

**FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION  
U.S. DEPARTMENT OF TRANSPORTATION  
FEES FOR THE UNIFIED CARRIER REGISTRATION  
PLAN & AGREEMENT**

**(DOCKET No. FMCSA-2009-0231)**

**SUBMITTED BY:**

***American Trucking Associations, Inc.***

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The American Trucking Associations (ATA) submits the following comments to the Federal Motor Carrier Safety Administration (FMCSA) on Notice of Proposed Rulemaking number FMCSA-2009-0231 (the NPRM), published in the *Federal Register* of September 3, 2009, at pages 45583-97.<sup>1</sup>

ATA, based in Arlington, Virginia, is a national federation of all types and sizes of motor carriers, as well as allied industries, individual-member councils, affiliated conferences of specialized carriers, and fifty affiliated state trucking associations, representing altogether some 37,000 motor carrier members.

The NPRM proposes to increase the level of fees imposed under the Unified Carrier Registration Agreement (UCRA) program by some 122 percent on a per-vehicle basis. ATA opposes such an increase for the following reasons:

Considering the size of the proposed increase, and the current economic circumstances of the motor carrier industry, the adjustment is not reasonable as required by 49 U.S. Code 14504a (f)(11)(E).

The proposed increase would adversely affect the motor carrier industry in a material way, since the industry is under the severest economic pressures since deregulation, if not in fact since the Great Depression.

On the whole, the states participating in the UCRA program have not done their part to enforce the requirements of the program. As a result, the increase would fall almost entirely – and most inequitably – on already compliant motor carriers and other entities. FMCSA must and can avoid this result.

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<sup>1</sup> In these comments, references simply to a page number are to this version of the NPRM.

The lack of serious state enforcement efforts, in particular the lack of state audits of UCRA compliance, calls into serious question FMCSA's asserted basis for its proposed increase. UCRA is still a new program, for which inadequate data are available concerning carrier and vehicle populations, the very basis of the UCRA fees. It is not clear now, and, without adequate state enforcement, never would be clear, how large a fee adjustment, if indeed any, might be needed beyond what states could collect through their own efforts.

FMCSA's proposed increase in UCRA fees mirrors almost exactly what the participating states, through the UCRA Board of Directors (the Board), recommended. Given the lack of UCRA enforcement by the states, and the uncertainties over the data that underlie the program, for FMCSA to acquiesce in the states' request creates a moral hazard. States will learn from this that they need only request an increase in the fees; they need not exert any enforcement effort.

Sharply increased UCRA fees will increase noncompliance. Future state revenue shortfalls are likely to result, followed by requests for yet higher fees. Spiraling UCRA rates are to be expected.

FMCSA has very evidently considered only the request of the UCRA states in preparing its proposal. The statute does not require so one-sided a process, and in fact demands a more balanced approach. FMCSA may cite the statute in defense of its inequitable adjustment, but Congress could not have intended so unfair a result, and the statutory language requires consideration of so enormous a factor for the industry as the current economic crisis.

FMCSA's inclusion in the UCRA fee base of administrative money for the Board and of a "revenue reserve" is wholly unwarranted.

The NPRM includes certain inconsistencies and arbitrary assumptions that call the level of the proposed fees into serious question.

FMCSA's determination that this is not a significant rulemaking is erroneous.

ATA recognizes that an adjustment to the UCRA fees is necessary before states can collect anything under the program for 2010. The amendment of the statute by Congress in section 4306 of Public Law 110-244 requires an adjustment of the fees for 2010 that reflects the elimination of trailing equipment from the fee calculation. ATA would support an increase in the fees that accommodates that elimination alone, an adjustment comparable to that reflected in tables 4 and 12 in the NPRM, an adjustment on a per-vehicle basis of approximately 61 percent.

ATA also agrees that the rules currently contained in subpart A of 49 CFR part 367, having to do with the repealed Single State Registration System,<sup>2</sup> should be deleted.

### Background

Some background on the UCRA program and the current rulemaking may be in order.

The UCRA was enacted by Congress in 2005 in Public Law 109-59.<sup>3</sup> Although it was designed to replace the Single State Registration System, UCRA represented an entirely new program, in many ways a novel experiment in the federal system of the United States. Among many other unique features, UCRA provides for the setting of the rates of state taxes by FMCSA, a federal agency, based upon the recommendation of the Board, a body composed of representatives of the UCRA participating states, the motor carrier and allied industries, and FMCSA itself. As a result, a rulemaking such as the current NPRM raises novel legal and policy issues. (*See* Sec. (3)(f), Presidential Executive Order no. 12866, issued October 4, 1993.)

