. Further, reviews under the corresponding provision in the prior regulations (§400.31(d)) have been very rare, and there is no evidence indicating that such reviews are likely to become more common in the future. Therefore, there does not appear to be a need to include significant additional procedural requirements.

*Section 400.51 - Accounts, records and reports*

*Comments*: Numerous commenters proposed deleting the reference to generally accepted accounting principles for zone accounts. For the annual report provision, those commenters proposed the following revisions: changing the proposed 90-day filing period to the 120-day period that has been the Board's recent practice; allowing the Executive Secretary to extend the filing period; directing grantees to submit timely reports (with such reports noting whether any zone participants have not timely provided their data for inclusion in the reports); and stating that data submitted by zone participants will be treated as "business proprietary." Those commenters

stated that the Board's annual report to Congress should not provide company-specific data. One commenter proposed a 90-day timeframe for a zone user to submit its data to the zone grantee, with the grantee allowed an additional 30 days for submission of its report to the Board. Alternatively, the commenter proposed allowing a user or a grantee to obtain a 30-day extension.

One commenter stated that the format for zones' annual reports should be revised to take domestic material, labor, overhead and profit into account for export figures. One commenter stated that the Board should require annual reports to include information about admission of merchandise subject to AD/CVD orders for production activity, any production activity involving a foreign article subject to an AD/CVD order and approval of such activity by the Board, or a certification that no production activity occurred involving a foreign article subject to an AD/CVD order. The commenter stated that the Board should obtain data from CBP annually on admission of merchandise subject to AD/CVD orders into zones or subzones with production authority. That commenter also stated that the Board should publish a report each year summarizing data obtained from grantees and from CBP to enable parties to identify discrepancies that should be examined by the Board.

*Board position*: In response to these comments, we have made a number of revisions to this section. We have deleted the reference to generally accepted accounting principles in favor of simply stating that zone records must comply with the requirements of governmental agencies with appropriate jurisdiction. Regarding the annual report provisions, we have retained our proposed 90-day timeframe for grantees' reports to the Board, but have specifically allowed requests for time extensions, indicating factors for the Executive Secretary to consider in evaluating such requests. In addition, we have allowed a grantee to submit a timely report to the Board without information from an operator that has failed to timely provide information to the

grantee. With regard to the specific format and contents of reports to the Board or of reports produced by the Board, as well as the treatment of specific information provided in reports to the Board, these are administrative matters that appropriately should continue to be handled as part of the ordinary functioning of the Board and its staff.

*Section 400.52 - Notices and hearings*

*Comments*: Numerous commenters proposed the following revisions to this section: limiting invitation for public comment to specific identified situations; eliminating the requirement for local public notice to be published in a manner that allows at least 30 days for submission of public comments; limiting a determination on the need for a hearing initiated by the Board to a period ending 60 days after the end of the initial public comment period in a proceeding; establishing a "materially impacted" standard for any party requesting a hearing; requiring the Board to allow any party to present at a hearing, provided the party has given seven days advance notice; requiring the Executive Secretary to notify the grantee and affected zone participants of all parties that will be presenting at a hearing; and requiring that the applicant and its witnesses be allowed to present first and rebut last at any hearing.

*Board position*: Based on public comments, we are requiring that local public notice allow at least 15 days for public comment on an application submitted to the Board (rather than the 30 days in the proposed rule). We also have narrowed the standard for parties that may request public hearings by stating that only parties that may be materially affected may make such a request. We have not adopted other suggested revisions to this section. It is not appropriate to limit the types of situations in which the Board may invite public comment or the timeframe during which a determination may be made to hold a hearing. Given that certain Board proceedings may result in the development of an extensive record over a significant period of time, the Board must maintain the ability to invite comment or hold a hearing whenever the need

to do so presents itself. The remaining changes suggested for this section have not been adopted because they would not improve the effectiveness of processes in question and, in the case of the order of presentations at a hearing, would create the appearance of an unbalanced process.

*Section 400.53 - Official records; public access*

*Comments*: Numerous commenters proposed adding the word “confidential” immediately before the word “proprietary” in the final sentence of this section.

*Board position*: We have not made the change proposed by commenters because the term “confidential” has a specific significance as an official classification action by government agencies. The information subject to this provision would not have been classified by a government agency, but rather would be considered by an outside entity to be “business proprietary” in nature. Therefore, the continued application of the terminology from the proposed regulations, which has been in use in the prior regulations since 1991, is appropriate.

*Section 400.54 - Information*

*Comments*: Numerous commenters proposed allowing submission of business proprietary information in applications and stated that data submitted in annual reports shall generally be considered “business proprietary.”

*Board position*: We have not made these changes. The FTZ Board’s application process is inherently a public process, and includes publishing notices of applications in the *Federal Register* and inviting comments. Therefore, it is appropriate for the FTZ Board to focus the application process on submission of information that will be available for public review. With regard to data submitted in annual reports, some of those data may well be considered “business proprietary” by the zone operators/users that submit the data through their zones’ grantees. However, the FTZ Board cannot assume that all data submitted are indeed business

proprietary. Rather, the Board has been implementing a new system for submission of annual report data that specifically allows an individual operator/user to indicate whether it considers its data business proprietary, in which case only a ranged version of the data would be reported publicly.

*Section 400.61 - Revocation of authority*

*Comments*: Numerous commenters proposed adding the phrase "in whole or in part" to §400.61(b)(4) and requiring notice to zone or subzone operators. One commenter stated that §400.61(b)(3) should specify the adjudicative standard that will govern the hearing and that the grantee or operator will be able to call and cross examine witnesses.

*Board position*: We have added language pertaining to notification of any known operators to §400.61(b)(1), and added the phrase "in whole or in part" to §400.61(b)(4) to enhance clarity. We have not included additional procedural provisions or details (such as the adjudicative standard that would apply to hearings) because the need for such additional details – with their attendant increase in complexity – is unclear given that actual use of the revocation provision has been very rare. If additional procedural details become necessary, they could be implemented through a future rulemaking action.

*Section 400.62 - Fines, penalties and instructions to suspend activated status*

*Comments*: Numerous commenters stated that this section would likely have a chilling effect on the FTZ program, particularly at a time of dwindling resources of both grantees and operators. Those commenters proposed the following specific revisions: deleting the inflation-adjustment provision and related references because it is not provided for in the FTZ Act and does not act as a deterrent to violations; adding references to "administrators" and changing references of "operators" to "zone participants;" stating that the $1,000 per day maximum for fines would include any CBP fines, penalties or liquidated damages for the same violations; stating that filing

and obtaining approval of a “voluntary disclosure” would eliminate or reduce any penalty; modifying the production-related language to bring it in line with changes proposed by those commenters for other sections of the regulations; stating that a grantee would not be subject to a fine under the annual report-related provision so long as the grantee had filed a timely report identifying any operators that have not submitted complete or timely information to the grantee; stating that requests for extensions of the periods to provide responses or mitigating evidence will not be unreasonably withheld; changing the delegation of certain fine-imposition authority to the Assistant Secretary for Import Administration (from the Executive Secretary); inserting references to affected parties for actions pertaining to suspension of activated status; and stating that the Board will give due consideration for allowing transfers of affected merchandise from a site for which a determination has been made to suspend activated status.

Two commenters proposed that the Board clarify that operational activities within zones are within the sole purview of CBP, limit penalties under this section to specifically defined violations, and state normal ranges for penalties for each type of defined violation. Two commenters requested that the regulations explicitly preclude both the Board and the CBP from imposing fines on the same party resulting from the same offense. One commenter proposed that the Board: confine suspensions of activated status and processing of requests solely to the specific non-compliant operations; clarify who the responsible parties are for certain violations, to eliminate the potential for double fines for a single violation; eliminate ambiguity regarding the timeframe for operators to submit their annual reports to grantees; clarify the meaning of “conflict of interest;” for responses to notifications of violations, allow parties 30 days and two extensions of 30 days each if requested in writing; and treat “inaccurate written advice provided by a Board staff member” as binding on the government rather than as a mitigating factor.

One commenter opposed adopting the proposed section, proposing instead that the Board retain the existing penalties provision and insert a brief provision addressing fine amounts for violations involving production, annual reports and conflicts of interest. The commenter also stated that penalties should only be assessed pursuant to a transparent process. Two commenters stated that the Board should notify a zone's grantee of any penalty action initiated against an operator within the zone. One commenter stated that the regulations should clearly define circumstances that could lead to penalties. Another commenter supported this proposed section as rectifying an omission in the Board's oversight and monitoring of zone activity. That commenter proposed that the Board expand this section to include details of the judicial review process, provide more comprehensive explanation of decisions, and consider a formal, adjudicative process for dispute resolution.

One commenter expressed concern that the detailed section pertaining to fines changes the Board's focus from gatekeeper of zone access to policing agent over day-to-day zone management. Another commenter stated that this section as proposed obscures the limitations on liability expressed in §400.46. One commenter asked that the Board clarify whether a confidentiality clause in a grantee's contract with a zone participant can be relied on by that participant to prevent a grantee from disclosing to the Board a potential violation pertaining to that participant, such as the untimeliness of an operator's annual report to the grantee. One commenter stated that the Board should not accept other commenters' proposed changes that would reduce the impact of the penalty provisions.

One commenter stated that this section should be reviewed carefully to ensure conformity with 19 U.S.C. 81s. That commenter also stated that the regulations should clarify the approach to be taken when multiple parties may be subject to penalty for the same violation; specify the adjudicative standard that will govern any hearing and that the grantee or operator will be able

to call and cross examine witnesses; and state a clear limitations period on enforcement of any fine, penalty or sanction.

One commenter stated that fines should not be imposed on any party for an offense that is not the result of the party's negligence (for example, clerical error or a grantee's inability to collect information from an operator for the grantee's annual report).

*Board position*: It is appropriate for these regulations to contain detailed procedures for imposing penalties authorized by the FTZ Act. Delineating such procedures provides important clarity and predictability for all potentially affected parties. The provisions of this section target key areas for which the potential imposition of penalties is an important compliance tool.

In response to the public's comments, we have narrowed the focus of fining actions pursuant to this section to two specific types of violations: untimely submissions of annual reports and failure to afford uniform treatment under like conditions to parties using (or seeking to use) a zone. We have specifically excluded violations for production activity because such violations are already subject to fines by CBP and we want to avoid subjecting a zone participant to fines from two different agencies for a single action.

Further, the proposal to include fines pertaining to production activity created a need for the proposed separate section allowing "prior disclosure" of violations in order to encourage disclosure and rectification of any non-compliant activity. However, the effect of implementing the proposed sections would have been to require zone operators to disclose violations to two separate agencies under two distinct sets of procedures. Doubling the disclosure burden on zone operators would have tended to discourage zone use (with resulting negative impacts on U.S. competitiveness) without contributing to improved compliance.

Based on the narrowed focus on §400.62, we have eliminated the proposed prior disclosure provision from the regulations. As a consequence, we have not addressed detailed comments

pertaining to the proposed section allowing for prior disclosure (§400.63). Although a number of commenters supported the inclusion of this type of provision, the provision was relevant to violations involving production activity, which are no longer targeted in §400.62. The remaining types of violations targeted in §400.62 are not of a nature for which prior disclosure would be relevant or appropriate.

Because the Board is not adopting the prior disclosure provision, we do not need to address comments pertaining to the interaction of the provisions of §400.62 with the prior disclosure provision. Similarly, given that production activity is no longer targeted by §400.62, we do not need to consider changes to the language of this section that would flow from changes related to production in other sections of the regulations. Based on the narrower focus of this revised section, we have also eliminated "inaccurate written advice provided by a Board staff member" as a mitigating factor, because it is irrelevant to the types of violations that are now targeted by this section.

The revisions to this section should help to ensure that a fine is only imposed on the party(ies) with direct responsibility for the violation that results in the fine. Based on the comments, we have added language to this section indicating that a grantee will not be subject to a fine for an untimely annual report if the grantee has filed a timely report identifying any operator that has not submitted complete or timely information to the grantee. The range of changes we have made to this section should also provide clarity and be in harmony with the limitations on grantee liability explained in §400.46.

We have not deleted the inflation-adjustment provision and related references because Congress mandated the adjustment of these types of penalties in the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410), as amended by the Debt Collection

Improvement Act of 1996 (Pub. L. 104-134). Based on public comments, we have added language to notify the zone's grantee, in addition to the parties responsible for a violation.

We have added certain references to an "administrator" as an example of a "person undertaking one or more functions on behalf of the grantee" in concert with changes made to §400.43. We have also indicated that parties at a hearing may call and cross examine witnesses, and that requests for extensions of the periods to provide responses or mitigating evidence will not be unreasonably withheld. We have not changed certain references from "zone operators" to "zone participants" because, apart from grantees and persons undertaking functions on behalf of grantees (such as administrators), zone operators are the only other category of party relevant to the specific types of violations now targeted by this section. We also have not changed the delegation of certain fine-imposition authority from the Executive Secretary to the Assistant Secretary for Import Administration because the authority in question is for relatively minor offenses.

In light of the narrowed focus of the fining provision, we have broadened the potential reach of suspension of activated status to encompass any "repeated and willful failure to comply with a requirement of the FTZ Act or the Board's regulations." Given the "repeated and willful" standard, we do not anticipate frequent use of this provision, but it will be available as an enforcement mechanism, if needed. We have not added the proposed additional references to "affected parties" for actions pertaining to suspension of activated status. We have instead added references to the grantee of a zone. A zone's grantee would be in a position to notify affected parties. The FTZ Board would not necessarily have information regarding the range of parties that might be affected by suspension of activated status.

We have added that the Board will give due consideration to and make allowance for the transfer of merchandise prior to the suspension of activated status, because such consideration

is appropriate. We have not included additional procedural provisions or details (such as the adjudicative standard that would apply to hearings) because the proposed provisions already provide a significant increase in the level of procedural detail pertaining to penalty actions. The Board should develop a practice under the procedural details provided in these regulations before deciding whether to adopt additional provisions or details.

We have added language clarifying that suspensions of activated status and processing of requests will be targeted to the specific non-compliant operations. We have also clarified who will be the responsible parties for specific violations, so that there should be no potential for a violator's being subject to double fines for a single violation.

