(S E R V E D)
(AUGUST 22, 2012)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR Part 515

Docket No. 11-09

RIN 3072-AC46

Adjustment of the Amount for the Optional Bond Rider for Proof of NVOCC Financial Responsibility for Trade with the People's Republic of China

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its rules regarding the amount of bond coverage on the optional China Bond Rider for Non-Vessel-Operating Common Carriers (NVOCCs). The final rule is intended to provide NVOCCs with the ability to post a bond with the Commission that satisfies the equivalent of 800,000 Chinese Renminbi, for which the equivalent U.S. Dollar amount has fluctuated since the regulation was first adopted by the Commission.

DATES: The final rule is effective November 23, 2012.

FOR FURTHER INFORMATION CONTACT:

Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001
Phone: (202) 523-5725

Rebecca A. Fenneman, General Counsel
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001
Phone: (202)523-5740
secretary@fmc.gov

SUPPLEMENTARY INFORMATION:

Background

Under a Memorandum of Consultations pursuant to the 2003 bilateral Maritime Agreement between the United States and the People's Republic of China (China or the PRC), the PRC does not require U.S. Non-Vessel-Operating Common Carriers (NVOCCs) to make a cash deposit in a Chinese bank as would otherwise be required by Chinese regulations, so long as the NVOCC:

(1) is a legal person registered by U.S. authorities;

(2) obtains an FMC license as an NVOCC; and

(3) provides evidence of financial responsibility in the total amount of Chinese Renminbi (RMB) 800,000 or U.S. $96,000.

An FMC-licensed U.S. NVOCC that voluntarily provides an additional surety bond in the amount of $21,000 (denominated in U.S. Dollars or Chinese Renminbi), which by its conditions is available for potential claims of the Ministry of Transport (MOT) of the PRC (as well as other Chinese agencies) for violations of the Chinese Regulations on International Maritime Transportation, may register in the PRC without paying the cash deposit otherwise required by Chinese law and regulation.

In 2004, the Commission issued a Notice of Proposed Rulemaking (NPR) to explore mechanisms for NVOCCs to file proof of such additional financial responsibility. *See* 69 Fed. Reg. 4271 (January 29, 2004). On April 1, 2004, the Commission issued a final rule that amended its regulations governing proof of financial responsibility for ocean transportation intermediaries to allow an optional bond rider to be filed with a licensed NVOCC's proof of financial responsibility to provide additional proof of financial responsibility for such carriers serving the U.S. oceanborne trade with the PRC. Docket No. 04-02, *Optional Rider for Proof of Additional NVOCC Financial Responsibility*, 30 S.R.R. 179 (2004).

On April 15, 2011, the Commission received a communication from the Maritime Administration of the U.S. Department of Transportation, transmitting a request from the MOT to revise the Commission's regulations at Appendix E to Subpart C of Part 515 – Optional Rider for Additional NVOCC Financial Responsibility (Optional Rider to Form FMC 48) [Form 48A] (China Bond Rider). MOT requested that the Commission review its regulations set forth in 46 CFR Part 515. MOT asserted that the exchange rate between the U.S. Dollar ($) and the Renminbi (RMB) has risen from 1:8.276 in 2003 to 1:6.536 at present, an increase of approximately 21.02%. Consequently, MOT asserted, the amount of $96,000 is inadequate to meet 800,000 RMB at the current exchange rate. Specifically, MOT requested that the regulation be revised to include a provision that would allow for adjustments to the U.S. Dollar amount required in a NVOCC optional Bond Rider covering transportation activities in the U.S./China trades when the U.S. Dollar and the Renminbi exchange rate fluctuates 20% higher or lower than that of the last adjustment. MOT also proposed that the adjustment be jointly approved by the U.S. and the PRC at the bilateral maritime consultative meeting of the same year. Finally, if this proposal is adopted, the MOT also proposed that the existing total required bond amount of U.S. $96,000 be increased to U.S. $122,000, which, MOT asserted, is the equivalent amount of 800,000 RMB at the present exchange rate.

Comments in Response to the Notice of Inquiry

The Commission issued a Notice of Inquiry (NOI) soliciting public commentary on the proposal on June 10, 2011. The NOI sought general comments on the optional China Bond Rider, and also presented three questions for particular study:

> 1. Describe how, and to what extent, the optional rider to the required NVOCC bond has impacted your company's business operations? Does this make for more certainty in your business operation? Has the optional rider to the required NVOCC bond impacted your overall business costs? If so, how?
>
> 2. What do you see as the advantages and disadvantages of an adjustment to the current optional rider to the required NVOCC bond?
>
> 3. Please explain whether, and if so, how significantly your business costs/operations would be affected by a provision that allows for adjustments to the U.S. Dollar amount required in a NVOCC optional China bond rider when the USD (U.S. Dollar) and the RMB (Renminbi) exchange rate fluctuates 20% higher or lower.

