



INTERNATIONAL
TRADE
ADMINISTRATION

U.S. Foreign-Trade Zones Board

Public Utility, Zone Schedules, and Uniform Treatment



Public Utility in Context

- In FTZ Act, Congress attached specific requirements to privilege of being FTZ grantee because grantee generally has a monopoly on FTZ access in its region.
- FTZ Act requires each zone “be operated as a public utility, and all rates and charges for all services or privileges... shall be fair and reasonable...”
- 2012 regulations developed through extensive public comment process, address real-world implications of public utility requirement.



Regulations' Public Utility Provisions

- Revised “public utility” and “zone schedule” regulatory provisions had a compliance date of 2/28/2014.
- Zones may impose cost recovery-based fees – directly related to services provided – that include reasonable return on investment. No tying fees to users’ benefits.
- Based on comments: Zone cannot require users to use/buy a provider’s products/services (incl. pay for provision/availability of a provider’s technical expertise). Extends to both direct and indirect payments.



Regulations' Public Utility Provisions (cont.)

- Distinction between technical expertise (involving application of detailed knowledge of processes, procedures or requirements – which a range of providers vie to sell to users) versus general facilitative role (which grantees commonly undertake and which appropriately can be funded through mandatory fees).
- For any uncertainty/questions, parties may contact FTZ Board for determination specific to their facts.
- Additional detail also addressed in correspondence available in Reading Room section of Board's website.



How can a grantee gauge if its fees are consistent with Public Utility provisions?

If grantee undertakes most grantee functions internally:

- Estimate total cost of staff time, overhead, and other relevant expenses associated with grantee function.
- Determine if there is any “reasonable return on investment” to add to ordinary costs/expenses.
- Adopt reasonable and uniform method to allocate the total of costs/expenses and return on investment over the range of users paying fees.



- Preamble for Sec. 400.42 gives some examples of methods (presented by grantees in comments on the proposed regulations) to allocate costs over users:
 - Operator's square footage of activated FTZ space
 - Value of 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
 - Whether the operator is in an industry sector targeted for attraction based on community economic development plans



- Remember that a grantee does not need to recover all (or any) of its costs. Grantee can subsidize zone.
- Otherwise, total fees collected, on average, should be in sync with total costs + reasonable return on investment.
- Costs and user population may evolve, but a grantee generally should not need to revise fees annually.
- Grantee should be ready to reexamine fees if there is a major shift in costs and/or user population over time.
- FTZ Act's public utility requirement means zone cannot serve as profit center for grantee.



If grantee outsources most grantee functions:

- Same considerations apply regarding: total costs/expenses and reasonable return on investment; how to allocate over categories of users; and, frequency of reevaluating fees.
- For fees that incorporate costs for outsourced functions, Sec. 400.45 of regs (“Complaints related to public utility and uniform treatment”) says “the Board may consider the costs incurred by those parties (using best estimates, as necessary).”



Grantees' "Zone Schedules"

- Grantee may not charge any amount (or formula) that is not in its zone schedule (15 CFR 400.44(b)(4) requires zone schedule to include “[a]ll rates or charges assessed by or on behalf of the grantee”).
- After regulations' 2/28/14 compliance date for grantees to make any needed changes to zone schedules, FTZ Staff contacted grantees with missing zone schedules or missing elements/questionable language.
- Per regulation, collected zone schedules on FTZB website on each zone's info. page in OFIS.



Missing Zone Schedules

- Zones that had not provided requested zone schedules were sent letters reminding the grantee that a zone cannot operate without a zone schedule in place (incl. copy submitted to FTZ Board).
- Zones that subsequently still had not submitted missing schedules have been included in list on FTZB website of zones that cannot operate, and we have notified the grantee and the local CBP office that the zone cannot operate.



Uniform Treatment in Context

- In context of general local FTZ grantee monopoly, FTZ Act requires each zone to afford users “uniform treatment under like conditions.”
- In Sept. 2007, FTZ Board published *Federal Register* notice inviting comment re concerns raised related to uniform treatment in local FTZ access. Notice cited potential conflicts of interest where party working for grantee may effectively control access to FTZ while also trying to sell FTZ-related services to users of the zone.



Uniform Treatment Regulation

- Key provision for “Avoidance of Non-Uniform Treatment” in specific circumstances: Person (or related party) who w/in last 12 months has offered/sold FTZ-related product or service to a zone’s users cannot:
 - Take action for/make recommendation to grantee on application’s disposition (for FTZ authority/activation)
 - Approve/be party to agreement with (or for) grantee pertaining to user’s FTZ authority/activation
 - Oversee user’s operations in zone for grantee.



Uniform Treatment Regulation (cont.)

- Professional advice and assistance to grantees on applications would not constitute first key function if ultimate recommendation or action on disposition of application is made within grantee organization.
- Third party should be aware that its checks on activity on behalf of grantee may constitute third key function.
- May contact Board for determination on whether particular activity constitutes undertaking key function.
- Additional detail also addressed in correspondence available in Reading Room section of Board's website.



Uniform Treatment Regulation (cont.)

- Grantee or person subject to provision may request waiver. No “one size fits all” approach.
- For waiver decision, FTZ Board will consider circumstances presented in waiver application, including nature of person’s specific grantee-related function(s).
- Uniform treatment does not preclude grantees from negotiating provisions of individual operators’ agreements. Good faith negotiations starting from standard contractual provisions are permissible.



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If you have questions, please contact
your regional representative
(see list under “Contact Us” on FTZ
Board website – www.trade.gov/ftz),
ftz@trade.gov or (202) 482-2862