In response to comments, we have modified §400.51 to specify a timeframe for operators' submission of annual reports to grantees. That change should clarify various parties' potential liabilities for untimely reports. We have also modified this section and §400.51 in response to comments to require that grantees disclose to the FTZ Board whether each of the grantee's operators has submitted the information required for the Board's report to Congress. Such required disclosure could not be avoided by an agreement between an operator and a grantee.

In light of modifications made to §400.43, we have made harmonizing changes to §400.62(c). Those changes, in combination with elimination of use of the term "agent," should help to clarify the specific types of parties that would be subject to §400.62(c).

The provisions of this section would apply equally to any party with responsibility for a violation. Therefore, it is possible that multiple parties could be penalized for the same violation. However, given that the provisions of this section are now focused narrowly on failures to submit annual reports on time and on violations of the uniform treatment requirements, the number of parties potentially affected by this section is dramatically reduced relative to the proposed rule. Further, an untimely annual report is likely to be the fault of a single party. Therefore, the sole category

of violation for which multiple parties are potentially likely to share responsibility is the uniform treatment requirements. Given the importance of enforcing compliance with the statutory uniform treatment requirement, it would be appropriate to fine any parties that share responsibility for such a violation. Finally, we have not adopted a limitations period for fines or penalties. Given that this section is new, and the potential variation in circumstances for which fines or penalties prove to be appropriate, it is not feasible at this time to provide a single limitations period for enforcement. However, the Board's focus in applying this section will be to encourage compliance rather than to penalize past actions for which corrective action has already been taken.

*Section 400.63 - Appeals to the Board of decisions of the Assistant Secretary for Import Administration and the Executive Secretary*

*Comments*: Numerous commenters proposed providing an opportunity for input by the affected grantee and zone participant, issuing a report regarding the Board's decision, and identifying the court to which judicial appeal could be made.

*Board position*: The suggested procedural changes in this section fail to take into account the nature of the section. Additional opportunity for input by an affected grantee or zone participant is unnecessary because this provision is limited to appeals to the Board by such parties, who will be able to include all desired input in the appeal documents they present for the Board's consideration. For similar reasons, no additional procedures are needed stemming from the Board's decision regarding the appeal. The regulations already contain substantial procedural requirements pertaining to potential actions by, or on behalf of, the Board. Finally, we have not included language identifying the court to which judicial appeal could be made because the Board does not have the authority to confer, limit, or otherwise delineate the jurisdiction of Federal courts.

*Other comments*

*Comments*: Numerous commenters suggested edits to individual sections that were minor or essentially non-substantive.

*Board position*: We have adopted suggested edits where they would improve the clarity or effectiveness of the provisions in question. Given their minor or essentially non-substantive nature, we have not addressed such edits individually in this summary.

*Comments*: Multiple commenters expressed concern about complexity or additional burden that they perceived the proposed regulations would create.

*Board position*: Concerns about complexity and additional burden have been considered in the development of these regulations and have resulted in our making changes, including significantly simplifying the process and requirements for notifications to request production authority. Other changes that reduce complexity or burden include eliminating potential FTZ Board penalties pertaining to production activity, and eliminating certain provisions and substantially modifying others pertaining to uniform treatment (§400.43). Although these regulations contain additional detail on certain topics, that detail provides guidance and clarity for grantees and zone participants in a manner that should ultimately facilitate those parties' participation in the FTZ program.

*Comments*: Numerous commenters stated that the two sentences from the Preamble to the prior regulations regarding the public policy objective of the FTZ program should be included in the Preamble of any future Board regulations. One commenter proposed that one of those sentences be included within §400.1 of the regulations.

*Board position*: The Preamble of the proposed regulations already contained the primary sentence that is the focus of the comments in question. We have retained that sentence in the Preamble for these regulations. We have not included in the Preamble the second sentence that

certain commenters proposed because it could be misread as implying we would apply different evaluative or procedural standards than the ones contained in these regulations.

*Comment*: Numerous commenters proposed adding a new section with language designating certain offices of the U.S. Commercial Service as representatives of the Board for export promotion activities and stating that the Board and its representatives will act in a manner that prioritizes government export promotion objectives.

*Board position*: We have not adopted this proposal. The proposed section deals with matters beyond the statutory authority of the Board.

*Comment*: Numerous commenters proposed adding a new section stating that the Board will mandate the development of updated, written procedures by agencies that require reporting pertaining to zone activity.

*Board position*: We have not added the proposed new section. The proposed section could affect the policies and procedures of a range of government agencies that fall outside the scope of the FTZ Act, and the Board cannot require other agencies or bureaus to act.

*Comment*: One commenter proposed redefining what constitutes a foreign-trade zone, as well as zone, general-purpose zone and subzone, to focus on conferring a status rather than designating a geographic location.

*Board position*: We have not adopted the type of revisions proposed by this commenter because the FTZ Act is focused on the designation of geographic locations as foreign-trade zone sites, and because the commenter's submission does not indicate a clear advantage to an approach based on status. However, as noted in our response to comments on §400.11, we intend to address through a subsequent rule simplifying the parallel site-designation frameworks that currently exist. The intended effect of this change is to enhance the ability of the FTZ program to improve the competitiveness of U.S. facilities.

*Comments*: One commenter stated that grantees may be unwilling to jeopardize the "permanent" status of current sites through a transition to the ASF, which has standard "sunset" periods that can be too short. The commenter proposed grandfathering existing permanent sites into the ASF. That commenter also proposed changing the process for designating usage-driven sites to an automatic designation once CBP had approved activation for a location, with the Board simply notified of that designation.

*Board position*: As noted in responses to certain other comments, the Board intends to address through a subsequent rule simplifying the parallel site-designation frameworks that currently exist. In that process, the Board will be able to evaluate provisions affecting existing zone sites. We have not established an automatic mechanism for designating usage-driven sites based on CBP approval for activation. That change would effectively shift authority to designate sites from the Board and its staff to CBP officials at various ports nationwide, with a range of potential policy implications for both the Board and CBP. Given the quick, simple process already available for designating usage-driven sites, it is not clear that a need exists for the shift in authority proposed by the commenter.

*Comment*: One commenter expressed concern that the proposed regulations concentrate more power in the hands of the Executive Secretary and Board staff to intrude on zone operations and policy decisions made by grantees and users.

*Board position*: These regulations reflect the same fundamental assignment of responsibilities as the prior regulations. They include sections providing new specificity regarding compliance with the FTZ Act's requirements that a zone operate as a public utility and afford uniform treatment to zone participants. Inherent in the functioning of some of the specific provisions is a greater role for the Board's Executive Secretary and the Board's staff. In practice, the adopted provisions do not constitute "intrusion" on grantees or users but, rather, reflect balanced

measures designed to ensure that zones comply with the requirements established by Congress through the FTZ Act.

*Comment*: One commenter requested a process by which the Board would obtain feedback before publication of further notice pertaining to this rulemaking.

*Board position*: The Administrative Procedure Act (APA), 5 U.S.C. 553, provides the procedural basis for this action. Accordingly, we provided interested persons with notice of the proposed rule and almost 150 days to participate in the rulemaking by commenting on it during the comment period. Further, the public comment period exceeded the requirements of the APA. In addition, during the public comment period, the Board staff held detailed public seminars at eight regional hubs across the United States, as well as in Washington, DC, at which numerous parties received extensive explanations of the intent of proposed provisions and answers to their questions. The Board staff also made such information available interactively via the internet. In addition to the lengthy comment period on the proposed regulations, the Board allowed parties a subsequent 32-day period to submit comments responding to other parties' comments that had been submitted during the initial comment period. More than 100 parties submitted comments on the proposed regulations.

These regulations include key changes that provide dramatically simplified and expedited procedures designed to boost the competiveness of U.S. manufacturers and exporters. It is important for those changes to be implemented as soon as possible. Given the extensive comment process to date, it is unclear that an additional notice and comment/consultative process would yield benefits that would offset losses due to delayed implementation of the key changes made through these regulations. Therefore, we are not seeking additional comment/consultation prior to publishing these regulations.

*Comment*: One commenter stated that the application and approval process is susceptible to undue influence that can result in unfair advantages to certain parties, and that the Board must limit the influence of certain parties to ensure that zone status results in positive economic effects.

*Board position*: These regulations contain extensive provisions aimed at establishing neutral, balanced procedures for evaluating applications received by the FTZ Board. The commenter presented no evidence of unfair advantages for any parties resulting from the Board's processes. In the absence of such evidence, we have found that the provisions of these regulations are sufficient to ensure that the Board's processes are fair and equitable.

*Comments*: One commenter stated that Board decisions should be fair and reasonable, that a need exists for uniform treatment from the FTZ Board given what the commenter characterized as frequent changes in the ASF structure and different application of territorial standards in different regions, and that the primary intended constituency of the proposed regulations appears to be grantees rather than the companies that use the FTZ program.

*Board position*: Decisions of the Board and its staff consistently reflect high standards of fairness and reasonableness. The commenter has provided no examples to support its claims but, as a general matter, a party's disagreement with a Board decision does not imply that the decision was unfair or unreasonable. Similarly, a party may perceive a Board decision on an ASF-related matter – such as pertaining to the service area for a zone – as inconsistent with other Board decisions. However, a party to a particular Board case generally is unfamiliar with the details of other cases decided by the Board. In that context, what may appear to one party as inconsistent or non-uniform treatment is more likely to be consistent application of policy to circumstances that are superficially similar but that actually differ substantively. Given that the Board has only adopted a single set of modifications (November 2010) since its adoption of the

ASF in 2008, a claim of frequent changes in the ASF structure would also appear to reflect a lack of adequate familiarity with the Board's ASF practice. Finally, the statement that the primary intended constituency of the proposed regulations seems to be grantees would appear not to reflect a substantive assessment. The proposed regulations contain certain provisions that focus on grantees and on enhancing their abilities to perform their functions because 1) the FTZ Act provides for the Board to grant authority to zone grantees, not to other zone participants, and 2) the grantee, as a local agency or organization engaged in promoting trade and economic development, is in the best position to enable firms in the region it serves to reap the competitiveness benefits available through the FTZ program.

*Comment*: One commenter proposed allowing companies engaged in FTZ production to temporarily remove merchandise under the FTZ operator's bond for special processing in the United States that cannot be accommodated in the FTZ.

*Board position*: The type of procedure proposed by the commenter is properly in the realm of CBP. CBP's regulations govern FTZ operations and contain detailed provisions concerning the movement of merchandise into and out of FTZs.

Changes from Proposed Rule

In addition to the substantive changes mentioned above that we have made in response to comments, we have made various grammatical and similar changes to the rule from its proposed form, to increase clarity and accuracy and reduce potential public confusion.

Executive Orders 12866 and 13563

This rule has been determined to be significant for purposes of Executive Order 12866. Consistent with Executive Order 13563, we held public seminars across the country to help maximize public participation in the rulemaking process (as cited above in response to a comment), and we adopted approaches designed to impose the least burden on society while

attaining the regulatory objectives (see *e.g.*, the responses to comments on §§400.14, 400.26, 400.42, 400.43 and 400.62).

This rule is also consistent with section 5 of EO 12866, which instructs agencies to "periodically review their significant regulations to determine whether any such regulations should be modified or eliminated . . . to make the agency's regulatory program more effective," and section 6 of EO 13563, which instructs agencies to "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." This final rule replaces FTZ regulations that have not changed since 1991, and reflects the FTZ Board's view, following a review of those regulations, that modifying the 1991 rules will help to ensure that FTZs remain competitive, efficient, and flexible in the modern, 21st Century global economy.

Regulatory Flexibility Act

At the proposed rule stage of this rulemaking, the Acting Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. (5 U.S.C 605(b)). The factual basis for the certification was published in the proposed regulations and is not repeated here. We did not receive any public comments on the certification. As a result, a regulatory flexibility analysis was not required, and none was prepared.

Executive Order 13132

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 13132.

Paperwork Reduction Act

This rule contains information collection activities subject to the Paperwork Reduction Act. The overall burden on the public is reduced significantly as a result of the provisions adopted in this rule.

There is no impact on the collection that falls under the Office of Management and Budget (OMB) Control No. 0625-0109 (Annual Report to Foreign-Trade Zones Board). This rule amends the collection under OMB Control No. 0625-0139 (Application to Foreign-Trade Zones Board). Under this rule, the application requirements associated with the latter collection for zone applicants, grantees, operators, and users are significantly simplified, and there is a large overall reduction of the burden on those parties. The Board will be seeking OMB approval of these changes, and will notify the public when these amendments have been approved.

After publication of the proposed rule, the FTZ Board renewed its OMB information-collection authority and reduced the overall burden estimate for applications from 6,651 to 4,969 hours based on recent simplifications to the Board's practice. The changes in this rule will further reduce burden by shifting future production (manufacturing) applications to a simple notification as an initial stage. A more detailed application will only need to be submitted if review of the notification results in a determination that the additional application step is necessary. We estimate that the average annual number of notifications will be 33 (an increase from 25 manufacturing applications under the prior regulations), with 5 of those notifications requiring the additional application stage. Shifting applications for production authority to the notification process (with few applications needed as a subsequent step) is expected to reduce the total annual burden associated with requesting production authority from 850 to 351.5 hours (a reduction of 498.5 hours). As a result of this significantly reduced burden, the FTZ program should be much more accessible to all companies involved in production activity.

In addition to changes pertaining directly to production activity, the rule also specifically adopts the alternative site framework (ASF) authorized by the FTZ Board in December 2008. The ASF procedures reduce the time and complexity involved in designating FTZ sites for many companies. With increased use of the ASF by zones, there is expected to be a decline in the number of expansion applications in favor of a significant number of much simpler minor boundary modifications. The annual number of expansion applications over time should decline by half (from 20 to 10) which, combined with some simplified requirements in this rule, will reduce the burden from 1,980 to 990 hours. We project an annual average of 120 minor boundary modifications (simple “administrative” cases that can be approved by the Board’s staff), with an annual burden of 420 hours.