The first fees actually set for the UCRA program pertained to calendar year 2007, but they were set late in that year, by rulemaking number FMCSA-2007-27871. The Board made its final recommendation to FMCSA on March 23, 2007, with the entire membership of the Board, state and industry representatives alike, voting in favor (the FMCSA representative abstained). The NPRM proposing the fees was published in the *Federal Register* of May 29, 2007, and the final rule was published in the *Register* of August 24, 2007, with an immediate effective date. The rulemaking to set the 2007 UCRA fees was accomplished on an expedited schedule because it was very largely uncontroversial, a circumstance very different from the current rulemaking. Even so, it may be noted that the rulemaking process consumed just over five months' time, from March through August.

For 2008, the Board requested FMCSA to make no adjustment to the fees as set for 2007. (*See* letter dated February 1, 2008, from Avelino Gutierrez, chairman of the Board, to the Honorable Mary E. Peters.) The Board subsequently made a similar request with respect to the fees for 2009. (*See* letter dated July 11, 2008, from Avelino Gutierrez to the Honorable Mary E. Peters.) No adjustment in the fees was made for either year.

In 2008, as the result of representations made by both states and industry, Congress amended the Act to eliminate trailing equipment from the calculation of the UCRA fees, effective for calendar 2010. (*See* reference above.) The changes makes a rulemaking necessary, since the basis of the fees has been altered. The current rulemaking involves, that is, something more than a mere adjustment to the rates. States may collect no money under UCRA until the fee structure is amended to reflect the statutory change.

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<sup>2</sup> Formerly authorized by 49 U.S. Code 14504.

<sup>3</sup> The specific section of this law that sets out the framework for the UCRA program has been codified as 49 U.S. Code 14504a. This section is referred to in these comments as the Act.

Unlike the 2007 rulemaking, the entire process of setting the fees for 2010 has been controversial. Not only does the trucking industry and allied industries, face a severe recession, but state enforcement of the UCRA program has been lax. Industry strongly believes the states have not earned the increase they claim.

As has been its custom, the Board initially referred the matter to its Revenue and Fees Subcommittee. That body, which includes both state and industry representatives among its members, reported to the Board in February 2009, but could make no recommendation to that body. The subcommittee recognized that its membership was in hopeless disagreement on the level of the fees for 2010 and on the methodology for arriving at those fees.

At its meeting by conference call on February 12, 2009, the Board resolved to recommend a sharply increased level of fees for 2010.<sup>4</sup> The vote of the Board membership was split, with industry Board members opposing the recommendation, all state representatives voting for it, and FMCSA again abstaining. This recommendation was submitted to FMCSA on April 3, 2009. This submission represents the only recommendation by the Board on the UCRA fees for 2010. The Board did not subsequently suspend or withdraw that recommendation.

At subsequent meetings, the Board several times discussed alternatives to its recommendation, but was unable to agree on any substitute. A carefully worded letter from Avelino Gutierrez, dated July 15, 2009, to the Honorable Ray LaHood, refers to this history and states that the Board is unlikely to make any second recommendation.

On September 3, 2009, the NPRM was published, with only a fifteen-day period for public comment. The five members of the UCRA Board, seconded by many industry groups, requested an extension of time to comment. An additional ten days was granted. In the language with which the extension is accompanied, however, FMCSA expresses its surprise that the public should require more time. The issues surrounding the fees have all been aired, the agency says, in effect; and continuing the discussion now will only delay the rulemaking needlessly.

But how could interested parties, of whom there are many tens of thousands, have anticipated that in this NPRM, FMCSA would ignore almost completely the worst economic situation the trucking industry has faced in at least thirty years, and that the agency would, apparently without adding other factors to the balance, grant the states all they requested? To expedite and conclude this rulemaking along the lines on which it has opened would result only in inequity.

### The Motor Carrier Industry in Today's Economy

The NPRM does not disclose that FMCSA has taken the current economic picture into consideration to even the slightest degree in proposing to set the UCRA fees for 2010 at a

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<sup>4</sup> Actions of the Board are documented in the Board's official minutes.

very significantly higher level. That level reflects only what the participating states requested; it does not take into account the very real economic effect such an increase, coming at such a time, will have on the motor carriers and other entities that would be obliged to pay that increase.

