Magdalene Grant

From: Cindy Engelbrecht [CEngelbrecht@gkglaw.com]
Sent: Friday, July 15, 2011 3:14 PM
To: Secretary
Subject: Docket No. 11-09 - FMC Optional Bond Rider
Attachments: NCBFAA Comments - Docket No 11-09.pdf

Attached please find the Comments of the National Customs Brokers and Forwarders Association of America, Inc. in Docket No 11 09

(See attached file: NCBFAA Comments - Docket No 11-09.pdf)

Cindy Engelbrecht
GKG Law, P C.
1054 31st St , N W.
Washington, D C 20007
Ph : (202) 342 6771
Fax. (202) 342-5219

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 11-09

NOTICE OF INQUIRY – SOLICITATION OF VIEWS ON PROPOSAL OF THE MINISTRY OF TRANSPORT OF THE PEOPLE'S REPUBLIC OF CHINA FOR ADJUSTMENT OF THE AMOUNT FOR THE FMC OPTIONAL BOND RIDER

COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") submits the following Comments in response to a Notice of Inquiry ("NOI") that was issued by the Commission on June 13, 2011. As we understand the NOI, the Commission is seeking input from the shipping industry concerning a request made by the Ministry of Transport of the People's Republic of China ("MOT") that would increase the amount of the NVOCC optional bond rider covering the transportation activities in the U.S.-China trades by U.S.-licensed non-vessel operating common carriers ("NVOCCs").

I. BACKGROUND

Together with its 28 affiliated local and regional associations, the NCBFAA is the primary trade association representing NVOCCs in the United States. As the Commission is aware, the NCBFAA was deeply involved in helping shape the implementing rules by which U.S.-licensed NVOCCs are regulated by the MOT and other PRC agencies pursuant to their Regulations on International Maritime Transportation ("RIMT"). Those efforts included submitting formal pleadings and correspondence to the Commission, the Maritime Administration, and the PRC Ministry of Communications ("MOC").

As particularly relevant here, the NCBFAA expressed concerns about the RIMT's requirement that NVOCCs be required to post cash security deposits in a Chinese bank in the amount of RMB 800,000, which was roughly equivalent to US $96,000 in 2003 when the RIMT was promulgated. The Association pointed out that this would be prohibitively expensive to many NVOCCs already engaged in the U.S.-China trade and that many U.S. companies might be reluctant to comply because of the uncertainty of how those funds would be treated. The NCBFAA further argued that the overlapping financial responsibility requirements of the U.S. and the PRC were in large part redundant, and that the requirement created an artificial trade barrier. The NCBFAA therefore suggested that the U.S. and the PRC governments agree that U.S.-licensed NVOCCs would not be required to comply with the separate U.S. and PRC financial responsibility requirements.

That position was ultimately adopted by both governments. As the NOI points out, in an Annex to the 2003 bilateral Maritime Agreement between the United States and the PRC, U.S.-licensed NVOCCs were not required to make a cash deposit in a Chinese bank as long as they could provide evidence of financial responsibility in the total amount of RMB 800,000 or US $96,000.

Shortly thereafter, the NCBFAA filed a petition with the Commission requesting that the agency initiate a rulemaking to amend the financial responsibility requirements for NVOCCs and thereby formalize this arrangement. The NCBFAA proposed that the Commission provide for a mechanism by which licensed NVOCCs could, on a voluntary basis, amend their existing surety arrangements by obtaining a supplemental bond that would bridge the gap between the base $75,000 bond required by the FMC for licensed NVOCCs and the $96,000 required by the PRC.

In response to that petition, the FMC issued a Notice of Proposed Rulemaking in Docket Petition No. P10-03, *Petition of the National Customs Brokers and Forwarders Association of*

America, Inc. for Rulemaking, 30 S.R.R. 76 (FMC 2004). After comments were received from the NCBFAA and two associations representing surety interests, the Commission issued its final rule in Docket No. 04-02, *Optional Rider for Proof of Additional NVOCC Financial Responsibility*, 30 S.R.R. 179 (FMC 2004). Accordingly, for the past eight years, U.S.-licensed NVOCCs have been able to register to do business in the PRC by providing Chinese authorities with proof of their supplemental bond, thus reflecting total bond coverage of US $96,000.

MOT is now requesting that the FMC increase the amount of the supplemental bond by $26,000, so that the total of the supplemental bond would become $47,000. This revision, according to MOT, is necessary to account for the devaluation of the U.S. dollar as compared to the Renminbi. MOT asserts that the RMB has risen by approximately 21% in the past eight years as compared to the U.S. dollar. Further, to account for possible future fluctuation in the currency exchange rate, MOT proposes that the Commission revise its regulations to provide that the amount of the supplemental bond would be changed at any point in time that the exchange rate fluctuates by 20% either higher or lower, than the level as of the last adjustment.

II. <u>DISCUSSION</u>

The NCBFAA, having consulted with its members, has several comments in response to the NOI and several other questions posed by the Commission.