This rule includes also radically simplifies application requirements for subzone designation so that the average annual burden for the estimated 15 subzone applications should fall from 1,695 to 67.5 hours. We note that, unlike the prior rule, this rule entirely separates the procedures for production authority and subzone designation. As a result, some applicants which only needed to meet the subzone application requirements under the prior rule will need to meet both the subzone and production application requirements under this rule. Nonetheless, the combined application burden for subzone and production (manufacturing) notifications/applications should fall from 2,545 hours under the prior rule to 419 hours.

This rule also allows parties to apply pursuant to §400.43(f) for a waiver from the effect of §400.43(d)), which bars parties that provide products/services to zone users from performing key functions associated with the zone-grantee role. We estimate that the average annual number of applications for waivers will be 25, with an average burden of one hour per application, for a total of 25 burden hours annually associated with the waiver provision.

Finally, the burden-hours estimate for applications for new zones is unaffected by this rule, with three applications projected to result in 444 burden hours annually. The total burden of the various applications subject to this rule is 2,298 hours (the sum of 444 for new zones, 990 for expansions, 67.5 for subzones, 351.5 for production notifications and applications, 420 for minor boundary modifications, and 25 for waivers pursuant to §400.43(f)). In sum, there is a net reduction of 2,671 application-related burden hours annually (from 4,969 to 2,298 hours) through the provisions adopted in this rule.

List of Subjects in 15 CFR Part 400

Administrative practice and procedure, Confidential business information, Customs duties and inspection, Foreign-trade zones, Harbors, Imports, Reporting and recordkeeping requirements.

By order of the Board, Washington, DC, this ____16th__ day of __February_____, 2012.

_____
Paul Piquado
Assistant Secretary of Commerce
for Import Administration
Alternate Chairman
Foreign-Trade Zones Board

For the reasons set forth in the preamble, 15 CFR part 400 is revised to read as follows:

PART 400 -- REGULATIONS OF THE FOREIGN-TRADE ZONES BOARD

Subpart A--Scope, Definitions and Authority



Subpart B--Ability to Establish Zone; Limitations and Restrictions on Authority Granted

**Authority:** Foreign-Trade Zones Act of June 18, 1934, as amended (Pub. L. 73-397, 48 Stat. 998-1003 (19 U.S.C. 81a-81u)).

Subpart A--Scope, Definitions and Authority

**§400.1 Scope.**

(a) This part sets forth the regulations, including the rules of practice and procedure, of the Foreign-Trade Zones Board with regard to foreign-trade zones (FTZs or zones) in the United States pursuant to the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a-81u). It includes the substantive and procedural rules for the authorization of zones and for the Board's regulation of zone activity. The purpose of zones as stated in the Act is to "expedite and encourage foreign commerce, and other purposes." The regulations provide the legal framework for accomplishing this purpose in the context of evolving U.S. economic and trade policy, and economic factors relating to international competition.

(b) Part 146 of the customs regulations (19 CFR part 146) governs zone operations, including the admission of merchandise into zones, zone activity involving such merchandise, and the transfer of merchandise from zones.

(c) To the extent zones are "activated" under U.S. Customs and Border Protection (CBP) procedures in 19 CFR part 146, and only for the purposes specified in the Act (19 U.S.C. 81c), zones are treated for purposes of the tariff laws and customs entry procedures as being outside the customs territory of the United States. Under zone procedures, foreign and domestic

merchandise may be admitted into zones for operations such as storage, exhibition, assembly, manufacture and processing, without being subject to formal customs entry procedures and payment of duties, unless and until the foreign merchandise enters customs territory for domestic consumption. At that time, the importer ordinarily has a choice of paying duties either at the rate applicable to the foreign material in its condition as admitted into a zone, or if used in production activity, to the emerging product. Quota restrictions do not normally apply to foreign goods in zones. The Board can deny or limit the use of zone procedures in specific cases on public interest grounds. Merchandise moved into zones for export (zone-restricted status) may be considered exported for purposes such as federal excise tax rebates and customs drawback. Foreign merchandise (tangible personal property) admitted to a zone and domestic merchandise held in a zone for exportation are exempt from certain state and local *ad valorem* taxes (19 U.S.C. 81o(e)). Articles admitted into zones for purposes not specified in the Act shall be subject to the tariff laws and regular entry procedures, including the payment of applicable duties, taxes, and fees.

**§400.2 Definitions.**

(a) Act means the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a-81u).

(b) Activation limit is the size of the physical area of a particular zone or subzone authorized by the Board to be simultaneously in activated status with CBP pursuant to 19 CFR 146.6. The activation limit for a particular zone/subzone is a figure explicitly specified by the Board in authorizing the zone (commonly 2,000 acres) or subzone or, in the absence of a specified figure, the total of the sizes of the approved sites of the zone/subzone.

(c) Alternative site framework (ASF) is an optional approach to designation and management of zone sites allowing greater flexibility and responsiveness to serve single-operator/user locations. The ASF was adopted by the Board as a matter of practice in

December 2008 (74 FR 1170, January 12, 2009; correction 74 FR 3987, January 22, 2009) and modified by the Board in November 2010 (75 FR 71069, November 22, 2010).

(d) Board means the Foreign-Trade Zones Board, which consists of the Secretary of the Department of Commerce (chairman) and the Secretary of the Treasury, or their designated alternates.

(e) Board Order is a type of document that indicates a final decision of the Board. Board Orders are generally published in the *Federal Register* after issuance.

(f) CBP means U.S. Customs and Border Protection.

(g) Executive Secretary is the Executive Secretary of the Foreign-Trade Zones Board.

(h) Foreign-trade zone (FTZ or zone) includes one or more restricted-access sites, including subzones, in or adjacent (as defined by §400.11(b)(2)) to a CBP port of entry, operated as a public utility (within the meaning of §400.42) under the sponsorship of a zone grantee authorized by the Board, with zone operations under the supervision of CBP.

(i) Grant of authority is a document issued by the Board that authorizes a zone grantee to establish, operate and maintain a zone, subject to limitations and conditions specified in this part and in 19 CFR part 146. The authority to establish a zone includes the responsibility to manage it.

(j) Magnet site means a site intended to serve or attract multiple operators or users under the ASF.

(k) Modification: A major modification is a proposed change to a zone that requires action by the FTZ Board; a minor modification is a proposed change to a zone that may be authorized by the Executive Secretary.

(l) Person includes any individual, corporation, or entity.

(m) Port of entry means a port of entry in the United States, as defined by part 101 of the customs regulations (19 CFR part 101), or a user fee airport authorized under 19 U.S.C. 58b and listed in part 122 of the customs regulations (19 CFR part 122).

(n) Private corporation means any corporation, other than a public corporation, which is organized for the purpose of establishing, operating and maintaining a zone and which is chartered for this purpose under a law of the state in which the zone is located.

(o) Production, as used in this part, means activity involving the substantial transformation of a foreign article resulting in a new and different article having a different name, character, and use, or activity involving a change in the condition of the article which results in a change in the customs classification of the article or in its eligibility for entry for consumption.

(p) Public corporation means a state, a political subdivision (including a municipality) or public agency thereof, or a corporate municipal instrumentality of one or more states.

(q) Service area means the jurisdiction(s) within which a grantee proposes to be able to designate sites via minor boundary modifications under the ASF.

(r) State includes any state of the United States, the District of Columbia, and Puerto Rico.

(s) Subzone means a site (or group of sites) established for a specific use.

(t) Usage-driven site means a site tied to a single operator or user under the ASF.

(u) Zone means a foreign-trade zone established under the provisions of the Act and these regulations. Where used in this part, the term also includes subzones, unless the context indicates otherwise.

(v) Zone grantee is the corporate recipient of a grant of authority for a zone. Where used in this part, the term "grantee" means "zone grantee" unless otherwise indicated.

(w) Zone operator is a person that operates within a zone or subzone under the terms of an agreement with the zone grantee (or third party on behalf of the grantee), with the concurrence of CBP.

(x) Zone participant is a current or prospective zone operator, zone user, or property owner.

(y) Zone plan includes all the zone sites that a single grantee is authorized to establish.

(z) Zone site (site) means a physical location of a zone or subzone. A site is composed of one or more generally contiguous parcels of land organized and functioning as an integrated unit, such as all or part of an industrial park or airport facility.

(aa) Zone user is a party using a zone under agreement with a zone operator.

**§400.3 Authority of the Board.**

(a) In general. In accordance with the Act and procedures of this part, the Board has authority to:

(1) Prescribe rules and regulations concerning zones;

(2) Issue grants of authority for zones, and approve subzones and modifications to the original zone;

(3) Authorize production activity in zones and subzones as described in this part;

(4) Make determinations on matters requiring Board decisions under this part;

(5) Decide appeals in regard to certain decisions of the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary;

(6) Inspect the premises, operations and accounts of zone grantees, operators and users (and persons undertaking zone-related functions on behalf of grantees, where applicable);

(7) Require zone grantees and operators to report on zone operations;

(8) Report annually to the Congress on zone operations;

(9) Restrict or prohibit zone operations;

(10) Terminate reviews of applications under certain circumstances pursuant to §400.36(g);

(11) Authorize under certain circumstances the entry of "zone-restricted merchandise" (19 CFR 146.44) into the customs territory pursuant to §400.48;

(12) Impose fines for violations of the Act and this part;

(13) Instruct CBP to suspend activated status pursuant to §400.62(h);

(14) Revoke grants of authority for cause;

(15) Determine, as appropriate, whether zone activity is or would be in the public interest or detrimental to the public interest, health or safety; and

(16) Issue and discontinue waivers pursuant to §400.43(f).

(b) Authority of the Chairman of the Board. The Chairman of the Board (Secretary of the Department of Commerce) has the authority to:

(1) Appoint the Executive Secretary of the Board;

(2) Call meetings of the Board, with reasonable notice given to each member; and

(3) Submit to the Congress the Board's annual report as prepared by the Executive Secretary.

(c) Alternates. Each member of the Board shall designate an alternate with authority to act in an official capacity for that member.

(d) Authority of the Assistant Secretary for Import Administration (Alternate Chairman). The Commerce Department’s Assistant Secretary for Import Administration has the authority to:

(1) Terminate reviews of applications under certain circumstances pursuant to §400.36(g);

(2) Mitigate and assess fines pursuant to §§400.62(e) and (f) and instruct CBP to suspend activated status pursuant to §400.62(h); and

(3) Restrict the use of zone procedures under certain circumstances pursuant to §400.49(c).

(e) Determinations of the Board. Determinations of the Board shall be by the unanimous vote of the members (or alternate members) of the Board, which shall be recorded.

**§400.4 Authority and responsibilities of the Executive Secretary.**

The Executive Secretary has the following responsibilities and authority:

(a) Represent the Board in administrative, regulatory, operational, and public affairs matters;

(b) Serve as director of the Commerce Department's Foreign-Trade Zones staff;

(c) Execute and implement orders of the Board;

(d) Arrange meetings and direct circulation of action documents for the Board;

(e) Arrange with other sections of the Department of Commerce and other governmental agencies for studies and comments on zone issues and proposals;

(f) Maintain custody of the seal, records, files and correspondence of the Board, with disposition subject to the regulations of the Department of Commerce;

(g) Issue notices on zone matters for publication in the *Federal Register*;

(h) Direct processing of applications and reviews, including designation of examiners and scheduling of hearings, under various sections of this part;

(i) Make determinations on questions pertaining to grantees' applications for subzones as provided in §400.12(d);

(j) Make recommendations in cases involving questions as to whether zone activity should be prohibited or restricted for public interest reasons, including proceedings and reviews under §400.5;

(k) Determine questions of scope under §400.14(d);

(l) Determine whether additional information is needed for evaluation of applications and other requests for decisions under this part, as provided for in various sections of this part, including §§400.21-400.25;

(m) Issue instructions, guidelines, forms and related documents specifying time, place, manner and formats for applications and notifications in various sections of this part, including §§400.21(b) and 400.43(f);

(n) Determine whether proposed modifications are major modifications or minor modifications under §400.24(a)(2);

(o) Determine whether applications meet pre-docketing requirements under §400.31(b);

(p) Terminate reviews of applications under certain circumstances pursuant to §400.36(g);

(q) Authorize minor modifications to zones under §400.38, commencement of production activity under §400.37(d) and subzone designation under §400.36(f);

(r) Review notifications for production authority under §400.37;

(s) Direct monitoring and reviews of zone operations and activity under §400.49;

(t) Review rate schedules and determine their sufficiency under §400.44(c);

(u) Assess potential issues and make recommendations pertaining to uniform treatment under §400.43 and review and decide complaint cases under §400.45;

(v) Make certain determinations and authorizations pertaining to retail trade under §400.47;

(w) Authorize under certain circumstances the entry of "zone-restricted merchandise" into the customs territory under §400.48;

(x) Determine the format and deadlines for the annual reports of zone grantees to the Board and direct preparation of an annual report from the Board to Congress under §400.51(c);

(y) Make recommendations and certain determinations regarding violations and fines, and undertake certain procedures related to the suspension of activated status, as provided in §400.62; and

(z) Designate an acting Executive Secretary.

**§400.5 Authority to restrict or prohibit certain zone operations.**

The Board may conduct a proceeding, or the Executive Secretary a review, to consider a restriction or prohibition on zone activity. Such proceeding or review may be either self-initiated or in response to a complaint made to the Board by a person directly affected by the activity in question and showing good cause. After a proceeding or review, the Board may restrict or prohibit any admission of merchandise or process of treatment in an activated FTZ site when it determines that such activity is detrimental to the public interest, health or safety.

**§400.6 Board headquarters.**

The headquarters of the Board are located within the U.S. Department of Commerce (Herbert C. Hoover Building), 1401 Constitution Avenue, NW, Washington, DC 20230, within the office of the Foreign-Trade Zones staff.

**§400.7 CBP officials as Board representatives.**

CBP officials with oversight responsibilities for a port of entry represent the Board with regard to the zones adjacent to the port of entry in question and are responsible for enforcement, including physical security and access requirements, as provided in 19 CFR part 146.

Subpart B--Ability to Establish Zone; Limitations and Restrictions on Authority Granted

**§400.11 Number and location of zones and subzones.**

(a) Number of zones-port of entry entitlement.