To be sure, the Act provides that the Secretary of Transportation is to set UCRA fees based on recommendations from the Board. (*See* 49 U.S. Code 14504a(f)(1)(B).) That the Act does not permit the Board itself to set the fees implies, however, that FMCSA is to exercise some discretion in determining the fees – must, in fact, balance the interests of the UCRA participating states with the interests of the industry over which the agency has been granted a degree of supervision. There is no indication in the NPRM that the agency has exercised any such discretion or engaged in any such balancing of interests in proposing this tax increase. Moreover, the Act goes on to say that the Board may ask the Secretary to adjust the fees “within a reasonable range.” (*See* paragraph (f)(11)(E) of the Act.) In the current economic climate, the “adjustment” proposed by the NPRM is not reasonable.

Recent revisions to data on the gross domestic product of the United States confirm that the current recession has been the longest and deepest in post-war history. It is certainly the most difficult economic time the Nation’s trucking industry has faced since federal deregulation in 1980. ATA’s for-hire truck tonnage index shows a drop of some 20 percent in the last 18 months. The corresponding index of for-hire truckload loads fell 22.5 percent in the year ending in June. For-hire trucking employment is at its lowest level in 14 years. Truckload revenue per mile has fallen over 14 percent in the last year, and less-than-truckload by more than 19 percent in that same time. Finally, and most importantly, ATA’s seasonally-adjusted index of for-hire truckload revenue has fallen over 31 percent in the past year, and is still falling. The revenue for large less-than-truckload carriers is down by more than 42 percent over that same period.<sup>5</sup>

In sum, the recession has hit the trucking industry far worse than many other industries. For the economy as a whole, the recession may be over or almost over; ATA does not expect a real recovery for trucking for at least another year. In this climate, many trucking operations are barely holding on.

The tax increase proposed by the NPRM would extract from this beleaguered industry some \$35 million to \$40 million of operating capital – to be paid almost entirely by compliant motor carriers, it is worth noting, not the many entities that have not seen fit to comply with UCRA requirements. Although the increase for any single motor carrier operation may not equal the price of a new piece of equipment or the salary of an additional driver, this is hardly, in times like these, the relevant measure of its significance.

### The Economic Effect of the Proposed Increase

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<sup>5</sup> Figures supplied by ATA Economics and Statistical Analysis Group, Arlington, VA.

The financial crisis that has been such a damaging aspect of the current recession has rendered it exceedingly difficult for businesses of all kinds to borrow money, whether to refinance debt, to finance accounts receivable, or to obtain working capital for their daily operations. Credit terms have tightened very drastically over the past year and are still showing only slight moderation at the present.

Like other businesses, motor carriers depend on lines of credit for their day-to-day operations. Whether those lines of credit stay open depends most of all on a carrier's cash flow. It is this most of all that is subjected these days to constant scrutiny by lenders. It is here that the difference of a few thousand or even a few hundred dollars may make the difference between the survival of a motor carrier in these times, or its closure. It is this that makes the increase in the fees under the UCRA program proposed by the current NPRM so significant for the industry. A few hundred or a few thousand dollars – the amount of the proposed increased UCRA liability for many medium-sized fleets – can easily make the difference – in today's climate – between survival and bankruptcy. To increase business taxes during a recession is always problematic for government; significantly increasing taxes on the trucking industry in what qualifies – for this industry – as a depression, must be accounted irresponsible.

It may be said that times are hard for UCRA participating states as well. And they are. It would be exceedingly difficult to maintain, however, that a continued shortfall in revenues for another year on the scale experienced by some participating states over the past three years will make a real difference in the survival of any state program or agency – unless, of course, the value of that program or agency were already open to question. It is significant in this connection that when, earlier this year, the National Conference of State Transportation Specialists (NCSTS), which serves as the professional organization of the administrators of the states' UCRA programs, attempted to survey its members on the effects of the revenue shortfall from the UCRA fees, few administrators bothered to answer, and, of those that did, only one or two could cite any real operational or programmatic difficulty caused by the shortage.

Sooner or later, the Nation's economy will recover. When it does, the speed and the solidity of that recovery will depend, among many other factors, on the health of the trucking industry, on which the U.S. transportation system critically relies. The trucking industry is not healthy today. Trucking capacity is down, and the industry's ability to expand rapidly, when the times call for it, is already substantially diminished. It would be wiser on government's part not to impose a tax increase on this industry at this juncture.

