Comments of the

World Shipping Council

Submitted to the

Federal Maritime Commission

In the Matter of

Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements, and General Duties; Advance Notice of Proposed Rulemaking

Docket No. 13-05

July 18, 2013
The World Shipping Council ("WSC" or "the Council") respectfully files these comments in response to the Advance Notice of Proposed Rulemaking published in the above-referenced docket on May 31, 2013 (78 Fed. Reg. 32946). WSC takes no position on the majority of the rule changes proposed. Our comments focus on two specific points that are of interest to vessel operating common carriers (VOCCs). Those two issues are: (1) the proposal for a priority system for claims against OTI bonds, and (2) the proposal that VOCCs be required to check license/registration status of OTIs in addition to checking tariff publication and proof of financial responsibility status.

For the reasons stated below, WSC urges the Commission not to pursue the first proposal and to modify or drop the second proposal.

1. Proposed Priority System for Claims Against OTI Bonds.

The ANPRM proposes to amend Section 515.23 of the Commission’s regulations to introduce a three-tiered priority system for claims against OTI bonds, along with a notification system that would support the implementation of the priority system. Shippers and consignees would be in Tier 1; common carriers, ports, terminals, and other third-party creditors would be in Tier 2; and the Commission would be in Tier 3. The stated reason for the proposed change is that there has been at least one instance in which the first-in-time system in place today resulted in the first filer taking the bulk of the available bond, leaving little for later claimants. With respect to the proposal that shipper and consignee claims be primary to all other commercial claims, the stated rationale is that carriers have a greater ability to control the extension of credit to OTIs.

The Council urges the Commission to leave the system for making claims against OTI financial responsibility instruments as it exists today. The complexities and delays associated with the proposed priority system outweigh any potential improvements that revised system might make with respect to the Commission’s perceived shortcomings of the current system.

At the outset, WSC notes its objection to the segregation of commercial claimants into Tiers 1 and 2. With the possible exception of individual household goods shippers, the majority of shippers and consignees are sophisticated commercial entities with access to information about the OTIs with whom they choose to do business. Those shippers and consignees also almost universally insure their cargoes against damage and loss. WSC can discern no reason why those parties should be preferred in the claims process.

With respect to the suggestion that common carriers may be in a better position to protect themselves against OTI-related losses by restricting credit to OTIs, certainly the option
of placing OTIs on a pre-paid cash basis exists. Before adopting a regulation that encourages the imposition of restrictive credit practices with respect to VOCC/OTI business relationships – practices that could in turn affect the credit terms offered by OTIs to their customers – the Council urges the Commission to consider as a policy matter whether that result would be preferable to the status quo. WSC also notes that making it more difficult for VOCCs to claim against OTI bonds, for example for unpaid freight, makes it more likely that VOCCS would resort to cargo liens as security, another result that the Commission may decide is not preferable to the current situation.

In addition to the fact that the proposed changes appear to be driven by perhaps only a single instance in which the bond was inadequate to satisfy multiple claimants (a situation that would not fundamentally be altered if the proposed rules were adopted), and in addition to the fact that adoption of the proposed priority system could lead to unintended consequences with respect to credit and cargo lien practices, the proposed priority system, if adopted, would introduce a number of procedural problems that do not exist today.

First, the five-month delay that would be triggered by a claim in excess of 20% of the bond value or by the filing of two claims (no matter how small) is itself a negative aspect to the proposal. One of the strengths of the current system is that payment is made quickly. To the extent the priority system is invoked, that benefit would be lost.

Second, the priority regime as proposed still leaves many questions unanswered. For example, there is no mechanism for prioritizing or pro-rating claims among claimants in the same tier. How are sureties supposed to deal with those situations, and what administrative expenses would be involved with any process that was created to address those situations?

Third, there is an unanswered question of what happens if a surety pays a claim when it should have invoked the five-month waiting period. If the surety has no liability in that situation, then the system is unlikely to work. If the surety does incur liability to later filers that would have benefitted from invocation of the priority system, then presumably that risk of liability will cause sureties to charge more for providing bonds. This possibility is one that the Commission may wish to consider further before it proceeds.

Fourth, by making the process of claiming against an OTI bond slower and less certain than today’s quick settlement on a first-in-time basis, changing the rules as proposed could encourage claimants (especially large claimants) to bypass the bond claims process altogether, and instead to pursue non-bond assets such as bank accounts and other property. If that were to occur, it could encumber resources that serve as collateral for the OTI’s bond, thus encouraging sureties to cancel bonds. Today bonds can be cancelled on 30 days notice, which is shorter than the five-month waiting period set forth in the proposed regulations. Early
cancellations could leave some claimants with less protection than they have today. Although it is impossible to predict how these factors might come together in any given case, WSC encourages the Commission to better understand how these factors may interact before it changes the rules.

