**Issued: January 5, 2012**

**FEDERAL MARITIME COMMISSION**

**46 CFR Part 515**

**Docket No. 11-09**

**RIN 3072-AC46**

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

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Federal Maritime Commission proposes to amend its rules regarding the amount of bond coverage required in its optional China Bond Rider for Non-Vessel-Operating Common Carriers (NVOCCs). The proposed 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 dollar amount has fluctuated since the regulation was first adopted by the Commission.

**DATES:** Comments or suggestions are due on or before March 12, 2012.

**ADDRESSES:** Address all comments concerning this proposed rule to:

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

**SUPPLEMENTARY INFORMATION:**

Submit Comments: Submit an original and five (5) copies in paper form, and if possible, send a PDF of the document by e-mail to secretary@fmc.gov. Include in the subject line: Docket No. 11-09, Comments on Proposed Adjustment of the Amount for the FMC Optional China Bond Rider.

## 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 NVOCC that voluntarily provides an additional surety bond in the amount of $21,000 (denominated in USD or RMB), which by its conditions is available for potential claims of the MOT (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 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 (FMC 2004).

On April 15, 2011, the Commission received a communication from the Maritime Administration, U.S. Department of Transportation, transmitting a request from the Ministry of Transport (MOT) of the PRC 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 financial responsibility regulations set forth in 46 CFR Part 515. MOT asserts that the exchange rate between the USD and the RMB has risen from 1:8.276 in 2003 to 1:6.536 at present, an increase of approximately 21.02%. Consequently, MOT asserts, the amount of 96,000 USD is inadequate to meet 800,000 RMB at the current exchange rate. Specifically, MOT requests that the regulation be revised to include a provision that would allow for adjustments to the USD amount required in a NVOCC optional bond rider covering transportation activities in the U.S./China trades when the USD and the RMB exchange rate fluctuates 20% higher or lower than that of the last adjustment. MOT also proposes 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 proposes that the existing total required bond amount of 96,000 USD be increased to 122,000 USD, which, MOT asserts, is the equivalent amount of 800,000 RMB at the present exchange rate.

<u>Comments</u>

The Commission issued a Notice of Inquiry soliciting public commentary on the proposal on June 10, 2011. The NOI sought general comments on the 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, each of which is 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 set and exchange value as of a given date, 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 Bond Rider. Additionally, although the NCBFAA does not object to the Commission's consideration of a 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 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.

Proposed Change

In the 2003 Memorandum of Consultation between the U.S. and China, the two nations agreed that U.S. NVOCCs operating in trade with China would provide “evidence of financial responsibility in the total amount of Chinese Renminbi (RMB) 800,000 or U.S. $96,000.” The Memorandum specified an amount in both Chinese and U.S. 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 dollar, and in the spirit of comity and good faith with our trading partner, the Commission is proposing to adjust its China bond rider so that total NVOCC financial responsibility will equal 800,000 RMB under current exchange rates. The Commission acknowledges that all the submitted comments see value in maintaining the optional China Bond Rider, and recognize 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 proposes to amend 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 proposed 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 proposed 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 seeks comments particularly on the feasibility of these proposed revisions.

The Commission intends to review the value of the total coverage provided by the China bond rider periodically.

Certifications

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 only 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 is 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. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Ronald D. Murphy, Managing Director, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Maritime Commission, Washington, D.C. 20503.

**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 proposes to amend 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:

* * * * *

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

* * * * *
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.

Rachel E. Dickon
Assistant Secretary