

Key Proposals for Changes to the FTZ Regulations



Agenda



- Major Themes
- Key Areas of Proposed change
- New Provisions
- NAFTAZ priority issues
- Comment Preparation & Submission
- Next Steps

Notice of Proposed Rulemaking Foreign-Trade Zones Board



- Published – December 30, 2010
- Comments originally due – April 8, 2011
- Extension to May 26, 2011
- 1991 Regulation History – 20 months
 - January 26, 1990 / November 20, 1990 / October 8, 1991
- 1991 Current Regulations – 27 Sections/10,954 Words
- Proposed 2010 Regulations – 44 Sections/17,634 Words
- NAFTAZ Proposed 2011 Regulations – 47 Sections/18,234 Words (+600)
- FTZB next steps

NAFTZ Process



- Reviewed and Responded to Proposed Regulations
 - Numerous rounds of analysis of issues/concerns
 - Multiple task forces and constituent groups have provided detailed suggested changes
 - Association consensus reached
 - Submitted NAFTAZ comments to the Foreign-Trade Zones Board
 - Educating Members and others to encourage comments
 - Discussing recommendations with Foreign-Trade Zones Board, Members of Congress, and Other Associations
 - Discussing next steps under consideration by Foreign-Trade Zones Board (proposed, interim, final rules)

Key Themes



- To achieve New Regulations That Are Clearly Superior To The Existing Regulations In The Following Ways:
 - Implement trade policy goals of making US. locations for manufacturing, logistics and duty savings equal to alternative foreign locations
 - Foster practical and creative proposals for the management of foreign-trade zones
 - Partnership with the Board and CBP to promote secure operations in zones with minimum paperwork burdens and uniform treatment throughout the country

Key Goals



Update Regulations to Reflect:

- Growth of the program and necessary enhancement
- Expedited approval of production activity
- Need to encourage U.S. jobs, investments and exports to improve U.S. competitiveness
- Clarify processes while maintaining flexibility
- Help Zone Grantees, Operators, and Users develop a more robust FTZ program
- Address compliance concerns
- Improve the FTZ program
- Balance competing interests

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Subpart A—Scope, Definitions and Authority

- 400.1 Scope.
- 400.2 Definitions.
- 400.3 Authority of the Board.
- 400.4 Authority and responsibilities of the Executive Secretary.
- 400.5 Authority to restrict or prohibit certain zone operations.
- 400.6 Board headquarters.

Subpart A--Scope, Definitions and Authority

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- 400.6 Board headquarters.
- 400.7 CBP Port Director as Board Representative.
- 400.8 Export Promotion.
- 400.9 Federal Agency Uniform Procedures on FTZ Compliance.

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Subpart B—Ability To Establish Zone; Limitations and Restrictions on Authority Granted

- 400.11 Number and location of zones and subzones.
- 400.12 Eligible applicants.
- 400.13 General conditions, prohibitions and restrictions applicable to grants of authority.
- 400.14 Production—activity requiring approval or reporting; restrictions.
- 400.15 Production equipment.
- 400.16 Exemption from state and local ad valorem taxation of tangible personal property.

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Subpart C—Applications To Establish and Modify Authority

- 400.21 Application for zone.
- 400.22 Application for production or subzone authority.
- 400.23 Application for expansion or other modification to zone project.
- 400.24 Criteria for evaluation of zone proposals or expansion or other modifications to zone projects.
- 400.25 Criteria for evaluation of production and subzone proposals.
- 400.26 Burden of proof.
- 400.27 Application fees.

Subpart C--Applications To Establish and Modify Authority

- 400.21 Application for new general-purpose zone.
- 400.22 Application for subzone.
- 400.23 Application for production authority.
- 400.24 Criteria for evaluation of production activity.
- 400.25 Application for expansion or other modification to Zone Project.
- 400.26 Criteria for evaluation of zone proposals or expansion or other modifications to Zone Projects.
- 400.27 Burden of proof.
- 400.28 Application fees.

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Subpart D—Procedures for Application Evaluation and Reviews

- 400.31 General application provisions and pre-docketing review.
- 400.32 Procedure for docketing application and commencement of case review.
- 400.33 Examiner’s review—case not involving production activity.
- 400.34 Examiner’s review—case involving production activity.
- 400.35 Completion of case review.
- 400.36 Procedure for application for minor modification of zone project.
- 400.37 Procedure for notification and review of production changes.
- 400.38 Monitoring and reviews of zone operations and activity.