FMCSA has that discretion. Although the Act definitely ties any adjustment to UCRA fees to a recommendation of the Board, the Act very clearly implies that FMCSA is to exercise its administrative judgment in setting those fees, to balance, that is, all of the interests involved. The balance of those interests clearly indicates that although the fees must be adjusted for the elimination of trailing equipment from the program no overall increase in the rates is warranted, at least not for 2010.

## States' Failure to Enforce UCRA

On the whole, the participating states have not done a good job of enforcing the requirements of the UCRA program. Both FMCSA, in the NPRM, and NCSTS, in its comments to this docket, recognize this as a problem, but neither party recognizes how poorly the states have in fact done, nor how significant a factor this failure is in the revenue shortfalls the states have experienced.

There are two aspects to the lack of enforcement effort by the states. First, many though not all of the participating states, and all of the nonparticipating states, have failed to rigorously require motor carriers and other entities subject to the UCRA fees to register and pay them. Fully 19 of the UCRA states, nearly half the participating jurisdictions, have still not managed to register for purposes of the 2009 fees even three-quarters of the carriers based within their borders.<sup>6</sup> These figures bespeak a woeful lack of effort on the part of these jurisdictions. That it is possible for a state to do better is evidenced by the strikingly better numbers reported by a number of other participating jurisdictions – approaching or in one case exceeding 90 percent registration. Clearly, there are a great many motor carriers in operation who have not chosen to register for UCRA and who have not been obliged to. It is deeply unfair that the revenue these entities should be supplying must be made up by compliant carriers.

Perhaps even more serious, however, is the lack of compliance by carriers who have registered for the program but have not paid all they properly owe. There is much talk in the NPRM about “bracket shift” (*see* pages 45589-91 and 45593-95), the phenomenon that occurs when a carrier pays less in fees than would be expected from the data on the carrier that is reflected in FMCSA’s Motor Carrier Management Information System (MCMIS). Bracket shift is estimated by one source to account for somewhat more than 25 percent of the total revenue shortfall of the UCRA program, quite possibly more than is due to noncompliance through nonregistration (*see* page 45591). It is a highly significant aspect of the UCRA.

Bracket shift may occur from any of five causes – or from several at once: (1) the MCMIS data on a carrier may be erroneous, and the carrier legitimately pays fees at a level different than the recorded data would predict, (2) the carrier chooses under the Act to base its fee calculation on the actual number of vehicles it operated during the preceding year instead of the number it reported to FMCSA, and therefore falls into a different bracket (3) the carrier operates some of its vehicles solely in intrastate commerce, excludes these from its fleet count, as is permitted by the Act, and pays less than expected, (4) the carrier is legitimately confused about the requirements of the Act, and excludes trailing equipment or equipment operated in interstate commerce but solely within a single state, or, finally, (5) the carrier cheats, and knowingly pays less than it owes.

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<sup>6</sup> Figures taken from e-mail message from Dave Lazarides, Illinois Commerce Commission, dated September 8, 2009.

Curiously, none of this analysis appears in the NPRM, where UCRA noncompliance is regularly equated only with failure to register for the program (*see* pages 45591, 45594). Yet the fourth and fifth causes of bracket shift listed above certainly reflect noncompliance, and are very likely major causes of the states' revenue shortfalls. But what proportion of the reported 25 percent revenue loss is due to evasion and what to legitimate bracket shift? No one knows, for states have yet, more than two years into the program, to perform any UCRA audits!<sup>7</sup> Once again, compliant carriers are left to bear higher fees, and the noncompliant have no reason at all to fear state enforcement. States that are short of money and asking for more might be expected to slide over the important distinction between the legitimate and illegitimate causes of bracket shift,<sup>8</sup> but FMCSA must not do so.

A word should also be said in this connection about the elimination from the UCRA program of trialing equipment. Inclusion of such equipment for the program's first three years undoubtedly led to a great deal of confusion on the part of motor carriers when they came to calculate their fees, and undoubtedly led many to underpay what they owed. This factor has now been removed from the overall UCRA equation, and some revenue gain from this change may be expected.<sup>9</sup> Again, no one knows how much, but FMCSA, which has included a number of other, equally uncertain factors in its fee proposal, should not ignore this one (*cf.* page 45593, where it is stated that even the state representatives on the Board felt this factor was worth considering).