The Commission received three comments, summarized below.

Econocaribe Consolidators: John Abisch, the President of Econocaribe, did not appear to oppose the suggestion that the China Bond Rider be increased to cover currency valuations. Instead, the comment focused on the effect of the China Bond Rider and other rider requirements imposed on bondholders, such as the requirement that NVOCC's obtain an additional $10,000 in bond coverage for each branch office. Econocaribe noted that if a bondholder has five additional branch offices, the total coverage would be $125,000 ($75,000 base plus $50,000 for five branch offices). Econocaribe stated that "[i]f the FMC can get the [Chinese Government] to 'count' the entire bond currently posted, including the amount of the bond posted for the branch offices, even with the [Chinese Government] increasing the bond requirement, this would actually have a slight reduction in the cost of the bond[.]"

Mohawk Global Logistics: Richard J. Roche submitted comments on behalf of Mohawk Global Logistics. Mohawk believes that the optional rider method of conducting business is "a fair and equitable" solution to the alternative of posting a cash bond in China. Mohawk prefers bond coverage to cash deposit because it allows Mohawk to "expand [its] offering in China without having to make a significant investment of cash." Similarly, Mohawk understands currency fluctuations, and "agree[s] that an increase in demonstrated bond coverage is warranted due to the lower value of the U.S. dollar today." Mohawk did not identify disadvantages to the increase, other than the minor administrative burden of possibly prorating bonds in effect, addressing different bond premium dates, and the incremental increase in the cost of the China Bond Rider coverage. These disadvantages would be multiplied if the Commission added an automatic trigger based on a currency fluctuation of a defined percentage. If currencies fluctuated rapidly or drastically, it could cause additional administrative burdens on bondholders. Mohawk did not see this outcome as likely, and believed that an automatic trigger for additional coverage could prove workable. Mohawk also agreed with Econocaribe that many bondholders already demonstrate 800,000 RMB worth of coverage if one includes the aggregate amount posted for branch offices. In Mohawk's view:

> A more reasonable approach might be for China to determine the exchange value to be assigned in a given 12 month period, and allow NVOCC's to offset the bond coverage based on total bond value, adding any additional coverage as might be required to make up any shortfall not already covered by multiple branch offices. This would limit the bond transactions significantly, while providing simplicity and stability for all involved.

National Customs Brokers and Forwarders Association (NCBFAA): The NCBFAA notes in its comments the history of the China Bond rider provision, and the role that the NCBFAA played in Docket No. 04-02, *Optional Bond Rider for Proof of Additional NVOCC Financial Responsibility*. Like Mohawk, the NCBFAA believes that the China Bond Rider has been "extremely successful," and has allowed U.S. companies to provide services in China that might otherwise be difficult if the companies were required to post cash with the Chinese Government. Though U.S.-licensed NVOCCs must register in China in order to conduct business, NCBFAA indicates that the process "has not been unduly onerous," and "has not heretofore unduly increased operating costs."

The NCBFAA also accepts that the respective currencies have fluctuated, and some justification exists for the Chinese Government's request to increase the amount of the optional Bond Rider. Additionally, although the NCBFAA does not object to the

Commission's consideration of an optional Bond Rider adjustment any time the currency values fluctuate more than 20%, it does not believe that an automatic adjustment "is necessary or appropriate." The NCBFAA also echoes the beliefs of Mohawk and Econocaribe that many NVOCCs already have an aggregate coverage of greater than $125,000 (which would surpass the adjusted optional China Bond Rider amount of $122,000). If the Chinese Government assented, NCBFAA posits that allowing the NVOCCs to count all bond coverage might actually decrease the cost for many U.S.-licensed NVOCCs who do business in China. The NCBFAA looks to the Annex to the 2003 Bilateral Maritime Agreement for support, noting that it did not require a Bond Rider of a certain amount, but instead required evidence of financial responsibility of a certain total amount ($96,000). The Agreement left open how that total may be satisfied. The NCBFAA thus suggests that the Commission seek the Chinese Government's assent to accepting a total bond amount in addition to a Bond Rider in satisfying the $122,000 amount. Each NVOCC could thus determine whether it was more cost effective to procure a Bond Rider, or simply rely on its aggregate coverage amount that exceeded $122,000. This would reduce operating costs for some NVOCCs, but would still maintain adequate coverage.