(1) Provided that the other requirements of this part are met:

(i) Each port of entry is entitled to at least one zone;

(ii) If a port of entry is located in more than one state, each of the states in which the port of entry is located is entitled to a zone; and

(iii) If a port of entry is defined to include more than one city separated by a navigable waterway, each of the cities is entitled to a zone.

(2) Applications pertaining to zones in addition to those approved under the entitlement provision of paragraph (a)(1) of this section may be approved by the Board if it determines that the existing zone(s) will not adequately serve the convenience of commerce.

(b) Location of zones and subzones-port of entry adjacency requirements.

(1) The Board may approve "zones in or adjacent to ports of entry" (19 U.S.C. 81b).

(2) The "adjacency" requirement is satisfied if:

(i) A general-purpose zone site is located within 60 statute miles or 90 minutes' driving time (as determined or concurred upon by CBP) from the outer limits of a port of entry boundary as defined in 19 CFR 101.3.

(ii) A subzone meets the following requirements relating to CBP supervision:

(A) Proper CBP oversight can be accomplished with physical and electronic means;

(B) All electronically produced records are maintained in a format compatible with the requirements of CBP for the duration of the record period; and

(C) The operator agrees to present merchandise for examination at a CBP site selected by CBP when requested, and further agrees to present all necessary documents directly to the relevant CBP oversight office.

**§400.12 Eligible applicants.**

(a) In general. Subject to the other provisions of this section, public or private corporations may apply for grants of authority to establish zones. The Board shall give preference to public corporations.

(b) Public corporations and private non-profit corporations. The eligibility of public corporations and private non-profit corporations to apply for a grant of authority shall be supported by enabling legislation of the legislature of the state in which the zone is to be located, indicating that the corporation, individually or as part of a class, is authorized to so

apply. Any application must not be inconsistent with the charter or organizational papers of the applying entity.

(c) Private for-profit corporations. The eligibility of private for-profit corporations to apply for a grant of authority shall be supported by a special act of the state legislature naming the applicant corporation and by evidence indicating that the corporation is chartered for the purpose of establishing a zone.

(d) Applicants for subzones (except pursuant to §400.24(c)) - (1) Eligibility. The following entities are eligible to apply establish a subzone:

(i) The grantee of the closest zone in the same state;

(ii) The grantee of another zone in the same state, which is a public corporation (or a non-public corporation if no such other public corporation exists), if the Board, or the Executive Secretary, finds that such sponsorship better serves the public interest; or

(iii) A state agency specifically authorized to submit such an application by an act of the state legislature.

(2) Notification of closest grantee. If an application is submitted under paragraph (d)(1)(ii) or (iii) of this section, the Executive Secretary shall:

(i) Notify, in writing, the grantee specified in paragraph (d)(1)(i) of this section, which may, within 30 days, object to such sponsorship, in writing, with supporting information as to why the public interest would be better served by its acting as sponsor;

(ii) Review such objections prior to docketing the application to determine whether the proposed sponsorship is in the public interest, taking into account:

(A) The objecting zone's structure and operation;

(B) The views of state and local public agencies; and

(C) The views of the proposed subzone operator;

(iii) Notify the applicant and objecting zone in writing of the Executive Secretary's determination;

(iv) If the Executive Secretary determines that the proposed sponsorship is in the public interest, docket the application (see §400.63 regarding appeals of decisions of the Executive Secretary).

**§400.13 General conditions, prohibitions and restrictions applicable to authorized zones.**

(a) In general. Grants of authority issued by the Board for the establishment of zones and any authority subsequently approved for such zones, including those already issued, are subject to the Act and this part and the following general conditions or limitations:

(1) Prior to activation of a zone, the zone grantee or operator shall obtain all necessary permits from federal, state and local authorities, and except as otherwise specified in the Act or this part, shall comply with the requirements of those authorities.

(2) A grant of authority approved under this part includes authority for the grantee to permit the erection of buildings necessary to carry out the approved zone (subject to concurrence of CBP for an activated area of a zone).

(3) Approvals from the grantee (or other party acting on behalf of the grantee, where applicable) and CBP, pursuant to 19 CFR part 146, are required prior to the activation of any portion of an approved zone.

(4) Authority for a zone or a subzone shall lapse unless the zone (in case of subzones, the subzone facility) is activated, pursuant to 19 CFR part 146, and in operation not later than five years from the authorization of the zone or subzone, subject to the provisions of Board Order 849 (61 FR 53305, October 11, 1996).

(5) Zone grantees, operators, and users (and persons undertaking zone-related functions on behalf of grantees, where applicable) shall permit federal government officials acting in an

official capacity to have access to the zone and records during normal business hours and under other reasonable circumstances.

(6) Activity involving production is subject to the specific provisions in §400.14.

(7) A grant of authority may not be sold, conveyed, transferred, set over, or assigned (FTZ Act, section 17; 19 U.S.C. 81q).

(8) Private ownership of zone land and facilities is permitted, provided the zone grantee retains the control necessary to implement the approved zone. Such permission shall not constitute a vested right to zone designation, nor interfere with the Board's regulation of the grantee or the permittee, nor interfere with or complicate the revocation of the grant by the Board. Should title to land or facilities be transferred after a grant of authority is issued, the zone grantee must retain, by agreement with the new owner, a level of control which allows the grantee to carry out its responsibilities as grantee. The sale of zone-designated land/facility for more than its fair market value without zone designation could, depending on the circumstances, be subject to the prohibitions set forth in section 17 of the Act (19 U.S.C. 81q).

(b) Board authority to restrict or prohibit activity. Pursuant to section 15(c) of the Act (19 U.S.C. 81o(c)), the Board has authority to "order the exclusion from [a] zone of any goods or process of treatment that in its judgment is detrimental to the public interest, health, or safety." In approvals of proposed production authority pursuant to §400.14(a), the Board may adopt restrictions to protect the public interest, health, or safety. When evaluating production activity, either as proposed in an application or as part of a review of an operation, the Board shall determine whether the activity is in the public interest by reviewing it in relation to the evaluation criteria contained in §400.27.

(c) Additional conditions, prohibitions and restrictions. Other conditions/requirements, prohibitions and restrictions under Federal, State or local law may apply to authorized zones and subzones.

**§400.14 Production – requirement for prior authorization; restrictions.**

(a) In general. Production activity in zones shall not be conducted without prior authorization from the Board. To obtain authorization, the notification process provided for in §§400.22 and 400.37 shall be used. If Board review of a notification under §400.37 results in a determination that further review is warranted for all or part of the notified activity, the application process pursuant to §§400.23, 400.31-400.32, 400.34 and 400.36 shall apply to the activity.

(b) Scope of authority. Production activity that may be conducted in a particular zone operation is limited to the specific foreign-status materials and components and specific finished products described in notifications and applications that have been authorized pursuant to paragraph (a) of this section, including any applicable prohibitions or restrictions. A determination may be requested pursuant to paragraph (d) of this section as to whether particular activity falls within the scope of authorized activity. Unauthorized activity could be subject to penalties pursuant to the customs regulations on foreign-trade zones (19 CFR part 146).

(c) Information about authorized production activity. The Board shall make available via its website information regarding the materials, components, and finished products associated with individual production operations authorized under these and previous regulations, as derived from applications and notifications submitted to the Board.

(d) Scope determinations. Determinations may be made by the Executive Secretary as to whether changes in activity are within the scope of the production activity already authorized under this part. When warranted, the procedures of §§400.32 and 400.34 shall be followed.

(e) Restrictions on items subject to antidumping and countervailing duty actions.

(1) Board policy. Zone procedures shall not be used to circumvent antidumping duty (AD) and countervailing duty (CVD) actions under 19 CFR part 351.

(2) Admission of items subject to AD/CVD actions. Items subject to AD/CVD orders, or items which would be otherwise subject to suspension of liquidation under AD/CVD procedures if they entered U.S. customs territory, shall be placed in privileged foreign status (19 CFR 146.41) upon admission to a zone or subzone. Upon entry for consumption, such items shall be subject to duties under AD/CVD orders or to suspension of liquidation, as appropriate, under 19 CFR part 351.

**§400.15 Production equipment.**

(a) In general. Pursuant to section 81c(e) of the FTZ Act, merchandise that is admitted into a foreign-trade zone for use within such zone as production equipment or as parts for such equipment, shall not be subject to duty until such merchandise is completely assembled, installed, tested, and used in the production for which it was admitted. Payment of duty may be deferred until such equipment goes into use as production equipment as part of zone production activity, at which time the equipment shall be entered for consumption as completed equipment.

(b) Definition of production equipment. Eligibility for this section is limited to equipment and parts of equipment destined for use in zone production activity as defined in §400.2(o) of this part. Ineligible for treatment as production equipment under this section are general materials (that are used in the installation of production equipment or in the assembly of equipment) and materials used in the construction or modification of the plant that houses the production equipment.

(c) Equipment not destined for zone activity. Production equipment or parts that are not destined for use in zone production activity shall be treated as normal merchandise eligible for

standard zone-related benefits (*i.e.*, benefits not subject to the requirements of §400.14(a)), provided the equipment is entered for consumption or exported prior to its use.

**§400.16 Exemption from state and local *ad valorem* taxation of tangible personal property.**

Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes, shall be exempt from state and local *ad valorem* taxation.

Subpart C--Applications to Establish and Modify Authority

**§400.21 Application to establish a zone.**

(a) In general. An application for a grant of authority to establish a zone (including pursuant to the ASF procedures adopted by the Board; see 74 FR 1170, Jan. 12, 2009, 74 FR 3987, Jan. 22, 2009, and 75 FR 71069, Nov. 22, 2010) shall consist of an application letter and detailed contents to meet the requirements of this part.

(b) Application format. Applications pursuant to this part shall comply with any instructions, guidelines, and forms or related documents, published in the *Federal Register* and made available on the Board's website, as established by the Executive Secretary specific to the type of application in question. An application submitted that uses a superseded format shall be processed unless the format has not been current for a period in excess of one year.

(c) Application letter. The application letter shall be dated within six months prior to the submission of the application and signed by an officer of the corporation authorized in the resolution for the application (see §400.21(d)(1)(iii)). The application letter shall also describe:

(1) The relationship of the proposal to the state enabling legislation and the grantee's charter;

(2) The specific authority requested from the Board;

(3) The proposed zone site(s) and facility(ies) and any larger project of which the zone is a part;

(4) The project background;

(5) The relationship of the project to the community's and state's international trade-related goals and objectives;

(6) Any production authority requested; and

(7) Any additional pertinent information needed for a complete summary description of the proposal.

(d) Detailed contents.

(1) Legal authority for the application shall be documented with:

(i) A current copy of the state enabling legislation described in §§400.12(b) and (c);

(ii) A copy of the relevant sections of the applicant's charter or organization papers; and

(iii) A certified copy of a resolution of the applicant's governing body specific to the application authorizing the official signing the application letter. The resolution must be dated no more than six months prior to the submission of the application.

(2) Site descriptions (including a table with site designations when more than one site is involved) shall be documented with:

(i) A detailed description of the zone site, including size, location, and address (and legal description or its equivalent in instances where the Executive Secretary determines it is needed to supplement the maps in the application), as well as dimensions and types of existing and

proposed structures, master planning, and timelines for construction of roads, utilities and planned buildings;

(ii) Where applicable, a summary description of the larger project of which the site is a part, including type, size, location and address;

(iii) A statement as to whether the site is within or adjacent to a CBP port of entry (including distance from the limits of the port of entry and, if the distance exceeds 60 miles, driving time from the limits of the port of entry);

(iv) A description of existing or proposed site qualifications, including appropriate land-use zoning (with environmentally sensitive areas avoided) and physical security;

(v) A description of current and planned activities associated with the site;

(vi) A summary description of transportation systems, facilities, and services, including connections from local and regional transportation hubs to the zone;

(vii) A statement regarding the environmental aspects of the proposal;

(viii) The estimated time schedules for construction and activation; and

(ix) A statement as to the possibilities and plans for future expansion of the site.

(3) Operation and financing shall be documented with:

(i) A statement as to site ownership (if not owned by the applicant or proposed operator, evidence as to their legal right to use the site);

(ii) A discussion of plans for operations at the site;

(iii) A commitment to satisfy the requirements for CBP automated systems; and

(iv) A summary of the plans for financing the project.

(4) Economic justification shall be documented with:

(i) A statement of the community's overall economic and trade-related goals and strategies in relation to those of the region and state, including a reference to the plan or plans on which the goals are based and how they relate to the zone project;

(ii) An economic profile of the community including discussion of:

(A) Dominant sectors in terms of employment or income;

(B) Area strengths and weaknesses;

(C) Unemployment rates; and

(D) Area foreign trade statistics;

(iii) A statement as to the role and objective of the zone project and a discussion of the anticipated economic impact, direct and indirect, of the zone project, including references to public costs and benefits, employment, and U.S. international trade;

(iv) A separate justification for each proposed site, including a specific explanation addressing the degree to which the site may duplicate types of facilities at other proposed or existing sites in the zone;

(v) A statement as to the need for zone services in the community, with specific expressions of interest from proposed zone users and letters of intent from those firms that are considered prime prospects for each specific proposed site; and

(vi) For any production activity to be conducted at a proposed site, the separate requirements of §400.14(a) must also be met.

(5) Maps and site plans shall include the following documents:

(i) State and county maps showing the general location of the proposed site(s) in terms of the area's transportation network;

(ii) For any proposed site, a legible, detailed site plan of the zone area showing zone boundaries in red, with street name(s), and showing existing and proposed structures; and

(iii) For proposals involving a change in existing zones, one or more maps showing the relationship between existing zone sites and the proposed changes.

(e) ASF applications. In addition to the general application requirements of this section, applications under the ASF shall include the following, where applicable:

(1) Service area.

(2) Appropriate information regarding magnet sites.

(3) Appropriate information regarding usage-driven sites.

(f) Additional information. The Board or the Executive Secretary may require additional information needed to evaluate proposals adequately.

(g) Amendment of application. The Board or the Executive Secretary may allow amendment of an application. Amendments which substantively expand the scope of an application shall be subject to comment period requirements such as those of §400.32(c)(2) with a minimum comment period of 30 days.