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Subpart E—Operation of Zones and Administrative Requirements

- 400.41 Operation of zones; general.
- 400.42 Operation as public utility.
- 400.43 Uniform treatment.
- 400.44 Requirements for commencement of operations in a zone project.
- 400.45 Zone schedule.
- 400.46 Complaints related to public utility and uniform treatment.
- 400.47 Grantee liability.
- 400.48 Retail trade.
- 400.49 Zone-restricted merchandise.

Subpart E--Operation of Zones and Administrative Requirements

- **400.40 Monitoring and reviews of zone operations and activity.**
- 400.41 Operation of zones; general.
- 400.42 Operation as public utility principles.
- 400.43 Uniform treatment.
- 400.44 Requirements for commencement of operations in a Zone Project.
- 400.45 Zone Schedule.
- 400.46 Complaints related to public utility and uniform treatment.
- 400.47 Grantee **or administrator** liability.
- 400.48 Retail trade.
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Subpart F—Records, Reports, Notice, Hearings and Information

- 400.51 Accounts, records and reports.
- 400.52 Notice and hearings.
- 400.53 Official record; public access.
- 400.54 Information.

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Subpart G—Penalties, Prior Disclosure and Appeals to the Board

- 400.61 Revocation of grants of authority.
- 400.62 Fines, penalties and instructions to suspend activated status.
- 400.63 Prior disclosure.
- 400.64 Appeals to the Board of decisions of the Assistant Secretary for Import Administration and the Executive Secretary.

Subpart G--Penalties, Prior Disclosure and Appeals to the Board

- 400.61 Revocation of grants of authority.
- 400.62 Fines, penalties and instructions to suspend activated status.
- **400.63 Voluntary disclosure.**
- 400.64 Appeals to the Board of decisions of the Assistant Secretary for Import Administration and the Executive Secretary.

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.1 Scope

- Added language to clarify interplay between FTZs and Free Trade Agreements/Special Trade Treatment Programs

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.2 Definitions

NPRM – 23 Definitions NAFTAZ – 38 Definitions

Removed: Agent, Zone, Zone Grantee, Zone Operator, Zone Site, Zone User

Added:

- Activation
- ASF
- Domestic Status
- General-purpose zones
- Inverted Tariff
- Modification
- Non-privileged foreign
- Privileged foreign
- Special Tariff Treatment Program
- Usage-Driven Site
- User
- Administrator
- Board Order
- Free Trade Agreement
- Grantee
- Magnet Site
- NAFTA
- Operator
- Service Area
- Traditional Site Framework
- Zone restricted

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.2 Definitions

Changed/Enhanced:

- Foreign-trade zone
- Grant of Authority
- Person
- Port Director
- Port of Entry
- Private corporation
- Production
- Zone Project

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.3 Authority of the Board.

- Provided that the Board may award lowest duty rate

Sec. 400.4 Authority and responsibilities of the Executive Secretary.

- Neutrality
- Temporary approvals

Sec. 400.5 Authority to restrict or prohibit certain zone operations.

- Reversed order – review then restrict/prohibit

Sec. 400.6 Board headquarters.

- No change

Sec. 400.7 CBP Port Director as Board Representative.

- New section
- Clarified roles and responsibilities

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.8 Export Promotion.

- New section
- Explicit coordination with other export promotion agencies to educate on the benefits of FTZs

Sec. 400.9 Federal Agency Uniform Procedures on FTZ Compliance.

- New section
- Other Government Agency requirements for FTZs

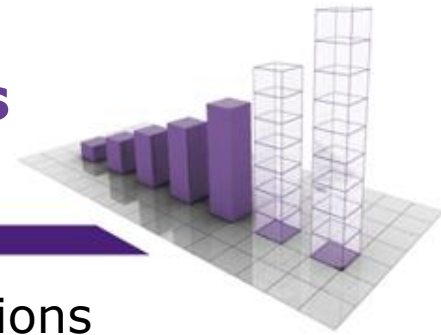
Sec. 400.11 Number and location of zones.

- Adjacency determination by Grantee/Zone Participant with concurrence of CBP

Sec. 400.12 Eligible applicants.

- Changed standard from “must be consistent with”
- “Any application **must not be inconsistent with** the charter or organizational papers of the applying entity”

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.13 General conditions, prohibitions and restrictions applicable to grants of authority.

- Added language to Board ability to restrict or prohibit zone activity that in its judgment is detrimental to the public interest **“based on the facts and the public record”**
- Added language that any determination that production as part of ongoing reviews is not in the public interest **must be supported by evidence of significant and material detrimental impact upon a directly affected person**
- **Added new provision that Operators are permitted to allow other persons to undertake business activities within the Operator’s activated zone site, without physical segregation, under the Operator’s responsibility**

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.14 Production—activity requiring approval or reporting; restrictions.