Comments in Response to the Notice of Proposed Rulemaking

The Commission also issued a Notice of Proposed Rulemaking (NPR) soliciting public commentary on the proposal on January 5, 2012. The NPR sought general comments on the optional China Bond Rider and on the proposed rulemaking. The proposed rule amended Appendix F to Subpart C of Part 515 (group bonds) to increase the amount specified from $21,000 to $50,000. In response to the comments the Commission received from the Notice of Inquiry from June 10, 2012, the proposed rule amended Appendix E to Subpart C of Part 515 (individual NVOCC bonds) to remove pre-specified rider amounts to account for variances in NVOCCs' combined total surety levels maintained to meet the Commission's other financial responsibility requirements, including $10,000 in bond coverage that NVOCCs maintain for each of their branch offices pursuant to 46 CFR 515.21(a)(4). This recognition means that NVOCCs with branch offices may have rider amounts that vary to satisfy the level of coverage requested by the PRC, so long as their total coverage equals $125,000. The Commission sought comments particularly on the feasibility of these proposed revisions.

Carla Leung: Leung submitted a brief comment expressing significant concern as a small business owner affected by the regulation change. Her comments addressed the increased costs the proposed rulemaking might impose on small businesses in the industry and the ability to stay in business during these difficult financial times. Leung expressed concern that her business may not be able to sustain the increased costs.

Roanoke Trade: Matthew L. Zehner, Vice President of Surety Information & Communication for Roanoke Trade Services, Inc. (Roanoke), submitted comment as an insurance broker who provides surety bond products, such as the Chinese Bond Rider, to Ocean Transportation Intermediaries (OTIs). Zehner expressed Roanoke's support for the proposed changes as they represented the continuation of a regime that allows

OTIs to “relatively easily” satisfy “certain financial responsibilities and obligations required” by the People’s Republic of China. Support was also registered for leaving blank spaces in the rider form in order to allow flexibility for varying business structures.

Zehner did express concern regarding the timing of implementation as riders can generally only be altered or added in accord with “the underlying bond’s anniversary cycle.” Roanoke proposes a 12-month phase-in period in order to limit the impact of immediate compliance on the industry and FMC resources. Alternatively, Roanoke would request at least 90 days notice prior to the regulation taking effect as to allow time for proper processing of bonding alterations.

Roanoke also sought “additional clarity or guidance” regarding how to represent bond amounts in paragraphs 1.a. and 1.c. of FMC Form 48A when bonded U.S. office locations are involved.

FedEx Trade Networks Transport & Brokerage, Inc.: As a “large freight forwarder and non-vessel operating common carrier licensed by the FMC,” FedEx Trade Networks Transport & Brokerage, Inc. (Fedex Trade Networks) registered support for the proposed rulemaking modification. Fedex Trade Networks finds the increased bond requirement a reasonable request by the Chinese Ministry. The comment highlighted the benefit to U.S. NVOCCs of using bonds to satisfy Chinese regulations rather than necessarily operating directly with a Chinese bank.

Likewise, the comment “strongly endorses” FMC proposals to allow bond amounts to be aggregated. Fedex Trade Networks explains: “Allowing NVOCCs to meet the increased bond requirement by maintaining a bond of at least $125,000.00 would both fully satisfy the terms of the U.S.-China agreement and be more cost effective and efficient."

Final Rule

In the 2003 Memorandum of Consultations between the U.S. and China, it was agreed that U.S. NVOCCs operating in the China trade would provide "evidence of financial responsibility in the total amount of Chinese Renminbi (RMB) 800,000 or U.S. $96,000." The Memorandum of Consultations specifies amounts in both Chinese and United States currency, and did not provide for adjustment in exchange rates. Nevertheless, in recognition of the recent slight improvement in the value of the RMB against the U.S. Dollar (and in a spirit of comity and in conformity with Executive Order 13609, *Promoting International Regulatory Cooperation*) the Commission adjusts its optional China Bond Rider so that total NVOCC financial responsibility will equal 800,000 RMB under current exchange rates. The Commission acknowledges that the majority of the submitted comments see value in maintaining the optional China Bond Rider in contrast to any alternative, and recognizes the PRC's justification for adjusting the value based on exchange rate changes that have taken place since 2004. Therefore, based on the generally favorable comments, the Commission now amends its regulations in 46 CFR Part 515 to adjust the amount of surety available in the optional China Bond Rider provided in Appendices E and F to Subpart C of Part 515 (Form FMC-48A, OMB No. 3072-0018), and provide a method for NVOCCs to demonstrate financial responsibility by aggregating the total bond coverage for all bonds.