The NPRM makes a great show of including a compliance factor, stating that the UCRA participants will not collect their entitlements unless they improve compliance with the program on an overall basis (*see* pages 45594-95). But this must be discounted heavily. After all, the fees proposed by the NPRM are almost exactly the same as those recommended to the Secretary in February 2009, and there is no reason to suppose that the states, which have been disinclined in general to enforce the requirements of UCRA, included a compliance factor in *their* recommendation. The states, that is, believe they can collect their full entitlements at this fee level without improving their compliance efforts beyond the bare minimum they had collectively in place when the Board made its recommendation in February 2009.<sup>10</sup>

Coupled with the state of the economy, and its dire effects on motor carriers and allied industries, the failure of the states to enforce UCRA requirements is the major reason for ATA's opposition to the fee increases proposed by the NPRM. Until states make a real effort to achieve widespread compliance with the program, not alone in carrier registration but also in the elimination of the evasion element of bracket shift, the states will not in fact know how much, if in fact any, additional money they may actually require from increased fees. Given the state of the economy, FMCSA should refuse to

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<sup>7</sup> At least no audits have been reported to the Board, which some time ago established an Audit Subcommittee. That body, however, has so far produced no audit program or guidance, either to govern audits of taxpayers or of state UCRA administrative programs.

<sup>8</sup> See UCRA Board Responses to FMCSA Questions, submitted by Avelino Gutierrez to William Quade, FMCSA, on July 27, question no. 3. This document is cited hereafter as Board Responses.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.*, question no. 1.

allow the states any increase beyond what may be needed to accommodate the elimination of trailing equipment from the program.

FMCSA's failure to require the states to do better in the way of UCRA compliance has three significant results. First, as noted already, the increase in UCRA fees will be borne only by already compliant motor carriers and other entities. Particularly given today's economic climate, they will suffer all the more for their honesty.

Second, the NPRM establishes a precedent, and creates a moral hazard for the states. Despite the very evident fact that many of the participating states, perhaps even most of them, have made only feeble efforts at enforcing UCRA, the NPRM has in effect given the states everything they have asked for in the way of increased UCRA fees – and a little more besides.<sup>11</sup> If the increase stands, states will have learned their lesson; they need not enforce in the future, they need only request higher rates, and these will be granted them.<sup>12</sup>

Finally, the NPRM establishes a precedent in another respect as well. It explicitly acquiesces in state non-enforcement of a federal program established by Congress in the interests of highway safety, even, as a practical matter, rewards states for this behavior. Will this acquiescence spread now to other federal programs managed by the Department of Transportation?

A word should also be said about the comments that states have filed on the NPRM. Nine states have done so at the time of this writing, along with the NCSTS. Eight of the states repeat almost verbatim the short NCSTS comments, which, all too predictably, support the extraordinary increase proposed in the UCRA fees. Notably, however, the thoughtful comments of the California Department of Motor Vehicles differ radically from those of the other states. That agency deplors the poor enforcement effort of the states generally, and opposes the fee increase as inequitable and poorly justified.

#### FMCSA's Duty Under the Act

ATA firmly believes that FMCSA has not, in acting on the UCRA Board's recommendation, properly considered all the relevant factors. We recognize that the UCRA was designed to replace states revenues from SSRS and related programs. The Act clearly sets out the procedures by which the fees levied under the new program may be adjusted by the Secretary if state revenues fall short. FMCSA's characterization throughout the NPRM of its statutory duty under the Act is mistaken, however, in that the Act does not merely require the agency, once the Board has recommended an adjustment in the level of the fees, to approve it, as FMCSA in effect proposes to do in this instance.

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<sup>11</sup> Related to this aspect of the increase is that if states are not compelled to enforce the requirements of the program, there never will be any reliable data about how much they could collect without a fee increase at all. Their whole entitlements, perhaps – but who would be able to say with certainty?

<sup>12</sup> And still higher rates will undoubtedly soon be requested, since the current sharp increase will lead to increased evasion, and to smaller revenues than expected.

The NPRM repeatedly refers to this as “the requirement” of the Act, evidently to the exclusion of any other.

