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FEDERAL MARITIME COMM

December 19, 2003

Via Hand Delivery

Bryant Van Brakle, Secretary
Federal Maritime Commission
88 North Capitol St. NW
Room 1046
Washington DC 20573

Re: Docket No. P10-03, NCBFAA Petition for Rulemaking

Dear Bryant:

Enclosed is an original and 15 copies of the National Customs Brokers and Forwarders Association of America, Inc.'s Petition for Rulemaking for filing with the Commission, as well as a check in the amount of $225.00 to cover the cost of the filing fee.

If you have any question concerning this, please do not hesitate to contact me. In the meantime, I would appreciate it if you would please date stamp and return the extra copy enclosed.

Very truly yours,

Edward D. Greenberg

EDG
Encl

BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

Petition No. P_10_-03

PETITION OF
NATIONAL CUSTOMS BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC.
FOR RULEMAKING

I. <u>Introduction</u>

The National Customs Brokers and Forwarders Association of America, Inc. (the "NCBFAA") submits this Petition, pursuant to 46 C.F.R. §502.51, requesting the Federal Maritime Commission (the "Commission") to initiate a rulemaking that would amend the financial responsibility requirements of regulations set forth in 46 C.F.R. §515.21 *et seq.* The purpose of the proposed rule would be to provide a mechanism by which licensed non-vessel operating common carriers ("NVOCCs") would be able on a voluntary basis to amend their existing bonds, filed pursuant to Section 19 of the Shipping Act, 46 U.S.C. app. §1718, and 46 C.F.R. §515.21, as an alternative to making cash deposits in banks located in the People's Republic of China ("PRC") as otherwise required by the PRC's new Regulations on International Maritime Transportation ("RIMT") and the Implementing Rules promulgated hereunder.

The Commission's initiation rulemaking would appear to be appropriate as a way of implementing the recently negotiated provisions of the Agreement on Maritime Transport (the "AMT") and Memorandum on Consultations ("Memorandum") between the U.S. and PRC governments, both of which were signed on December 8, 2003. The NCBFAA believes that the use of a rulemaking would also be the most efficient and appropriate procedure to both effectuate provisions of the Memorandum and alleviate the burden on licensed NVOCCs that would otherwise exist due to the RIMT's security deposit provision.

Specifically, the NCBFAA proposes that the FMC allow NVOCCs to amend their existing bonds by adding a Rider, which would comply with the RIMT requirement that all

NVOCCs operating in the U.S.-PRC trades provide evidence of a financial responsibility in the total amount of RMB 800,000 (or approximately U.S. $96,000). The Rider is necessary because the Commission's regulations generally only require a bond in the amount of U.S. $75,000 (not including an additional $10,000 for branch offices) for licensed NVOCCs. The proposed regulation would therefore, and in accordance with the Memorandum, authorize licensed NVOCCs to add a Rider to existing bonds that would (1) increase the base amount of the bond by U.S.$21,000 and (2) provide that the bond would also be available for the payment of fines or reparation awards that might be imposed by the Chinese authorities due to the NVOCC's violation of the RIMT. Allowing NVOCCs to add this Rider to their bonds will enable them to comply with the provisions of the RIMT, while at the same time minimizing the burden, costs and the risk of paying a cash security deposit into PRC banks. The NCBFAA therefore urges the Commission to commence a rulemaking to implement and adopt this proposed regulation.

II. <u>Argument</u>

A. Interest of NCBFAA

The NCBFAA is the national trade association representing the interests of freight forwarders, NVOCCs and customs brokers in the ocean shipping industry. Its members are integrally linked to approximately 90% of the cargo that moves into and out of the United States via ocean transportation. Together with its approximately 30 affiliated local and regional associations, the NCBFAA is the primary trade association representing licensed Ocean Transport Intermediaries ("OTIs") in the U.S. As the Commission is aware, the large majority of licensed OTIs acts both as forwarders and NVOCCs, both of which are involved in providing services for U.S. shippers and receivers of goods moving via ocean transportation. As such, the NCBFAA's members are directly affected by regulatory regimes around the world concerning the conduct of ocean transportation and the logistics services routinely provided by NVOCCs.

In addition, the NCBFAA has been involved in the past several years in efforts to alleviate the more burdensome provisions of the RIMT. These efforts have included submitting formal pleadings and correspondence to the Commission, the Maritime Administration

("MARAD") and the PRC Ministry of Communications ("MOC"), as discussed more fully below.

B. Background

The need for the proposed amendment to the Commission's bonding regulations stems from the PRC's enactment of the RIMT, which were apparently intended to emulate the regulatory provisions of the U.S. Shipping Act of 1984.[1] As relevant here, the RIMT provides that NVOCCs are required to post a cash security deposit in a Chinese bank in the amount of RMB 800,000 (approximately U.S. $96,000) plus RMB 200,000 (approximately U.S. $24,000) for each unincorporated branch office it maintains. (RIMT, Articles 7 and 8). The Shipping Act also requires NVOCCs to maintain evidence of financial responsibility, but the U.S. law differs from the RIMT regulation in several important respects; namely, that such evidence can be satisfied through a surety bond and the required amounts are smaller. 46 C.F.R. § 515.21(a).

The NCBFAA initially expressed its concerns about the RIMT letter to MARAD and the Commission dated March 4, 2002, pointing out that the cash security deposit would unfairly preclude many smaller and medium-sized NVOCCs from operating in the U.S.-PRC trade. The Association asserted that while such companies can comfortably pay the premiums necessary for the surety required under U.S. law, the cash deposit the amount required under the RIMT raised both the cost and risk of doing business with the PRC and that Chinese NVOCCs were not similarly burdened by U.S. regulations.