- Added **expedited reviews** but **Board Orders** in all cases involving new production activity
- Emphasis on **Intermediate/Finished products** as definition of scope of authority **including all inputs used to make**
- Eliminates HTS number tracking of components
- Eliminates proposed quarterly reporting
- Eliminates capacity limitations
- Allowed for **Interim Authority** after close of period for public comment
- **Delegation to Executive Secretary for decisions when proposed activity allowed under CBP bonded procedures, sole benefit is scrap/waste, or similar to recent approvals by the Board**
- **Added Board authorization for production of items subject to AD/CVD for export when U.S. competitiveness is advanced an similar activity is authorized in other countries**

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.15 Production equipment.

- Changed definition from: “limited to equipment and parts of equipment destined for use in **zone production activity**” to: “limited to equipment and parts of equipment destined for **use in a zone**”
- Intent to preserve production equipment benefit for distribution activities when equipment is the same
- Added ability to obtain temporary FTZ and expedited activation for production equipment benefit similar to CBP bonded yard and warehouse procedures that allow imported machinery to be entered under entreties provision

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

- Suggested deletion of section due to language in FTZ Act or replicate statutory language in regulations
- Membership concerns expressed that NPRM language could be construed too narrowly

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.21 Application for new general-purpose zone.

- Explicit explanations of **TSF vs. ASF**
- Explicit inclusion of application content requirements versus web site guidelines

Sec. 400.22 Application for subzone.

- Explicit inclusion of application content requirements versus web site guidelines

Sec. 400.23 Application for production authority.

- Explicit inclusion of application content requirements versus web site guidelines

NAFTZ Comments: Key Discussion Points by Section



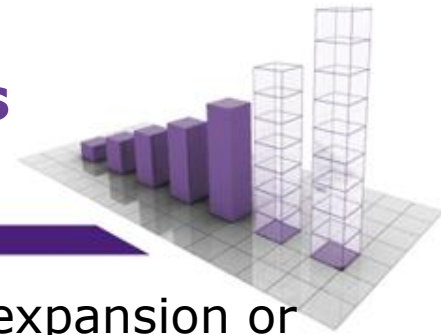
Sec. 400.24 Criteria for evaluation of production activity.

- Added ability to **conduct proposed activity outside of the U.S. with the same U.S. tariff impact**
- Added **precedence of prior Board decisions**
- Added **net effect on U.S. economy** (as well as employment)
- Added **promotion of U.S. competitiveness** to Board policy of when to authorize zone activity

Sec. 400.25 Application for expansion or other modification to Zone Project.

- Explicit inclusion of application content requirements versus web site guidelines

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.26 Criteria for evaluation of zone proposals or expansion or other modifications to Zone Projects.

- Increased standard for consideration of the views of persons likely to be “**materially impacted**” versus affected by proposed zone activity

Sec. 400.27 Burden of proof.

- Deleted “**significant**” from demonstration of public benefits by applicants for production-related authority
- Added that persons who oppose applications must demonstrate standing and submit **evidence of negative effects**
- Added that commenters submitting evidence of negative effects should provide information that is **probative and substantial** in addressing the matter in issue including any **evidence of direct impact**
- Probative and substantial standard mirrored in NPRM as standard for applicant responses to evidence of negative effects

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.28 Application fees.

- No substantive changes

Sec. 400.31 General application provisions and pre-docketing review.

- Reduced production activity processing standard from 1 year to **6 months**
- Reduced other application processing standard from 10 months to **5 months**

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.32 Procedures for docketing application and commencement of case review.

- Added that comments will not be accepted for filing or consideration by the Examiner or the Board after the comment period deadline
- Added “**sufficient**” cause required to open or reopen comment period
- Added that hearing must be arranged for within **60 days of end of initial comment period**
- Added that Executive Secretary must notify affected Zone Participants as well as the applicant in writing of Board determinations
- Changed that CBP review must submit its report within **15 days** of close of comment period (versus 45 days)

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.33 Examiner's review—case not involving production activity.

- Reduced timeframe for examiner's recommendations to Board from 120 days to **60 days** after close of comment period

Sec. 400.34 Examiner's review—case involving production activity.

- Added taking into account **consistency with previous determinations**
- Changed requirement from "appropriate industry surveys" when necessary to "**appropriate independent and objective industry research**"
- Reduced timeframe for examiner's recommendations to Board from 150 days to **75 days** after close of comment period
- Added ability for applicants or affected Zone Participants to receive time extensions which **shall not be unreasonably withheld** to respond to preliminary unfavorable recommendations or to rebut public comments based on new evidence

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.35 Completion of case review.