(h) Drafts. Applicants are encouraged to submit a draft application to the Executive Secretary for review. A draft application must be complete with the possible exception of the application letter and/or resolution from the grantee.

(i) Format and number of copies. Unless the Executive Secretary alters the requirements of this paragraph, the applicant shall submit an original (including original documents to meet the requirements of paragraphs (c) and (d)(1)(iii) of this section) and one copy of the application, both on 8 1/2" x 11" (216 x 279 mm) paper, and an electronic copy.

(j) Where to submit an application: Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230. Options for submission of electronic copies are described on the FTZ Board's website.

**§400.22 Notification for production authority.**

Notifications requesting production authority pursuant to §400.14(a) shall comply with any instructions, guidelines, and forms or related documents, published in the *Federal Register* and made available on the Board's website, as established by the Executive Secretary. Notifications shall contain the following information:

(a) Identity of the user and its location;

(b) Materials, components and finished products associated with the proposed activity, including the tariff schedule categories (6-digit HTSUS) and tariff rates; and

(c) Information as to whether any material or component is subject to a trade-related measure or proceeding (*e.g.*, AD/CVD order or proceeding, suspension of liquidation under AD/CVD procedures).

**§400.23 Application for production authority.**

In addition to any applicable requirements set forth in §400.21, an application requesting production authority pursuant to §400.37(c) shall include:

(a) A summary as to the reasons for the application and an explanation of its anticipated economic effects;

(b) Identity of the user and its corporate affiliation;

(c) A description of the proposed activity, including:

(1) Finished products;

(2) Imported (foreign-status) materials and components;

(3) For each finished product and imported material or component, the tariff schedule category (6-digit HTSUS), tariff rate, and whether the material or component is subject to a trade-related measure or proceeding (*e.g.*, AD/CVD order or proceeding, suspension of liquidation under AD/CVD procedures);

(4) Domestic inputs, foreign inputs, and plant value added as percentages of finished product value;

(5) Projected shipments to domestic market and export market (percentages);

(6) Estimated total or range of annual value of benefits to proposed user (broken down by category), including as a percent of finished product value;

(7) Annual production capacity (current and planned) for the proposed FTZ activity, in units;

(8) Information to assist the Board in making a determination under §§400.27(a)(3) and 400.27(b);

(9) Information as to whether alternative procedures have been considered as a means of obtaining the benefits sought;

(10) Information on the industry involved and extent of international competition; and

(11) Economic impact of the operation on the area; and

(d) Any additional information requested by the Board or the Executive Secretary in order to conduct the review.

**§400.24 Application for expansion or other modification to zone.**

(a) In general. (1) A grantee may apply to the Board for authority to expand or otherwise modify its zone (including pursuant to the ASF procedures adopted by the Board; see 74 FR 1170, Jan. 12, 2009, 74 FR 3987, Jan. 22, 2009, and 75 FR 71069, Nov. 22, 2010).

(2) The Executive Secretary, in consultation with CBP as appropriate, shall determine whether the proposed modification involves a major change in the zone plan and is thus subject to paragraph (b) of this section, or is minor and subject to paragraph (c) of this section. In making this determination the Executive Secretary shall consider the extent to which the proposed modification would:

(i) Substantially modify the plan originally approved by the Board; or

(ii) Expand the physical dimensions of the approved zone area as they relate to the scope of operations envisioned in the original plan.

(b) Major modification to zone. An application for a major modification of an approved zone shall be submitted in accordance with the requirements of §400.21, except that the content submitted pursuant to §400.21(d)(4) (economic justification) shall relate specifically to the proposed change.

(c) Minor modification to zone. Other applications or requests under this subpart shall be submitted in letter form with information and documentation necessary for analysis, as determined by the Executive Secretary, who shall determine whether the proposed change is a minor one subject to this paragraph (c) instead of paragraph (b) of this section (see, §400.38). Such applications or requests include those for minor revisions of general-purpose zone or subzone boundaries based on immediate need, as well as for designation as a subzone of all or part of an existing zone site(s) (or site(s) that qualifies for usage-driven status), where warranted by the circumstances and so long as the subzone activity remains subject to the activation limit (see §400.2(b)) for the zone in question.

(d) Applications for other revisions to authority. Applications or requests for other revisions to authority, such as for Board action to establish or modify an activation limit for a zone, modification of a restriction or reissuance of a grant of authority, shall be submitted in letter form with information and documentation necessary for analysis, as determined by the Executive Secretary. If the change involves the removal or significant modification of a restriction included by the Board in its approval of authority or the reissuance of a grant of authority, the review procedures of §§400.31-400.34 and 400.36 shall be followed, where relevant. If not, the procedure set forth in §400.38 shall generally apply (although the Executive Secretary may elect to follow the procedures of §§400.31-400.34 and 400.36 when warranted).

**§400.25 Application for subzone designation.**

In addition to the requirements of §§400.21(d)(1)(i) and (ii) pertaining to legal authority, §400.21(d)(2)(vii) pertaining to environmental aspects of the proposal, and §§400.21(d)(3)(i) and (iii) pertaining to operation, a grantee's application for subzone designation shall contain the following information:

(a) The name of the operator/user for which subzone designation is sought;

(b) The nature of the activity at the proposed subzone;

(c) The address(es) and physical size (acreage or square feet) of the proposed subzone location(s); and

(d) One or more maps conforming to the requirements of section §400.21(d)(5)(ii).

For any production activity to be conducted at a proposed subzone, the separate requirements of §400.14(a) must be met.

**§400.26 Criteria for evaluation of applications for expansions, subzones or other modifications of zones.**

The Board shall consider the following factors in determining whether to approve an application pertaining to a zone:

(a) The need for zone services in the port of entry area, taking into account existing as well as projected international trade-related activities and employment impact;

(b) The suitability of each proposed site and its facilities based on the plans presented for the site, including existing and planned buildings, zone-related activities, and the timeframe for development of the site;

(c) The specific need and justification for each proposed site, taking into account existing sites and/or other proposed sites;

(d) The extent of state and local government support, as indicated by the compatibility of the zone project with the community's master plan or stated goals for economic development and the views of state and local public officials involved in economic development. Such officials shall avoid commitments that anticipate the outcome of Board decisions;

(e) The views of persons likely to be materially affected by proposed zone activity; and

(f) If the application involves production activity, the criteria in §400.27.

**§400.27 Criteria applicable to evaluation of applications for production authority.**

The Board shall apply the criteria set forth in this section in determining whether to approve an application for authority to conduct production activity pursuant to §400.23. The Board's evaluation shall take into account such factors as market conditions, price sensitivity, degree and nature of foreign competition, intra-industry and intra-firm trade, effect on exports and imports, ability to conduct the proposed activity outside the United States with the same U.S. tariff impact, analyses conducted in connection with prior Board actions, and net effect on U.S. employment and the U.S. economy:

(a) Threshold factors. It is the policy of the Board to authorize zone activity only when it is consistent with public policy and, in regard to activity involving foreign merchandise subject to quotas or inverted tariffs, when zone procedures are not the sole determining cause of imports. Thus, without undertaking a review of the economic factors enumerated in §400.27(b), the Board shall deny or restrict authority for proposed or ongoing activity if it determines that:

(1) The activity is inconsistent with U.S. trade and tariff law, or policy which has been formally adopted by the Executive branch;

(2) Board approval of the activity under review would seriously prejudice U.S. tariff and trade negotiations or other initiatives; or

(3) The activity involves items subject to quantitative import controls or inverted tariffs, and the use of zone procedures would be the direct and sole cause of imports that, but for such procedures, would not likely otherwise have occurred, taking into account imports both as individual items and as components of imported products.

(b) Economic factors. After its review of threshold factors, if there is a basis for further consideration of the application, the Board shall consider the following factors in determining the net economic effect of the proposed activity:

(1) Overall employment impact;

(2) Exports and re-exports;

(3) Retention or creation of value-added activity;

(4) Extent of value-added activity;

(5) Overall effect on import levels of relevant products;

(6) Extent and nature of foreign competition in relevant products;

(7) Impact on related domestic industry, taking into account market conditions; and

(8) Other relevant information relating to the public interest and net economic impact considerations, including technology transfers and investment effects.

(c) The significant public benefit(s) that would result from the production activity, taking into account the factors in paragraphs (a) and (b) of this section.

(d) Contributory effect. In assessing the significance of the economic effect of the proposed zone activity as part of the consideration of economic factors, and considering whether it would result in a significant public benefit(s), the Board may consider the contributory effect zone savings have as an incremental part of cost-effectiveness programs adopted by companies to improve their international competitiveness.

**§400.28 Burden of proof.**

(a) In general. An applicant must demonstrate to the Board that its application meets the criteria set forth in these regulations. Applications for production-related authority shall contain evidence regarding the positive economic effect(s) and significant public benefit(s) that would result from the proposed activity and may submit evidence and comments concerning policy considerations.

(b) Comments on applications. Comments submitted regarding applications should provide information that is probative and substantial in addressing the matter at issue relative to the nature of the proceeding, including any evidence of the projected direct impact of the proposed authority.

(c) Requests for extensions of comment periods. Requests for extensions of comment periods shall include a description of the potential impact of the proposed authority and the specific actions or steps for which additional time is necessary.

(d) Responses to comments on applications. Submissions in response to comments received during the public comment period or pursuant to §400.33(e)(1) or §400.34(a)(5)(iv)(A) should contain evidence that is probative and substantial in addressing the matter at issue.

**§400.29 Application fees.**

(a) In general. This section sets forth a uniform system of charges in the form of fees to recover some costs incurred by the Foreign-Trade Zones staff of the Department of Commerce in processing the applications listed in paragraph (b) of this section. The legal authority for the fees is 31 U.S.C. 9701, which provides for the collection of user fees by agencies of the Federal Government.

(b) Uniform system of user fee charges. The following fee schedule establishes fees for certain types of applications and requests for authority on the basis of their estimated average

processing time. Applications combining requests for more than one type of approval are subject to the fee for each category.

(1) Additional general-purpose zones (§400.21; §400.11(a)(2)) ..... $3,200

(2) Special-purpose subzones (§400.25):

(i) Not involving production activity or involving production activity with fewer than three products .. $4,000

(ii) Production activity with three or more products ..... $6,500

(3) Expansions (§400.24(b)) ..... $1,600

(c) Applications submitted to the Board shall include a currently dated check drawn on a national or state bank or trust company of the United States or Puerto Rico in the amount called for in paragraph (b) of this section. Uncertified checks must be acceptable for deposit by the Board in a Federal Reserve bank or branch.

(d) Applicants shall make their checks payable to the U.S. Department of Commerce ITA. The checks will be deposited by ITA into the Treasury receipts account. If applications are found deficient under §400.31(b), or are withdrawn by applicants prior to formal docketing, refunds will be made.

Subpart D--Procedures for Application Evaluation and Reviews

**§400.31 General application provisions and pre-docketing review.**

(a) In general. Sections 400.31-400.36 and 400.38 outline the procedures to be followed in docketing and processing applications submitted under §§400.21, 400.23, 400.24(b), and 400.25. In addition, these sections set forth the time schedules which will ordinarily apply in processing applications. The schedules will guide applicants with respect to the time frames for each of the procedural steps involved in the Board's review. Under these schedules, applications for subzone designation will generally be processed within 5 months (3 months for

applications subject to §400.36(f)) and applications to establish or expand zones will generally be processed within 10 months. The general timeframe to process applications for production authority is 12 months, but additional time is most likely to be required for applications requesting production authority when a complex or controversial issue is involved or when the applicant or other party has obtained a time extension for a particular procedural step. The timeframes specified apply from the time of docketing. Each applicant is responsible for submitting an application that meets the docketing requirements in a timeframe consistent with the applicant's need for action on its request.

(b) Pre-docketing review. The grantee shall submit a single complete copy of an application for pre-docketing review. (For requests relating to production in already approved zone or subzone space, the request may be submitted by the operator, provided the operator at the same time furnishes a copy of the request to the grantee.) The Executive Secretary shall determine whether the application satisfies the requirements of §§400.12, 400.21, 400.23-400.25, and other applicable provisions of this part such that the application is sufficient for docketing. If the pre-docketing copy of the application is deficient, the Executive Secretary shall notify the applicant within 30 days of receipt of the pre-docketing copy, specifying the deficiencies. An affected zone participant may also be contacted regarding relevant application elements requiring additional information or clarification. If the applicant does not correct the deficiencies and submit a corrected pre-docketing application copy within 30 days of notification, the pre-docketing application (single copy) shall be discarded.

**§400.32 Procedures for docketing applications and commencement of case review.**

(a) Once the pre-docketing copy of the application is determined to be sufficient, the Executive Secretary shall notify the applicant within 15 days so that the applicant may then submit the original and requisite number of copies (which shall be dated upon receipt at the

headquarters of the Board) for docketing by the Board. For applications subject to §400.29, the original shall be accompanied with a check in accordance with that section.

(b) After the procedures described in paragraph (a) of this section are completed, the Executive Secretary shall within 15 days of receipt of the original and required number of copies of the application:

(1) Formally docket the application, thereby initiating the proceeding or review;

(2) Assign a case-docket number; and

(3) Notify the applicant of the formal docketing action.

(c) After initiating a proceeding based on an application under §§400.21 and 400.23-400.25, the Executive Secretary shall:

(1) Designate an examiner to conduct a review and prepare a report or memorandum with recommendations for the Board;

(2) Publish in the *Federal Register* a notice of the formal docketing of the application and initiation of the review. The notice shall include the name of the applicant, a description of the proposal, and an invitation for public comment. If the application requests authority for production activity and indicates that a component to be used in the activity is subject to a trade-related measure or proceeding (*e.g.*, AD/CVD order or proceeding, suspension of liquidation under AD/CVD procedures), the notice shall include that information. For applications to establish or expand a zone or for production authority, the comment period shall normally close 60 days after the date the notice appears. For applications for subzone designation, the comment period shall normally close 40 days after the date the notice appears. However, if a hearing is held (see §400.52), the comment period shall not close prior to 15 days after the date of the hearing. The closing date for general comments shall ordinarily be followed by an additional 15-day period for rebuttal comments. Requests for extensions of a comment period

will be considered, subject to the standards of §400.28(c). Submissions must meet the requirements of §400.28(b). With the exception of submissions by the applicant, any new evidence or new factual information and any written arguments submitted after the deadlines for comments shall not be considered by the examiner or the Board. Submission by the applicant of new evidence or new factual information may result in the (re)opening of a comment period. A comment period may otherwise be opened or reopened for cause;

(3) Transmit or otherwise make available copies of the docketing notice and the application to CBP;

(4) Arrange for hearings, as appropriate;

(5) Transmit the report and recommendations of the examiner and any comments by CBP to the Board for appropriate action; and

(6) Notify the applicant in writing (via electronic means, where appropriate) and publish notice in the *Federal Register* of the Board's determination.