The rule amends Appendix F to Subpart C of Part 515 (group bonds) to increase the amount specified from $21,000 to $50,000. In response to the comments the Commission received, the rule amends Appendix E to Subpart C of Part 515 (individual NVOCC bonds) to remove pre-specified rider amounts to account for variances in NVOCCs' combined total surety levels maintained to meet the Commission's other financial responsibility requirements, including $10,000 in bond coverage that NVOCCs maintain for each of their branch offices pursuant to 46 CFR 515.21(a)(4). This recognition means that NVOCCs with branch offices may have rider amounts that vary to satisfy the level of coverage requested by the PRC, so long as their total coverage equals $125,000.

The Commission intends to review the value of the total coverage provided by the optional China Bond Rider periodically.

<u>Small Business Regulatory Flexibility Threshold Analysis</u>

Pursuant to 5 U.S.C. 605(b), and in response to comments regarding small businesses affected by this optional China Bond Rider, a Regulatory Flexibility Threshold Analysis has been performed; it has been determined that the final rule will not have a significant economic impact on a substantial number of small entities.

The small entities affected are ocean transportation intermediaries (OTIs). In determining whether a significant economic impact would occur under the new rule, the first estimate costs of the bond rider coverage were assessed. The economic impact of the optional China Bond Rider has been estimated to be less than $20 for every $1,000 of bond rider coverage, with most estimates being under $15 for every $1,000 of bond rider coverage. To that end, $21,000 of bond rider coverage would cost approximately $420.00 under this analysis. Given this information, it is determined that these first estimate costs are not significant to small entities. Uncertainty remains on the exact amount the optional China Bond Rider coverage would cost; however, this uncertainty is minimized given the fact that over seven bond rider coverage estimates were collected from agents in the market.

To determine whether a substantial number of small entities would be affected, the OTI licensing statistics were reviewed. There are approximately 3,500 licensed U.S. OTIs that could file for the optional China Bond Rider; currently, only 350 OTIs have filed for the available optional China Bond Rider. This amounts to less than 10% of the entire market that may reasonably participate in the optional bond rider program. Based on this data, it is determined that a substantial number of small entities will not be effected by this rule.

It is important to note that the optional China Bond Rider is not an FMC-required bond; rather it is an alternative instrument crafted by the United States and China to relieve U.S. NVOCCs from the People's Republic of China's cash deposit requirement. The rule will not have a significant economic impact on a substantial number of small entities as outlined by the Regulatory Flexibility Threshold Act.

Certifications and Statutory Reviews

The Commission certifies this rulemaking because the proposed changes establish an optional provision for U.S. licensed NVOCCs, which may be used at their discretion. While some of these businesses qualify as small entities under the guidelines of the Small Business Administration, the rule provides a more cost-effective alternative than would otherwise be available to assist U.S. licensed NVOCCs with their business endeavors in the PRC. As such, the rule helps to promote U.S. business interests in the PRC and facilitate U.S. foreign commerce.

The Chairman of the Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The Commission recognizes that the majority of businesses that would be affected by this rule qualify as small entities under the guidelines of the Small Business Administration. The rule, however, would encompass an optional provision for U.S. licensed NVOCCs, which may be used at their discretion. The rule would not pose an economic detriment to all NVOCCs regulated by the Commission. It would only impact those NVOCCs who choose to exercise the option, at this date approximately 10% of the entire pool of all NVOCCs. Instead of applying to all NVOCCs (a majority of which are small entities), it adjusts the favored method of demonstrating financial responsibility for those NVOCCs who choose to use it. This method of demonstrating financial responsibility implements an agreement with the PRC that allows U.S. NVOCCs to avoid having to make a large cash deposit in a Chinese bank. As such, the rule would help continue to promote U.S. business interests in the PRC and facilitate U.S. foreign commerce.

This rule is not a “major rule” under 5 U.S.C. 804(2).

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980, as amended. Public reporting burden for this collection of information was estimated to be 1.25 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

List of Subjects in 46 CFR Part 515

Freight, Maritime carriers, Non-vessel-operating common carriers.