- Added **CBP/DHS default approval** during interagency review based on CBP concurrence letter received if comments are not received within 30 days of receipt of examiner's report
- Provided opportunity for Grantee and directly affected Zone Participants to **meet with the Board** if decision is not favorable or if Board is unable to reach a unanimous decision
- Added language on termination of reviews to ensure applicants can obtain extensions of time to respond as needed
- Added language requiring **confirmation of termination in writing** to the applicant and affected Zone Participant

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.36 Procedure for application for minor modification of Zone Project.

- Added that **CBP concurrence must be provided within 15 days** of a request from the Executive Secretary if not provided at time of application

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.40 Monitoring and reviews of zone operations and activity.

- Changed circumstances must be supported by **significant evidence of detriment to the public interest** in order to limit or restrict approved activity
- When threshold factors are the basis for a negative recommendation, Grantee and directly affected Zone Participants must be notified and given an opportunity to submit evidence
- Added requirement for “**probative and substantial evidence**” to support reviews initiated based on requests from parties directly affected by the activity in question and showing good cause
- Negative public interest findings must be based on evidence on the record that support a decision **inconsistent with the original Examiner’s Report**
- Negative determinations regarding previously approved activity must be supported on the record **by evidence of negative direct impact on a U.S. manufacturer**
- Prior to issuance of Board Order, affected Zone Participant shall be afforded opportunity to **meet with the Board**

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.41 Operation of zones; general.

- Deleted reference to CBP Port Director in favor of new section 400.7

Sec. 400.42 Operation of zone under public utility **principles**.

- Distinguished between zones as public utilities and zones operating under public utility **principles**
- Incorporated Administrator roles and responsibilities

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.43 Uniform treatment.

- Added ability to change standard contract terms as circumstances warrant
- Added that contract terms should be specific to provisions **relevant to zone participation**
- Added that neutral evaluation criteria may include but are not exclusive to considerations such as **impact on employment and investment maintenance and creation, ability to increase foreign trade, and consistency with public economic development and Zone Project plans**
- **Removed preclusions of conflicts of interest**
- **Added disclosure and recusal language**
- **Added language that potential and existing Users shall have the right to operate their own zone sites and contract with third party Operators and service providers at the election of the User subject to the requirements of 19 CFR part 146**

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.43 Uniform treatment. (continued)

- Added that other than uniform rates and charges assessed by the Grantee or its Administrator as reflected in the Zone Schedule, Users shall not be required to utilize or pay for zone related products or services that they do not elect to procure

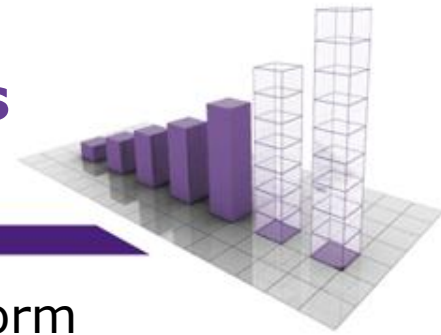
Sec. 400.44 Requirements for commencement of operations in a Zone Project.

- Minor wording changes and re-ordering

Sec. 400.45 Zone Schedule.

- Minor wording changes

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.46 Complaints related to public utility and uniform treatment.

- Added requirement that Grantees and their Administrators and Operators as applicable be notified of complaints submitted against them with opportunity to respond and access to information needed to respond
- Changed language under objections to rates and charges such that the factors considered in reviewing fairness and reasonableness include “the methodology supporting rates and charges” versus “the actual costs”

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.47 Grantee or Administrator liability.

- Incorporated Administrator roles and responsibilities
- Redefined “**general oversight**” role “to ensure that the reasonable needs of the business community are served by the Zone Project”
- Removed word “**ordinarily**” to make clear that Grantees and Administrators are not liable for violations by Zone Participants as long as they do not undertake detailed operational oversight of or direction to Zone Participants

Sec. 400.48 Retail trade.

- Clarified that restrictions apply to **activated areas** of zones only
- Changed Grantee permits to **Board issued permits with concurrence of Grantee**
- Clarified that **order fulfillment activities do not constitute retail trade**
- Changed requirement to **notification to Port Director** of Board approvals under this section instead of concurrence of the Port Director

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.49 Zone-restricted merchandise.

- Terminology improvements (admitted/entered/returned)

Sec. 400.51 Accounts, records and reports.