(d) CBP review. Any comments by CBP pertaining to the application shall be submitted to the Executive Secretary by the conclusion of the public comment period described in paragraph (c)(2) of this section.

**§400.33 Examiner's review - application to establish or modify a zone.**

An examiner assigned to review an application to establish, reorganize or expand a zone shall conduct a review taking into account the factors enumerated in §400.26 and other appropriate sections of this part, which shall include:

(a) Conducting or participating in hearings scheduled by the Executive Secretary;

(b) Reviewing case records, including public comments;

(c) Requesting information and evidence from parties of record;

(d) Developing information and evidence necessary for evaluation and analysis of the application in accordance with the criteria of the Act and this part; and

(e) Developing recommendations to the Board and submitting a report to the Executive Secretary, generally within 150 days of the close of the period for public comment (75 days for reorganizations under the ASF) (see §400.32):

(1) If the recommendations are unfavorable to the applicant, they shall be considered preliminary and the applicant shall be notified in writing (via electronic means, where appropriate) of the preliminary recommendations and the factors considered in their development. The applicant shall be given 30 days from the date of notification, subject to extensions upon request by the applicant, which shall not be unreasonably withheld, in which to respond to the recommendations and submit additional evidence pertinent to the factors considered in the development of the preliminary recommendations. Public comment may be invited on preliminary recommendations when warranted.

(2) If the response contains new evidence on which there has been no opportunity for public comment, the Executive Secretary shall publish a notice in the *Federal Register* after completion of the review of the response. The new material shall be made available for public inspection and the *Federal Register* notice shall invite further public comment for a period of not less than 30 days, with an additional 15-day period for rebuttal comments.

(3) If the bases for an examiner's recommendation(s) change as a result of new evidence, the applicable procedures of §§400.33(e)(1) and (2) shall be followed.

(4) When necessary, a request may be made to CBP to provide further comments, which shall be submitted within 45 days after the request.

**§400.34 Examiner's review - application for production authority.**

(a) The examiner shall conduct a review taking into account the factors enumerated in this section, §400.27, and other appropriate sections of this part, which shall include:

(1) Conducting or participating in hearings scheduled by the Executive Secretary;

(2) Reviewing case records, including public comments;

(3) Requesting information and evidence from parties of record and others, as warranted;

(4) Developing information and evidence necessary for analysis of the threshold factors and the economic factors enumerated in §400.27; and

(5) Conducting an analysis to include:

(i) An evaluation of policy considerations pursuant to §§400.27(a)(1) and (2);

(ii) An evaluation of the economic factors enumerated in §§400.27(a)(3) and 400.27(b), which shall include an evaluation of the economic impact on domestic industry, considering both producers of like products and producers of components/materials used in the production activity;

(iii) Conducting appropriate industry research and surveys, as necessary; and

(iv) Developing recommendations to the Board and submitting a report to the Executive Secretary, generally within 150 days of the close of the period for public comment (although additional time may be required in circumstances such as when the applicant or other party has obtained a time extension for a particular procedural step):

(A) If the recommendations are unfavorable to the applicant, they shall be considered preliminary and the applicant shall be notified in writing (via electronic transmission where appropriate) of the preliminary recommendations and the factors considered in their development. The applicant shall be given 45 days from the date of notification in which to respond to the recommendations and submit additional evidence pertinent to the factors

considered in the development of the preliminary recommendations. Public comment may be invited on preliminary recommendations when warranted.

(B) If the response contains new evidence on which there has not been an opportunity for public comment, the Executive Secretary shall publish notice in the *Federal Register* after completion of the review of the response. The new material shall be made available for public inspection and the *Federal Register* notice shall invite further public comment for a period of not less than 30 days, with an additional 15-day period for rebuttal comments.

(C) If the bases for an examiner's recommendation(s) change as a result of new evidence, the applicable procedures of §§400.34(a)(5)(iv)(A) and (B) shall be followed.

(b) Methodology and evidence. The evaluation of an application for production authority shall include the following steps:

(1) The first phase (§400.27(a)) involves consideration of threshold factors. If an examiner or reviewer makes a negative finding on any of the factors in §400.27(a) in the course of a review, the applicant shall be informed pursuant to §400.34(a)(5)(iv)(A). When threshold factors are the basis for a negative recommendation in a review of ongoing activity, the zone grantee and directly affected party shall be notified and given an opportunity to submit evidence pursuant to §400.34(a)(5)(iv)(A). If the Board determines in the negative regarding any of the factors in §400.27(a), it shall deny or restrict authority for the proposed or ongoing activity.

(2) The second phase (§400.27(b)) involves consideration of the enumerated economic factors, taking into account their relative weight and significance under the circumstances. Previous evaluations in similar cases shall be considered.

**§400.35 Examiner's review - application for subzone designation.**

The examiner shall develop a memorandum with a recommendation on whether to approve the application, taking into account the criteria enumerated in §400.26. To develop that

memorandum, the examiner shall review the case records including public comments, and may request information and evidence from parties of record, as necessary. The examiner's memorandum shall generally be submitted to the Board within 30 days of the close of the period for public comment. However, additional time may be taken as necessary for analysis of any public comment in opposition to the application or if other complicating factors arise.

(a) If the examiner's recommendation is unfavorable to the applicant, it shall be considered preliminary and the applicant shall be notified in writing (via electronic means, where appropriate) of the preliminary recommendation and the factors considered in its development. The applicant shall be given 30 days from the date of notification, subject to extensions upon request by the applicant, which shall not be unreasonably withheld, in which to respond to the recommendation and submit additional evidence pertinent to the factors considered in the development of the preliminary recommendations. Public comment may be invited on preliminary recommendations when warranted.

(b) If the response contains new evidence on which there has not been an opportunity for public comment, the Executive Secretary shall publish notice in the *Federal Register* after completion of the review of the response. The new material shall be made available for public inspection and the *Federal Register* notice shall invite further public comment for a period of not less than 30 days, with an additional 15-day period for rebuttal comments.

(c) If the bases for an examiner's recommendation(s) change as a result of new evidence, the applicable procedures of §§400.35(a) and (b) shall be followed.

(d) The CBP adviser shall be requested, when necessary, to provide further comments, which shall be submitted within 45 days after the request.

**§400.36 Completion of case review.**

(a) The Executive Secretary shall circulate the examiner's report (memorandum in the case of subzone applications) with recommendations to CBP headquarters staff and to the Treasury Board member for review and action.

(b) In its advisory role to the Board, CBP headquarters staff shall provide any comments within 15 days.

(c) The vote of the Treasury Board member shall be returned to the Executive Secretary within 30 days, unless a formal meeting is requested (see, §400.3(b)).

(d) The Commerce Department shall complete the decision process within 15 days of receiving the vote of the Treasury Board member, and the Executive Secretary shall publish the Board decision.

(e) If the Board is unable to reach a unanimous decision, the grantee shall be notified and provided an opportunity to meet with the Board members or their delegates.

(f) Delegation of authority to approve subzone designation. The Board delegates to the Executive Secretary authority to approve applications requesting subzone designation, on the condition that such approved subzones will be subject to the activation limit for the zone in question.

(g) The Board or the Commerce Department's Assistant Secretary for Import Administration may opt to terminate review of an application with no further action if the applicant has failed to provide in a timely manner information needed for evaluation of the application. A request from an applicant for an extension of time to provide information needed for evaluation of an application shall not be unreasonably withheld. The Executive Secretary may terminate review of an application where the overall circumstances presented in the application no longer exist as a result of a material change, and shall notify the applicant in writing of the intent to terminate review and allow 30 days for a response prior to completion of any termination action. The

Executive Secretary shall confirm the termination in writing (by electronic means, where appropriate) to the applicant.

**§400.37 Procedure for notification of proposed production activity.**

(a) Submission of notification. A notification for production authority pursuant to §§400.14(a) and 400.22 shall be submitted simultaneously to the Board's Executive Secretary and to CBP (as well as to the grantee of the zone, if the grantee is not the party making the submission).

(b) Initial processing of notification. Upon receipt of a complete notification conforming to the requirements of the notification format established by the Executive Secretary pursuant to §400.22, the Executive Secretary shall commence processing the notification. Unless the Executive Secretary determines, based on the content of the notification, to recommend further review to the Board without inviting public comment on the notification, the Executive Secretary shall transmit to the *Federal Register* a notice inviting public comment on the notification (with such comment subject to the standards of §400.28(b)). The notice shall be transmitted to the *Federal Register* within 15 days of the commencement of the processing of the notification, and the comment period shall normally close 40 days after the date the notice appears. If the notification indicates that a material or component to be used in the activity is subject to an AD/CVD order or proceeding, or suspension of liquidation under AD/CVD procedures, the notice shall include that information. Evidence, factual information and written arguments submitted in response to the notice must be submitted by the deadline for comments. Any comments by CBP pertaining to the notification shall be submitted to the Executive Secretary by the end of the comment period. Within 80 days of receipt of the notification, the Executive Secretary shall submit to the Board a recommendation on whether further review of all or part of the activity subject to the notification is warranted. The Executive Secretary's recommendation shall consider comments submitted during the comment period, any guidance from specialists within

government, and other relevant factors based on the Board staff's assessment of the notification, in the context of the factors set forth in §400.27.

(c) Determinations regarding further review. Within 30 days of receipt of the Executive Secretary's recommendation, the Board members shall provide to the Executive Secretary their determinations on whether further review is warranted concerning all or part of the activity that is the subject of the notification. If either Board member makes a determination that further review is warranted, the activity that is subject to further review (which may constitute all or part of the notified activity) shall not be conducted without authorization pursuant to the application requirements of §400.23 and the procedural requirements of §§400.31-400.34 and 400.36 (or the provisions of paragraph (d) of this section, where applicable). Within 120 days of receipt of the notification, the Executive Secretary shall notify the party that submitted the notification (and the zone grantee, if it did not submit the notification) that:

(1) Further review is not needed for all or part of the activity that is the subject of the notification, and that the activity in question may be conducted; or

(2) Further review is needed for all or part of the activity that is the subject of the notification, with such activity precluded absent specific authorization.

(d) Authorization for commencement of an activity on an interim basis. For an activity notified pursuant to §400.14(a), the Executive Secretary may authorize the commencement of some or all of the activity on an interim basis. Such authorization shall only be made based on a showing that commencement of the activity is time-sensitive, with such showing to include comments from CBP that specifically address the projected timeframe for commencement of the activity. Interim authorization shall not apply to materials or components subject to an AD/CVD order or proceeding or suspension of liquidation under AD/CVD procedures. As warranted, a determination that further review is needed for all or some of the notified activity pursuant to

§400.37(c) may also revoke the interim authorization until the Board makes a determination after conduct of that further review.

**§400.38 Procedure for application for minor modification of zone.**

(a) The Executive Secretary shall make a determination in cases under §400.24(c) involving minor modifications of zones that do not require Board action, such as boundary modifications, including certain relocations, and shall notify the applicant in writing of the decision within 30 days of the determination that the application or request can be processed under §400.24(c). The applicant shall submit a copy of its application/request to CBP no later than the time of the applicant's submission of the application/request to the Executive Secretary.

(b) If not previously provided to the applicant for inclusion with the applicant's submission of the application/request to the Executive Secretary, any CBP comments on the application/request shall be provided to the Executive Secretary within 20 days of the applicant's submission of the application/request to the Executive Secretary.

Subpart E--Operation of Zones and Administrative Requirements

**§400.41 General operation of zones; requirements for commencement of operations.**

(a) In general. Zones shall be operated by or under the general management of zone grantees, subject to the requirements of the FTZ Act and this part, as well as those of other federal, state and local agencies having jurisdiction over the site(s) and operation(s). Zone grantees shall ensure that the reasonable zone needs of the business community are served by their zones. CBP officials with oversight responsibilities for a port of entry represent the Board with regard to the zones adjacent to the port of entry in question and are responsible for enforcement, including physical security and access requirements, as provided in 19 CFR part 146.

(b) Requirements for commencement of operations in a zone. The following actions are required before operations in a zone may commence:

(1) The grantee shall submit the zone schedule to the Executive Secretary, as provided in §400.44.

(2) Approval or concurrence from the grantee and approval from CBP, pursuant to 19 CFR part 146, are required prior to the activation of any portion of an approved zone; and

(3) Prior to activation of a zone, the operator shall obtain all necessary permits from federal, state and local authorities, and except as otherwise specified in the Act or this part, shall comply with the requirements of those authorities.

**§400.42 Operation as public utility.**

(a) In general. Pursuant to Section 14 of the FTZ Act (19 U.S.C. 81n), each zone shall be operated as a public utility, and all rates and charges for all services or privileges within the zone shall be fair and reasonable. A rate or charge (fee) may be imposed on zone participants to recover costs incurred by or on behalf of the grantee for the performance of the grantee function. Such a rate or charge must be directly related to the service provided by the grantee (for which the fee recovers some or all costs incurred) to the zone participants. Rates or charges may incorporate a reasonable return on investment. Rates or charges may not be tied to the level of benefits derived by zone participants. Other 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.

(b) Delayed compliance date. The compliance date for the requirements of paragraph (a) of this section shall be [Insert date two years after the date of publication in the Federal Register].