First, the optional bond rider has been an extremely successful program and has permitted U.S.-licensed companies to conduct activities in the U.S.-PRC trade without having to post significant cash deposits in Chinese banks. By showing its willingness to address the concerns of U.S. NVOCCs, the PRC has alleviated much of the uncertainty that had existed in 2003 as to how the RIMT would be implemented and enforced. While U.S.-licensed NVOCCs must still undertake a registration process as a prerequisite to conducting business in the PRC, by all the reports the process has not been unduly onerous. And, by virtue of the supplemental bond rider, U.S. companies have freed up significant capital that would otherwise need to be deposited in a Chinese bank. Consequently, it is fair to say that the optional NVOCC bond rider arrangement that implemented the bilateral Maritime Agreement has been beneficial to the U.S. NVOCC industry and has not heretofore unduly increased operating costs.

Moving on to the second question posed in the NOI, the NCBFAA is aware that there has been significant currency fluctuation between the U.S. dollar and all currencies over the past eight years. The Association therefore accepts, for the purpose of this NOI, that the current total of $96,000 in bonds as required by the base NVOCC and optional bond rider no longer equates to RMB 800,000 at the current exchange rate. Consequently, there is some justification for reviewing the amount of the optional bond rider that should be required due to the present currency situation. Nor does the Association have an objection, based on the current record, if the Commission were to revisit the appropriate amount of the optional bond rider at any time there is a 20% fluctuation, up or down, in the relationship of the U.S. dollar to the RMB.

It is not clear, however, that it is necessary or appropriate to automatically require all U.S.-licensed NVOCCs to obtain additional bond coverage at this time notwithstanding the relative devaluation of the U.S. dollar over the past eight years. Many licensed companies already have bonds on file with the Commission that exceed the base $75,000 requirement set forth in 46 C.F.R. §515.21(a)(2). Consistent with the requirements of subsection (a)(4), all NVOCCs are required to have and maintain an additional $10,000 for each branch office. Thus, for example, an NVOCC with two branch offices has an FMC bond of $95,000, a company with three branch offices has bonds amounting to $105,000, and so on. This tends to be the situation with many, if not most, NVOCCs.

Just using the NCBFAA's NVOCC subcommittee as an example, the members of that committee have 81 branch offices. The average amount of FMC NVOCC bond for those companies is accordingly $165,000, rather than the base $75,000. Thus, many companies already have bonds that are significantly higher than the $96,000 required by the PRC government in 2003; similarly, many NVOCCs already have bonds in excess of the $122,000 MOT asserts is equivalent to the RMB 800,000 figure required by the RIMT.

The Annex to the 2003 bilateral Maritime Agreement did not require an optional $21,000 of FMC bonding. Instead, U.S. NVOCCs were required only to have "evidence of financial responsibility in the total amount of 800,000 RMB or $96,000 U.S." Consequently, as long as a U.S.-licensed NVOCC has bonds exceeding RMB 800,000, regardless whether they are the bonds required by §515.21 or the optional bond rider established under §515.25(c), there is no reason to automatically increase the amount of the bond in Appendices E and F of Part 515 to $47,000. Instead, the NCBFAA suggests that the Commission discuss this with MOT and seek that agency's consent to accept the total bond amount on file at the FMC in determining whether a particular NVOCC has satisfied the 800,000 RMB requirement. If appropriate, the Commission could then, for example, amend Appendices E and F to delete the reference to the number $21,000 and instead leave a blank space that is to be completed, as appropriate, by any NVOCC that wishes to avail itself of the opportunity to obtain the optional bond rider. In that way, each company can determine, based upon its own circumstances, the amount of any optional bond it would need in order to satisfy the RMB 800,000 or USD $122,000 (assuming the Commission accedes to MOT's request) financial responsibility requirements under the RIMT.

The NCBFAA recognizes that this approach would result in different NVOCCs having different optional bond amounts. Nonetheless, since companies with multiple branch offices are already paying additional bond premiums to cover their branch offices, they would not be receiving any inappropriate advantage vis-à-vis those companies with either no or fewer branch offices. They would, however, be spared additional premiums that could be better used in reducing their operating costs. And, MOT would not be disadvantaged, as the total amount of the base and optional FMC bonds required to comply with the RMB 800,000 established by the RIMT would still be in place and easily determined for each U.S. licensee registered in the PRC. Since the MOT registration rules presently require licensees to provide copies of the U.S. company's license and optional bond, MOT would still be able to determine the total amount of bonds held by any registrant by now requesting copies of both the optional and standard NVOCC bonds.

Accordingly, while the NCBFAA does not oppose modifying the optional bond to keep pace with the currency changes that have occurred in the past eight years, it requests that the Commission work with MOT so that agency recognizes the total amount of bonds on file at the FMC for each licensee in determining a company's satisfaction of the RMB 800,000 financial security requirement.

Respectfully submitted,

Edward D. Greenberg
GKG Law, P.C.
1054 Thirty-First Street, NW
Washington, DC 20037-4492
Telephone: 202/342-5200
Facsimile: 202/342-5219

Attorney for
THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

DATE: July 14, 2011