- Deleted GAAP reference due to broad ranging implications
- Provided for electronic record retention
- Clarified **120 days** versus 90 days for Annual Report filing
- Provided for extensions in writing which **shall not be unreasonably withheld**
- Provided that Grantee may submit the Annual Report on time and note missing information if it does not receive information on time from Zone Participants
- Provided that Annual Report data submitted by Zone Participants shall be deemed **business proprietary** other than information required to be published in the Annual Report to Congress

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.52 Notice and hearings.

- Added “**timely**” to scheduling of hearings during proceedings or reviews
- Added language that a directly affected party “who may be **materially impacted** by the proposed zone activity and **who shows” good cause** may request a hearing during “an application” proceeding
- Added that a determination as to the need for a hearing initiated by the Board must be made within **60 days of the end of the initial public comment period**
- Added **7 days advance written notice** to Executive Secretary for those requesting to present at hearing
- Added notification to Grantee and affected Zone Participants immediately for those requesting to present at hearing
- Added that applicants and their witnesses shall appear first and **last** to present introductory and rebuttal comments

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.53 Official record; public access.

- Added under protection of the official record that a certified copy of the record will be made available to any court before which any aspect of a proceeding is under review, with appropriate safeguards to prevent disclosure of “**confidential**” proprietary and privileged information.

Sec. 400.54 Information.

- Minor changes made to strengthen confidentiality of business proprietary information

Sec. 400.61 Revocation of grants of authority.

- Minor changes
- Added “**in whole or in part**” to make clear revocation of grants of authority may be partial

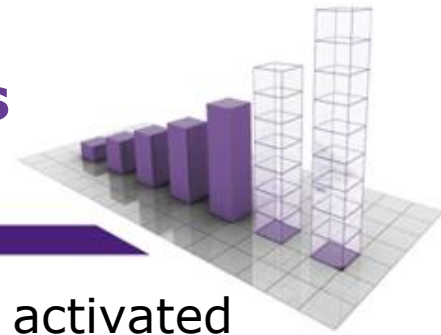
NAFTZ Comments: Key Discussion Points by Section



Sec. 400.62 Fines, penalties and instructions to suspend activated status.

- Clarified fines accrue each “**business**” **day** during which a violation continues
- Clarified that only Operators, Grantees and Administrator may be subjected to fines depending on the type of violation (Users?)
- Added that **daily cap on fines includes any fines, penalties, or liquidated damages issued by CBP if applicable for the same violation**
- Added Grantees are not subject to fines for late filing of Annual Report fines if they file on time identifying any operators that have not provided complete and timely information in response to timely requests by the Grantee
- Added requests for extensions to respond to notices of violations **shall not be unreasonably withheld**
- Added mitigating factors when **violator cooperates in resolution** of issue and when violation had **no government revenue impact**

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.62 Fines, penalties and instructions to suspend activated status. (continued)

- Modified mitigating factor when **violation relied on inaccurate advice provided by a Board staff member (removed "written")**
- Allowed for other mitigating factors as the Assistant Secretary of Import Administration deems appropriate
- Provided for **cancellation** of fines
- Added notification to responsible and **"affected"** parties
- Allowed **"affected"** as well as responsible parties to request hearings and receive transcripts of hearings
- Allowed for due consideration to allow for the **transfer of any affected merchandise from the applicable zone site before suspensions of activated status occur**

NAFTZ Comments: Key Discussion Points by Section



Sec. 400.63 **Voluntary disclosure.**

- Name changed to distinguish from CBP prior disclosure
- Defined when a voluntary disclosure is made
- Defined when an investigation is considered commenced
- Provided for **oral** and written voluntary disclosures
- Added that oral disclosures must be confirmed in writing within **15 days**
- Added inclusion of **preventative measures adopted** in disclosure
- Added **perfection** of disclosure within **30 days** with extensions upon request that **shall not be unreasonably withheld**
- Added determinations within **60 days** of perfection of disclosure
- Added that no fines or penalties shall be assessed upon a valid disclosure if violation has been rectified or there is no finding of fraud
- Added **50% reduction** in fines assessed if voluntary disclosure is filed

NAFTZ Comments: Key Discussion Points by Section



- Sec. 400.64 Appeals to the Board of decisions of the Assistant Secretary for Import Administration and the Executive Secretary.
- Provided opportunity for affected Grantee and Zone Participant to provide input to the Board
 - Provided opportunity to **meet with the Board** prior to negative decision
 - Clarified judicial review of Board decisions and Orders shall be conducted before the **U.S. Court of International Trade**

Next Steps



- Discuss Issues/Concerns with Foreign-Trade Zones Board, Members of Congress, and Other Associations
- Encourage Members and others to File Comments
- www.regulations.gov
- **ITA-2010-0012**
- Comments due **May 26, 2011**