Partly in response to the NCBFAA's concerns, the FMC issued a notice of inquiry inviting comments on the impact of the RIMT on U.S. oceanborne trade.[2] Several months afterward, the MOC also issued a notice inviting comments from the public concerning the RIMT and its proposed Implementing Rules.[3] Thereafter, the NCBFAA submitted comments both to the FMC, on June 27, 2002, and to the MOC, on July 30, 2002. In these comments, the NCBFAA reiterated its concerns about the requirement that all NVOCCs be required to make the

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1 The RIMT was promulgated by Decree No. 335 of the PRC State Council on December 11, 2001.

2 Docket No. 98-14, *Shipping Restrictions, Requirements and Practices of the People's Republic of China,* Notice of Inquiry published March 15, 2002 (51 Fed. Reg. 11695).

3 Notice on Inviting Comments on the Implementing Rules for the Regulations of the People's Republic of China on International Maritime Transportation, issued June 21, 2002.

cash deposits required by the RIMT, that this could be prohibitively expensive to many NVOCCs already engaged in the U.S./China trade and that U.S. companies would be reluctant to comply because of the uncertainty of getting their deposit back. The NCBFAA further argued that the overlapping financial responsibility requirements of the U.S. and the PRC served as an artificial trade barrier and created an inefficient ocean transportation marketplace. The Association therefore suggested that the U.S. and the PRC establish some mechanism of reciprocity, so that licensed NVOCCs would not be required to comply with the separate U.S. and PRC financial responsibility requirements.

When MOC ultimately promulgated the final version of its Implementing Rules on January 20, 2003, Article 12 provided that foreign NVOCCs that are qualified in another country and have obtained a surety bond in accordance with the requirements of that country's law would not need also to make a cash deposit at a bank located in the PRC. This provision was then included in the U.S. and PRC negotiations regarding various maritime trade issues, which resulted in the signing of the AMT and Memorandum on December 8, 2003. As relevant here, the Memorandum provided that the Chinese government will not require U.S. NVOCCs to make a cash deposit in a Chinese bank, as 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 RMB 800,000 or U.S. $96,000.

(Memorandum at 2.)

As the NCBFAA understands this agreement, this would permit an NVOCC licensed and bonded in accordance with the FMC regulations to increase the amount of its surety bond by $21,000 and have the conditions of its bond also be responsive to potential claims of the MOC (and other PRC agencies) for violations of the RIMT. If this is accomplished, the NVOCC could then register in the PRC without paying the cash deposit. The current FMC regulations, however, do not currently provide any mechanism for NVOCCs to furnish a bond amount greater than the base $75,000 required under 46 C.F.R. §515.21(a)(2), other than for branch offices; nor is there a provision addressing the regulatory requirements of any country, other than the United States. For that reason, it appears necessary for the Commission to amend its regulations in order to permit licensed NVOCCs, on an optional basis, to have an additional bond, through an appropriate form of Rider, that addresses the RIMT and the negotiated bilateral agreement on this issue embodied in the Memorandum.

C. Proposed Rulemaking

The NCBFAA proposes that the FMC promulgate regulations permitting NVOCCs to modify their FMC Bonds by obtaining Riders that add an additional $21,000 of bond amount that would be available to pay any fines and penalties that might be imposed by PRC authorities pursuant to the RIMT. To accomplish this, the NCBFAA recommends that the Commission amend the following regulations:

1. **§515.21** - - Add a new subsection (5) to provide that a licensed NVOCC could voluntarily obtain a bond Rider in the amount of $21,000.
2. **§515.22(b)** - - Add a sentence providing that the Rider would provide coverage for damages, reparations or penalties arising from any transportation-related activities under the Shipping Act and the RIMT.
3. **§515.22(d)(4) and (d)(5)** - - Make similar changes to these sections which relate to participation by licensed NVOCCs in group surety bonds.
4. **§515.23(a)** - - Amend this section to provide that such a Rider to the surety bond is to be available to pay reparations or penalties imposed by MOC.
5. **§515.23(b)** - - Amend this section in order to reference the possibility of a party filing a complaint with MOC that could relate to such Rider
6. **Appendix** - - The text of the proposed Rider is set forth as Attachment A.

III. Conclusion

The NCBFAA therefore requests that the Commission initiate a formal rulemaking as discussed above.

Respectfully submitted,

Edward D. Greenberg, Esq.
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Washington, D.C. 20007
Telephone: (202) 342-5200
Facsimile: (202) 342-5219

Attorneys for National Customs Brokers and Forwarders Association of America, Inc.

DATED: December 19, 2003

Attachment A

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:

   An additional condition of this Bond is that $ ______________________ shall be available to pay any fines and penalties imposed by the Ministry of Communications 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.

2. 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 1 of this Rider. In no event shall the Surety's obligation under this Rider exceed the amount set forth in section 1 regardless of the number of claims.

3. This Rider is effective the ________ day of ________________, 200__, 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 office in Washington, DC. The Surety also shall send notice to the Ministry of Communications of the People's Republic of China via telecopier or email. Evidence of transmission of the notice to the Ministry of Communications shall constitute proof of notice. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission, or transmission of the notice to the Ministry of Communications, whichever occurs later. 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.

4. Bond No. __________ 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 __________, 200__,

_____________________________[Principal] _________________________________[Surety]

By: ___________________________ By: ______________________________________