**§400.43 Uniform treatment.**

Pursuant to Section 14 of the FTZ Act (19 U.S.C. 81n), a grantee shall afford to all who may apply to make use of or participate in the zone uniform treatment under like conditions. Treatment of zone participants within a zone (including application of rates and charges) shall not vary depending on whether a zone participant has procured any zone-related product or service or engaged a particular supplier to provide any such product or service.

(a) Agreements to be made in writing. Any agreement or contract related to one or more grantee function(s) and involving a zone participant (*e.g.*, agreements with property owners and agreements with zone operators) must be in writing.

(b) Evaluation of proposals. A grantee (or person undertaking a zone-related function(s) on behalf of a grantee, where applicable) shall apply uniform treatment in the evaluation of proposals from zone participants. Uniform treatment does not require acceptance of all proposals by zone participants, but the bases for a grantee's decision on a particular proposal must be consistent with the uniform treatment requirement.

(c) Justification for differing treatment. Given the requirement for uniform treatment under like conditions, for any instance of different treatment of different zone participants, a grantee (or person undertaking a zone-related function(s) on behalf of a grantee, where applicable) must be able to provide upon request by the Executive Secretary a documented justification for any difference in treatment.

(d) Avoidance of non-uniform treatment. To avoid non-uniform treatment of zone participants, persons (as defined in §400.2(l)) within key categories set out in paragraph (d)(2) of this section shall not undertake any of the key functions set out in paragraph (d)(1) of this section (except in specific circumstances where the Board has authorized a waiver pursuant to paragraph (f) of this section).

(1) Key functions are:

(i) Taking action on behalf of a grantee, or making recommendations to a grantee, regarding the disposition of proposals or requests by zone participants pertaining to FTZ authority or activity (including activation by CBP);

(ii) 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); or

(iii) Overseeing zone participants' operations on behalf of a grantee.

(2) Key categories of persons are:

(i) A person that currently engages in, or which has during the preceding twelve months engaged in, offering/providing a zone-related product/service to or representing a zone participant in the grantee's zone;

(ii) Any person that stands to gain from a person's offer/provision of a zone-related product/service to or representation of a zone participant in the zone; or

(iii) Any person related, as defined in paragraph (e) of this section, to the person identified in paragraphs (d)(2)(i) and (ii) of this section.

(e) Definition of related persons. For purposes of this section, persons that are related include:

(1) Members of a family or members of a household. The term members of a family means spouses, parents, grandparents, children, grandchildren, siblings (including half-siblings and step-siblings), aunts, uncles, nieces, nephews, and first cousins, as well as the parents, children, and siblings of a spouse, and the spouse of a sibling, child or parent;

(2) Organizations that are wholly or majority-owned by members of the same family or members of the same household;

(3) An officer or director of an organization and that organization;

(4) Partners;

(5) Employers and their employees;

(6) An organization and any person directly or indirectly owning, controlling, or holding with power to vote, 20 percent or more of the outstanding voting stock or shares of that organization;

(7) Any person that controls any other person and that other person (the term control means the power, direct or indirect, whether or not exercised, through any means, to determine, direct, or decide important matters affecting an entity); or

(8) Any two or more persons who directly control, are controlled by, or are under common control with, any person (see definition of control in paragraph (e)(7) of this section).

(f) Waivers. The grantee or other person subject to paragraph (d) of this section may submit an application requesting that the Board issue a waiver exempting from the prohibition of that paragraph a person's undertaking a specific key function(s) listed in paragraph (d)(1) of this section. Using the format developed by the Executive Secretary, an application for a waiver shall explain in detail how the person falls within a key category(ies) set out in paragraph (d)(2) of this section, and the specific key function(s) listed in paragraph (d)(1) of this section that would be undertaken by the person. After receipt of an application requesting a waiver, the Executive Secretary may solicit additional information or clarification, as necessary, including from the person submitting the application and from the grantee. Based on the information presented in the application, the Executive Secretary shall make a recommendation to the Board. A waiver shall be authorized only by an affirmative vote by the Board. 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. 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.

(g) Requests for determinations. A grantee or other party may request a determination by the Executive Secretary regarding the consistency of an actual or potential arrangement with the requirements of this section.

(h) Identification of person undertaking function(s) on behalf of grantee. The Board, the Commerce Department's Assistant Secretary for Import Administration, or the Executive Secretary, may require a zone grantee to identify any person undertaking a zone-related function(s) on behalf of the grantee.

(i) Delayed compliance date. If, as of ***[Insert date 60 days after the date of publication in the Federal Register]***, existing business arrangements do not comply with the requirements of paragraphs (a) and (d) of this section, such existing arrangements shall be terminated or brought into compliance no later than [Insert date two years after the date of publication in the Federal Register].

**§400.44 Zone schedule.**

(a) In general. The zone grantee shall submit to the Executive Secretary (in both paper and electronic copies) a zone schedule which sets forth the elements required in this section. No element of a zone schedule (including any amendment to the zone schedule) may be

considered to be in effect until such submission has occurred. If warranted, the Board may subsequently amend the requirements of this section by Board Order.

(b) Each zone schedule shall include:

(1) A title page, which shall include the name of the zone grantee and the date of the current schedule;

(2) A table of contents;

(3) Internal rules/regulations and policies for the zone;

(4) All rates or charges assessed by or on behalf of the grantee;

(5) Information regarding any operator which has an agreement with the grantee to offer services to the public, including the operator's rates or charges for all zone-specific services offered; and

(6) An appendix with definitions of any FTZ-related terms used in the zone schedule (as needed).

(c) The Executive Secretary may review the zone schedule (or any amendment to the zone schedule) to determine whether it contains sufficient information for zone participants concerning the operation of the zone and the grantee's rates and charges as provided in paragraphs (b)(3) and (b)(4) of this section. If the Executive Secretary determines that the zone schedule (or amendment) does not satisfy these requirements, the Executive Secretary shall notify the zone grantee. The Executive Secretary may also conduct a review under 400.45(b).

(d) Amendments to the zone schedule shall be prepared and submitted in the manner described in paragraph (a) of this section, and listed in the concluding section of the zone schedule, with dates. No rates/charges or other provisions required for the zone schedule may be applied by, or on behalf of, the grantee unless those specific rates/charges or provisions are included in the most recent zone schedule submitted to the Board and made available to the

public in compliance with paragraph (e) of this section.

(e) Availability of zone schedule. A complete copy of the zone schedule shall be freely available for public inspection at the offices of the zone grantee and any operator offering FTZ services to the user community. The Board shall make copies of zone schedules available on its website.

(f) Delayed compliance date. The compliance date for the requirements of this section shall be [Insert date two years after the date of publication in the Federal Register].

**§400.45 Complaints related to public utility and uniform treatment.**

(a) In general. A zone participant may submit to the Executive Secretary a complaint regarding conditions or treatment that the complaining party believes are inconsistent with the public utility and uniform treatment requirements of the FTZ Act and these regulations. Complaints may be made on a confidential basis, if necessary. Grantees (and persons undertaking zone-related functions on behalf of grantees, where applicable) shall not enter into or enforce provisions of agreements or contracts with zone participants that would require zone participants to disclose to other parties, including the grantee (or person undertaking a zone-related function(s) on behalf of a grantee, where applicable), any confidential communication with the Board under this section.

(b) Objections to rates and charges. A zone participant showing good cause may object to any rate or charge related to the zone on the basis that it is not fair and reasonable by submitting to the Executive Secretary a complaint in writing with supporting information. If necessary, such a complaint may be made on a confidential basis pursuant to §400.45(a). The Executive Secretary shall review the complaint and issue a report and decision, which shall be final unless appealed to the Board within 30 days. The Board or the Executive Secretary may otherwise initiate a review for cause. The primary factor considered in reviewing fairness and

reasonableness is the cost of the specific services rendered. Where those costs incorporate charges to the grantee by one or more parties undertaking functions on behalf of the grantee, the Board may consider the costs incurred by those parties (using best estimates, as necessary). The Board will also give consideration to any extra costs incurred relative to non-zone operations, including return on investment and reasonable out-of-pocket expenses.

**§400.46 Grantee liability.**

(a) Exemption from liability. A grant of authority, *per se*, shall not be construed to make the zone grantee liable for violations by zone participants. The role of the zone grantee under the FTZ Act and the Board's regulations is to provide general management of the zone to ensure that the reasonable needs of the business community are served. It would not be in the public interest to discourage public entities from zone sponsorship because of concern about liability without fault.

(b) Exception to exemption from liability. A grantee could create liability for itself that otherwise would not exist if the grantee undertakes detailed operational oversight of or direction to zone participants. Examples of detailed operational oversight or direction include review of an operator's inventory-control or record-keeping systems, specifying requirements for such a system to be used by an operator, and review of CBP documentation related to an operator's zone receipts and shipments.

**§400.47 Retail trade.**

(a) In general. Retail trade is prohibited in activated areas of zones, except that 1) sales or other commercial activity involving domestic, duty-paid, and duty-free goods may be conducted within an activated area of a zone under a permit issued by the zone grantee and approved by the Board, and 2) no permits shall be necessary for sales involving domestic, duty-paid or duty-free food and non-alcoholic beverage products sold within the zone or subzone for consumption

on premises by individuals working therein. The Executive Secretary shall determine whether an activity is retail trade, subject to review by the Board when the zone grantee requests such a review with a good cause. Determinations on whether an activity constitutes retail trade shall be based on precedent established through prior rulings by CBP, as appropriate. Such prior rulings shall remain effective unless a determination is issued to modify their effect (after a notice-and-comment process, as appropriate). Determinations made by the Executive Secretary pursuant to this section shall be made available to the public via the Board's website.

(b) Procedure. Requests for Board approval under this section shall be submitted in letter form, with supporting documentation, to the Executive Secretary, who is authorized to act for the Board in these cases, after consultation with CBP as necessary.

(c) Criteria. In evaluating requests under this section, the Executive Secretary and CBP shall consider factors that may include:

(1) Whether any public benefits would result from approval; and

(2) The economic effect such activity would have on the retail trade outside the zone in the port of entry area.

**§400.48 Zone-restricted merchandise.**

(a) In general. Merchandise in zone-restricted status (19 CFR 146.44) may be entered into the customs territory of the United States only when the Board determines that the entry would be in the public interest. Such entries are subject to the customs laws and the payment of applicable duties and excise taxes (19 U.S.C. 81c(a), 4th proviso).

(b) Criteria. In making the determination described in paragraph (a) of this section, the Board shall consider:

(1) The intent of the parties;

(2) Why the merchandise cannot be exported;

(3) The public benefit involved in allowing entry of the merchandise; and

(4) The recommendation of CBP.

(c) Procedure. (1) A request for authority to enter "zone-restricted" merchandise into U.S. customs territory shall be made to the Executive Secretary in letter form by the zone grantee or by the operator responsible for the merchandise (with copy to the grantee), with supporting information and documentation.

(2) The Executive Secretary shall investigate the request and prepare a report for the Board.

(3) The Executive Secretary may act for the Board under this section with respect to requests that involve merchandise valued at 500,000 dollars or less and that are accompanied by a letter of concurrence from CBP.

**§400.49 Monitoring and reviews of zone operations and activity.**

(a) In general. Ongoing zone operation(s) and activity may be reviewed by the Board or the Executive Secretary at any time to determine whether they are in the public interest and in compliance and conformity with the Act and regulations, as well as authority approved by the Board. Reviews involving production activity may also be conducted to determine whether there are changed circumstances that raise questions as to whether the activity is detrimental to the public interest, taking into account the factors enumerated in §400.27. The Board may prescribe special monitoring requirements in its decisions when appropriate.

(b) Conduct of reviews. Reviews may be initiated by the Board, the Commerce Department's Assistant Secretary for Import Administration, or the Executive Secretary; or, they may be undertaken in response to requests from parties directly affected by the activity in question showing good cause based on the provision of information that is probative and substantial in addressing the matter in issue. After initiation of a review, any affected party shall provide in a timely manner any information requested as part of the conduct of the review. If a party fails to

timely provide information requested as part of such a review, a presumption unfavorable to that party may be made.

(c) Prohibition or restriction. Upon review, if a finding is made that zone activity is no longer in the public interest (taking into account the factors enumerated in §400.27 where production activity is involved), the Board or the Commerce Department's Assistant Secretary for Import Administration may prohibit or restrict the activity in question. Such prohibitions or restrictions may be put in place after a preliminary review (*e.g.*, prior to potential steps such as a public comment period) if circumstances warrant such action until further review can be completed. The procedures of §400.34(a)(5)(iv)(A) shall be followed to notify the grantee of the affected zone and allow for a response prior to the final imposition of a prohibition or restriction. The appropriateness of a delayed effective date shall be considered.

Subpart F--Records, Reports, Notice, Hearings and Information

**§400.51 Records and reports.**

(a) Records and forms. Zone records and forms shall be prepared and maintained in accordance with the requirements of CBP and the Board, consistent with documents issued by the Board specific to the zone in question, and the zone grantee shall retain copies of applications/requests it submits to the Board in electronic or paper format.

(b) Maps and drawings. Zone grantees or operators, and CBP, shall keep current layout drawings of approved sites as described in §400.21(d)(5), showing activated portions, and a file showing required activation approvals. The zone grantee shall furnish necessary maps to CBP.

(c) Annual reports. (1) Each zone grantee shall submit a complete and accurate annual report to the Board within 90 days after the end of the reporting period. Each zone operator shall submit a complete and accurate annual report to the zone grantee in a timeframe that will enable the grantee's timely submission of a complete and accurate annual report to the Board.

A zone grantee may request an extension of the deadline for its report, as warranted. The Executive Secretary may authorize such extensions, with decisions on such authorizations taking into account both the circumstances presented and the importance of the Board submitting its annual report to Congress in a timely manner. Annual reports must be submitted in accordance with any instructions, guidelines, forms and related documents specifying place, manner and format(s) prescribed by the Executive Secretary. In the event that a grantee has not received all necessary annual report information from an operator in a timely manner, the grantee may submit its annual report on time and note the absence of the missing information.

(2) The Board shall submit an annual report to Congress.