The current system for processing OTI bond claims works well in the vast majority of cases. The proposal to impose a tiered priority system on OTI bond claims would, if adopted, likely cause more problems than it would solve. We therefore urge the Commission not to proceed with this proposal.

2. **Proposal to Require VOCCs to Check the Registration/License Status of NVOCCs.**

   The ANPRM proposes to amend section 515.27 to require VOCCs to check the registration/license status of an NVOCC before doing business with that NVOCC. That verification requirement would be in addition to the existing requirement to check the NVOCC’s tariff and financial responsibility compliance.

   As an initial matter, it appears that the language of the revised draft regulation does not reflect the intention of the Commission as stated at page 32952 (column 1). On that page, in a discussion that includes the requirement that VOCCs check an NVOCC’s license or registration status, the Commission says that: “Section 515.27(b)(2) has been revised to insert the Commission’s web address as a location that common carriers can consult to verify an NVOCC’s status.” The proposed revised section 515.27(b)(2), however, makes reference to the Commission’s website only as a place where VOCCs may “obtain proof of an NVOCC’s compliance with the tariff and financial responsibility requirements. . . .” There is no mention in the proposed revised section 515.27 of using the Commission’s website as a resource for license or registration information. At a minimum, section 515.27(b) would have to be amended to expressly state that VOCCs may rely on the Commission’s website for information about an NVOCC’s license or registration status.

   There is another, more fundamental issue associated with the proposed new requirement that VOCCs check the registration/license status of an NVOCC before doing business with that NVOCC. That issue is that, with the addition of the registration/license status item to the existing tariff publication and financial responsibility status checks that VOCCs must perform, the chances of VOCCs inadvertently doing business with out-of-compliance NVOCCs would increase if the regulations were revised as proposed. That risk of confusion is multiplied by the Commission’s addition of a registration requirement for foreign
NVOCCs (to be renewed every two years)\(^1\) and by the new proposed requirement that NVOCC licenses also be renewed every two years. Given that the Commission has itself admitted that the new registrations and the conversion of existing indefinite licenses into two-year licenses are both likely to present administrative challenges, the chance for confusion and honest mistakes is multiplied.

If the Commission chooses to continue to require VOCCs to be part of the enforcement regime for the Commission’s NVOCC regulations, WSC respectfully urges the Commission (if it proceeds with the changes in the ANPRM) to amend its regulations at 515.27 to state that the Commission will display on its website next to the name of each NVOCC a clear statement of whether that NVOCC is in compliance or out of compliance. The Commission is in the best position to know whether an NVOCC is in compliance with the Commission’s rules, and if the Commission wishes to prevent VOCCs from doing business with out-of-compliance NVOCCs, then the Commission should post a clear “go/no go” status message for each NVOCC listed on its website.

Providing a Commission-designated comprehensive NVOCC status statement would increase compliance, would reduce the chances of innocent non-compliance, and would retain the Commission’s discretion to work through issues with NVOCCs without requiring VOCCs to make determinations about status based on incomplete information. On this point it appears that there may be a substantial period of uncertainty if the Commission proceeds to require foreign NVOCCs to register and converts existing NVOCC licenses to two-year licenses. It would be far more certain and administratively efficient if the Commission simply posted status determinations instead of forcing multiple VOCCs to make inquiries when inevitable questions arise during the phase-in period of the new registration and license renewal requirements.

3. Conclusion.

The World Shipping Council respectfully urges the Commission not to proceed with its proposal to change the OTI bond claim regulations. The existing system works well in the vast majority of cases, and the proposed changes would introduce problems that would be much more substantial than the minimal concerns that are the basis for the proposed changes.

The Council further requests that, if the Commission expands the requirements for VOCCs to verify the regulatory compliance of NVOCCs, then the Commission should adopt a

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\(^1\) We note that the Commission on July 18, 2013, published a final rule in Docket No. 11-22 in which it required registration for foreign non-licensed NVOCCs, with a three-year renewal frequency. 78 Fed. Reg. 42886.
notation system on the NVOCC portion of its website where VOCCs may obtain a simple “go/no go” determination from the Commission indicating whether VOCCs may do business with a particular NVOCC.

The Council appreciates the opportunity to share its views with the Commission on these two aspects of the ANPRM.