For the reasons stated in the supplementary information, the Federal Maritime Commission amends 46 CFR Part 515 as follows.

PART 515—LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES

1. The authority citation for part 515 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. 305, 40102, 40104, 40501–40503, 40901–40904, 41101–41109, 41301–41302, 41305–41307; Pub. L. 105–383, 112 Stat. 3411; 21 U.S.C. 862.

2. Revise Appendix E to Subpart C of Part 515 to read as follows:

APPENDIX E TO SUBPART C OF PART 515—OPTIONAL RIDER FOR ADDITIONAL NVOCC FINANCIAL RESPONSIBILITY (OPTIONAL RIDER TO FORM FMC–48) [FORM 48A]

FMC–48A, OMB No. [3072–0018, (04/06/04)]

Optional Rider for Additional NVOCC Financial Responsibility [Optional Rider to Form FMC–48]

RIDER

The undersigned [______], as Principal and [______], as Surety do hereby agree that the existing Bond No. [______] to the United States of America and filed with the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 is modified as follows:

1. The following condition is added to this Bond:

a. An additional condition of this Bond is that $_________ (payable in U.S. Dollars or Renminbi Yuan at the option of the Surety) shall be available to pay any fines and penalties for activities in the U.S.-China trades imposed by the Ministry of Communications of the People's Republic of China (“MOC”) or its authorized competent communications department of the people's government of the province, autonomous region or municipality directly under the Central Government or the State Administration of Industry and Commerce pursuant to the Regulations of the People's Republic of China on International Maritime Transportation and the Implementing Rules of the Regulations of the PRC on International Maritime Transportation promulgated by MOC Decree No. 1, January 20, 2003.

b. The liability of the Surety shall not be discharged by any payment or succession of payments pursuant to section 1 of this Rider, unless and until the payment or payments shall aggregate the amount set forth in section 1a of this Rider. In no event shall the Surety's obligation under this Rider exceed the amount set forth in section 1a regardless of the number of claims.

c. The total amount of coverage available under this Bond and all of its riders, available pursuant to the terms of section 1(a.) of this rider, equals $_______. The total amount of aggregate coverage equals or exceeds $125,000.

d. This Rider is effective the [______] day of [______], 20 [______], and shall continue in effect until discharged, terminated as herein provided, or upon termination of the Bond in accordance with the sixth paragraph of the Bond. The Principal or the Surety may at any time terminate this Rider by written notice to the Federal Maritime Commission at its offices in Washington, D.C., accompanied by proof of transmission of notice to MOC. Such termination shall become effective thirty (30) days after receipt of said notice and proof of transmission by the Federal Maritime Commission. The Surety shall not be liable for fines or penalties imposed on the Principal after the expiration of the 30-day period but such termination shall not affect the liability of the Principal and Surety for any fine or penalty imposed prior to the date when said termination becomes effective.

2. This Bond remains in full force and effect according to its terms except as modified above.

In witness whereof we have hereunto set our hands and seals on this [______] day of [______], 20 [______],

[Principal], By:

[Surety], By[U1]:

3. Revise paragraph 1.a. of Appendix F to Subpart C of Part 515 to read as follows:

APPENDIX F TO SUBPART C OF PART 515—OPTIONAL RIDER FOR ADDITIONAL NVOCC FINANCIAL RESPONSIBILITY FOR GROUP BONDS [OPTIONAL RIDER TO FORM FMC–69]

* * * * *

1. * * *

a. An additional condition of this Bond is that $ [______](payable in U.S. Dollars or Renminbi Yuan at the option of the Surety) shall be available to any NVOCC enumerated in an Appendix to this Rider to pay any fines and penalties for activities in the U.S.-China trades imposed by the Ministry of Communications of the People's Republic of China (“MOC”) or its authorized competent communications department of the people's government of the province, autonomous region or municipality directly under the Central Government or the State Administration of Industry and Commerce pursuant to the Regulations of the People's Republic of China on International Maritime Transportation and the Implementing Rules of the Regulations of the PRC on International Maritime Transportation promulgated by MOC Decree No. 1, January 20, 2003. Such amount is separate and distinct from the bond amount set forth in the first paragraph of this Bond. Payment under this Rider shall not reduce the bond amount in the first paragraph of this Bond or affect its availability. The Surety shall indicate that $50,000 is available to pay such fines and penalties for each NVOCC listed on appendix A to this Rider wishing to exercise this option.

* * * * *

By the Commission.

Karen V. Gregory
Secretary