**§400.52 Notices and hearings.**

(a) In general. The Executive Secretary shall publish notice in the *Federal Register* inviting public comment on applications and notifications for Board action (see, §§400.32 and 400.37(b)), and with regard to other reviews or matters considered under this part when public comment is necessary. An applicant under §§400.21, 400.24(b) and 400.25 shall give appropriate notice of its proposal in a local, general-circulation newspaper at least 15 days prior to the close of the public comment period for the proposal in question. The Board, the Secretary of Commerce, the Commerce Department's Assistant Secretary for Import Administration, or the Executive Secretary, as appropriate, may schedule and/or hold hearings during any proceedings or reviews conducted under this part whenever necessary or appropriate.

(b) Requests for hearings. (1) A party who may be materially affected by the zone activity in question and who shows good cause may request a hearing during a proceeding or review.

(2) The request must be made within 30 days of the beginning of the period for public comment (see §400.32) and must be accompanied by information establishing the need for the hearing and the basis for the requesting party's interest in the matter.

(3) A determination as to the need for the hearing shall be made by the Commerce Department's Assistant Secretary for Import Administration within 15 days after the receipt of such a request.

(c) Procedure for public hearings. The Board shall publish notice in the *Federal Register* of the date, time and location of a public hearing. All participants shall have the opportunity to make a presentation. Applicants and their witnesses shall ordinarily appear first. The presiding officer may adopt time limits for individual presentations.

**§400.53 Official records; public access.**

(a) Content. The Executive Secretary shall maintain at the location stated in §400.54(e) an official record of each proceeding within the Board's jurisdiction. The Executive Secretary shall include in the official record all timely evidence, factual information, and written argument, and other material developed by, presented to, or obtained by the Board in connection with the proceeding. While there is no requirement that a *verbatim* record shall be kept of public hearings, the proceedings of such hearings shall ordinarily be recorded and transcribed when significant opposition to a proposal is involved.

(b) Opening and closing of official record. The official record opens on the date the Executive Secretary dockets an application or receives a request or notification that satisfies the applicable requirements of this part and closes on the date of the final determination in the proceeding or review, as applicable.

(c) Protection of the official record. Unless otherwise ordered in a particular case by the Executive Secretary, the official record shall not be removed from the Department of Commerce. A certified copy of the record shall be made available to any court before which any aspect of a proceeding is under review, with appropriate safeguards to prevent disclosure of business proprietary or privileged information.

**§400.54 Information.**

(a) Request for information. The Executive Secretary, on behalf of the Board, may request submission of any information, including business proprietary information, and written argument necessary or appropriate to the proceeding.

(b) Public information. Except as provided in paragraph (c) of this section, the Board shall consider all information submitted in a proceeding to be public information, and if the person submitting the information does not agree to its public disclosure, the Board shall return the information and not consider it in the proceeding. Information to meet the basic requirements of §§400.21-400.25 is inherently public information to allow meaningful public evaluation pursuant to those sections and §400.32.

(c) Business proprietary information. Persons submitting business proprietary information and requesting that it be protected from public disclosure shall mark the cover page, as well as the top of each page on which such information appears, "business proprietary." Any business proprietary document submitted for a proceeding other than pursuant to §400.45 shall contain brackets at the beginning and end of each specific piece of business proprietary information contained in the submission. Any such business proprietary submission shall also be accompanied by a public version that contains all of the document's contents except the information bracketed in the business proprietary version, with the cover page and the top of each additional page marked "public version." Any information for which business proprietary treatment is claimed must be ranged (*i.e.*, presented as a number or upper and lower limits that approximate the specific business proprietary figure) or summarized in the public version. If a submitting party maintains that certain information is not susceptible to summarization or ranging, the public version must provide a full explanation specific to each such piece of information regarding why summarization or ranging is not feasible.

(d) Disclosure of information. Disclosure of public information shall be governed by 15 CFR part 4.

(e) Availability of information. Public information in the official record shall be available at the Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce Building, 1401 Constitution Avenue NW., Washington, DC 20230 and may also be available electronically over the internet via http://www.trade.gov/ftz (or a successor internet address).

Subpart G--Penalties and Appeals to the Board

**§400.61 Revocation of authority.**

(a) In general. As provided in this section, the Board can revoke in whole or in part authority for a zone or subzone whenever it determines that the zone grantee has violated, repeatedly and willfully, the provisions of the Act.

(b) Procedure. When the Board has reason to believe that the conditions for revocation, as described in paragraph (a) of this section, are met, the Board shall:

(1) Notify the grantee of the zone in question in writing stating the nature of the alleged violations, provide the grantee an opportunity to request a hearing on the proposed revocation, and notify any known operators in the zone;

(2) Conduct a hearing, if requested or otherwise if appropriate;

(3) Make a determination on the record of the proceeding not earlier than four months after providing notice to the zone grantee under paragraph (b)(1) of this section; and

(4) If the Board's determination is affirmative, publish a notice of revocation of authority, in whole or in part, in the *Federal Register*.

(c) As provided in section 18 of the Act (19 U.S.C. 81r(c)), the grantee of the zone or subzone in question may appeal an order of the Board revoking authority.

**§400.62 Fines, penalties and instructions to suspend activated status.**

(a) In general. Fines are authorized solely for specific violations of the FTZ Act or the Board's regulations as detailed in §§400.62(b) and (c). Each specific violation is subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to §400.62(j)), with each day during which a violation continues constituting a separate offense subject to imposition of such a fine (FTZ Act, section 19; 19 U.S.C. 81s). This section also establishes the party subject to the fine which, depending on the type of violation, would be the zone operator, grantee, or a person undertaking one or more zone-related functions on behalf of the grantee, where applicable. In certain circumstances, the Board or the Assistant Secretary for Import Administration could instruct CBP to suspend the activated status of all or part of a zone or subzone. Violations of the FTZ Act or the Board's regulations (including the sections pertaining to uniform treatment and submission of annual reports), failure to pay fines, or failure to comply with an order prohibiting or restricting activity may also result in the Executive Secretary's suspending the processing of any requests to the Board and staff relating to the zone or subzone in question. In circumstances where non-compliance pertains to only a subset of the operations in a zone, suspensions of activated status and suspensions of the processing of requests shall be targeted to the specific non-compliant operation(s).

(b) Violations involving requirement to submit annual report. A grantee's failure to submit a complete and accurate annual report pursuant to section 16 of the FTZ Act (19 U.S.C. 81p(b)) and §400.51(c)(1) of these regulations constitutes a violation subject to a fine, with each day of continued failure to submit the report constituting a separate offense subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to §400.62(j)). Further, each day during which a zone operator fails to submit to the zone's grantee the information required for the grantee's timely submission of a complete and accurate annual report to the Board shall constitute a separate offense subject to a fine of not more than 1,000 dollars (as adjusted for

inflation pursuant to §400.62(j)). Consistent with §400.46, if the grantee submits a timely report to the Board identifying any operator that has not provided complete and timely information in response to a timely request(s) by the grantee, the grantee shall not be subject to a fine-assessment action stemming from the operator's failure to timely provide its report.

(c) Violations involving uniform treatment. Failure by a grantee or a person undertaking one or more zone-related functions on behalf of the grantee to comply with the uniform treatment requirement of section 14 of the FTZ Act (19 U.S.C. 81n) or the provisions of §400.43 of these regulations constitutes a violation, with each day of continued violation constituting a separate offense subject to a fine of not more than 1,000 dollars (as adjusted for inflation pursuant to §400.62(j)).

(d) Procedures for determination of violations and imposition of fines. When the Board or the Executive Secretary has reason to believe that a violation pursuant to §§400.62(b) and (c) has occurred and that the violation warrants the imposition of a fine (such as a situation where a party has previously been notified of action required for compliance and has failed to take such action within a reasonable period of time), the following steps shall be taken:

(1) The Executive Secretary shall notify the party or parties responsible for the violation and the zone grantee in writing stating the nature of the alleged violation, and provide the party(ies) a specified period (no less than 30 days, with consideration given to any requests for an extension, which shall not be unreasonably withheld) to respond in writing;

(2) The Executive Secretary shall conduct a hearing, if requested or otherwise if appropriate. Parties may be represented by counsel at the hearing, and any evidence and testimony of witnesses in the proceeding shall be presented. A transcript of the hearing shall be produced and a copy shall be made available to the parties;

(3) The Executive Secretary shall make a recommendation on the record of the proceeding not earlier than the later of 15 days after the deadline for the party(ies)'s response under paragraph (d)(1) of this section or 15 days after the date of a hearing held under paragraph (d)(2) of this section. If the recommendation is for an affirmative determination of a violation, the Executive Secretary shall also recommend the amount of the fine to be imposed; and

(4) The Board shall make a determination regarding the finding of a violation and imposition of a fine based on the Executive Secretary's recommendation under paragraph (d)(3) of this section. For related actions where the total sum of recommended fines is no more than 10,000 dollars (50,000 dollars in the case of violations pursuant to paragraph (b) of this section), the Board delegates to the Executive Secretary the authority to make a determination.

(e) Mitigation -- (1) In general. The Commerce Department's Assistant Secretary for Import Administration may approve the mitigation (reduction or elimination) of an imposed fine based on specific evidence presented by the affected party. Authority is delegated to the Executive Secretary to mitigate a fine where the total sum of fines imposed on a party for related actions does not exceed 10,000 dollars (50,000 dollars in the case of violations pursuant to paragraph (b) of this section). Mitigating evidence and argument pertaining to mitigating factors must be submitted within 30 days of the determination described in paragraph (d)(4) of this section, subject to requests for extension for cause, the granting of which shall not be unreasonably withheld.

(2) Mitigating factors. Factors to be taken into account in evaluating potential mitigation include:

(i) A good record of a violator over the preceding five years with regard to the type of violation(s) at issue;

(ii) The violation was due to the action of another party despite violator's adherence to the requirements of the FTZ Act and the Board's regulations;

(iii) Immediate remedial action by the violator to avoid future violations;

(iv) A violator's cooperation with the Board (beyond the degree of cooperation expected from a person under investigation for a violation) in ascertaining the facts establishing the violation;

(v) A violation's resulting from a clerical error or similar unintentional negligence; and

(vi) Such other factors as the Board, or the Executive Secretary, deems appropriate to consider in the specific circumstances presented.

(f) Assessment of fines. After evaluating submitted mitigating evidence and argument, where applicable, the Commerce Department's Assistant Secretary for Import Administration may assess an imposed fine (in whole or in part). Authority is delegated to the Executive Secretary to assess a fine where the total sum of the imposed fines for related actions does not exceed 10,000 dollars (50,000 dollars in the case of violations pursuant to paragraph (b) of this section).

(g) Time for payment. Full payment of an assessed fine must be made within 30 days of the date of the assessment or within such longer period of time as may be specified. Payment shall be made in the manner specified by the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary.

(h) Procedures for instruction to suspend activated status. If a fine assessed pursuant to §§400.62(d) through (g) has not been paid within 90 days of the specified deadline for payment, if there is a repeated and willful failure to comply with a requirement of the FTZ Act or the Board's regulations, or if there is a repeated and willful failure to comply with a prohibition or restriction on activity imposed by an order of the Board or an order of the Commerce Department's Assistant Secretary for Import Administration pursuant to §400.49(c), the Board or the Commerce Department's Assistant Secretary for Import Administration may instruct CBP to

suspend the activated status of the zone operation(s) in question (or, if appropriate, the suspension may be limited to a particular activity of a zone operator, such as suspension of the privilege to admit merchandise), and the suspension shall remain in place until the failure to pay a fine, failure to comply with a requirement of the FTZ Act or the Board's regulations, or failure to comply with an order's prohibition or restriction on activity has been remedied. In determining whether to instruct CBP to suspend the activated status of a zone operation in the circumstances noted, the following steps shall be taken:

(1) Notification of party(ies). The Executive Secretary shall notify the responsible party(ies) in writing stating the nature of the failure to timely pay a fine, to comply with a requirement of the FTZ Act or the Board's regulations or to comply with a prohibition or restriction on activity imposed by an order of the Board or an order of the Commerce Department's Assistant Secretary for Import Administration. If the grantee is not one of the responsible parties notified, the Executive Secretary shall also provide a copy of the notification to the grantee. The responsible party(ies) shall be provided a specified period (of not less than 15 days) to respond in writing to the notification;

(2) Hearing. If the notified responsible party(ies) or the zone's grantee requests a hearing (or if a hearing is determined to be warranted by the Board, the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary), it shall be held before the Executive Secretary (or a member of the Board staff designated by the Executive Secretary) within 30 days following the request for a hearing (or the determination by the Board, the Commerce Department's Assistant Secretary for Import Administration or the Executive Secretary). Parties may be represented by counsel at the hearing, and any evidence and testimony of witnesses in the proceeding shall be presented. A transcript of the hearing shall be produced and a copy shall be made available to the parties;

(3) The Executive Secretary shall make a recommendation on the record of the proceeding not earlier than 15 days after the later of:

(i) The deadline for the party(ies)'s response under paragraph (h)(1) of this section; or

(ii) The date of a hearing held under paragraph (h)(2) of this section; and

(4) The Board or the Commerce Department's Assistant Secretary for Import Administration shall determine whether to instruct CBP to suspend the activated status of the zone operation(s) in question. If the determination is affirmative, the Executive Secretary shall convey the instruction to CBP, with due consideration to allow for the transfer of any affected merchandise from the applicable zone site(s).

(i) Enforcement of assessment. Upon any failure to pay an assessed fine, the Board may request the U.S. Department of Justice to recover the amount assessed in any appropriate district court of the United States or may commence any other lawful action.

(j) Adjustment for inflation. The maximum dollar value of a fine for a violation of the FTZ Act or the Board's regulations is subject to adjustment for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

**§400.63 Appeals to the Board of decisions of the Assistant Secretary for Import Administration and the Executive Secretary.**

(a) In general. Decisions of the Commerce Department's Assistant Secretary for Import Administration and the Executive Secretary made pursuant to this part may be appealed to the Board by adversely affected parties showing good cause.

(b) Procedures. Parties appealing a decision under paragraph (a) of this section shall submit a request for review to the Board in writing, stating the basis for the request, and attaching a

copy of the decision in question, as well as supporting information and documentation. After a review, the Board shall notify the appealing party of its decision in writing.

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