In fact, however, FMCSA must exercise its discretion in this matter, as implied by the Act’s requirement that a fee adjustment be “reasonable.” What can this mean, if it does not mean that FMCSA is to consider circumstances other than the amount of revenues collected by the states? The Act quite clearly does not intend FMCSA to follow blindly whatever fee adjustment the Board may recommend to it; rather, the language calls for the adjustment only to be “based on” such a recommendation. In this respect, the agency has exercised some discretion in the NPRM. While it has substituted its own judgment for the states’ in the matter of justifying the fee increase, FMCSA has nevertheless preserved almost intact the fee structure recommended to it. The unfortunate consequences of the agency’s acquiescence in this respect, both for the UCRA program and for the trucking industry, have been outlined above.

FMCSA needs to go farther. The Act does not at all require FMCSA to give the states everything they ask for. Rather, the Act limits a UCRA fee adjustment to “a reasonable range” (*see* paragraph (f)(11)(B) of the Act), and the language of that clause clearly implies that it is the Secretary, rather than the states, that is to determine the reasonableness of an adjustment requested by the Board. The implication is also plain that the agency need not agree to adjust for the whole of a UCRA revenue shortfall in a single annual fee adjustment, but to limit itself only to what is reasonable in particular circumstances in a given year.

Among the circumstances that FMCSA should have considered in this NPRM, and that it evidently has not, or has considered only inadequately, are: the state of the economy, the effect of such a significant tax increase on the trucking industry at this time, the continuing general failure of the states to audit and enforce UCRA requirements, the effect on future UCRA collections of the elimination of trailing equipment, the danger of spiraling fee increases in UCRA, and the moral hazard for the states in FMCSA’s unconsidered acquiescence in their request.

In sum, when faced with a recommendation from the UCRA Board to adjust the fees imposed under the UCRA, the Act requires FMCSA to consider and to balance many factors besides the states’ need for money. The current NPRM exhibits little evidence that FMCSA has met this requirement.

### The Proposed Fee Structure<sup>13</sup>

In the NPRM, FMCSA has properly determined a number of the factors that constitute the proposed UCRA fee structure for 2010. The agency’s analysis of the overall motor carrier population is unobjectionable. The underlying data may not be all it should be,

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<sup>13</sup> The current docket includes an FMCSA document entitled *FMCSA Regulatory Evaluation of the Fees for the Unified Carrier Registration Agreement*, dated August 7, 2009. Although this has some enlightening information on the extremely limited degree of discretion FMCSA has applied to the rulemaking, the document is prominently marked DRAFT – DO NOT CITE OR QUOTE, and we will not do so here.

but anyone working in this area must begin with it. So too are the amounts of the states' entitlements under the UCRA program; these are as determined by the Board. And so are the number of fee brackets FMCSA determines to be proper for the fee structure. Six, the maximum number permitted by the Act, allows the most flexibility for the fees. Finally, FMCSA has properly applied the principle of progressivity required by the Act (what the Board terms "bracket equilibrium"), so that the per-vehicle fees at the bottom of each bracket are substantially equivalent across the fee structure.

In a number of other areas, however, the basis for FMCSA's determinations are unclear or their justification is questionable.

Illusory precision. First, there is a misleading implication throughout much of the NPRM that the various factors involved in the UCRA fees and fee structure can be determined with great accuracy (*see*, for many instances of this, pages 45594-94). Many of the relevant proportions, for example, are carried to two decimal places. This is most often unjustified. The underlying data will not support such close calculations, and the unwarranted show of accuracy covers much guesswork and some arbitrary assumptions. Unfortunately, the process of setting the UCRA fees, in part because the program is so new, in part because so much of the data is unreliable, requires both guesses and assumptions to be made. These ought, of course, to be the correct ones, and the assessment of the results is not assisted by an impression of precision.

Arbitrary enforcement standard. Second, FMCSA sets an arbitrary and capricious standard for state enforcement efforts: the achievement of 80 percent registration compliance for carriers based in participating states and 59 percent for those based in nonparticipating states (*see* once again pages 45594-95). The dangers of setting any such enforcement standard for the states are outlined earlier in these comments, especially such a low standard. Enforcement is to be considered successful if in the fourth year of the program only four of every five taxable entities is even registered, with no assurance that any registered entity is paying the proper amount!<sup>14</sup>

Bracket shift. Third, and closely related, is FMCSA's unquestioning acceptance of a state analysis of bracket shift. As noted above, bracket shift is a far more complex and ominous phenomenon than the states admit. FMCSA should not take this superficial analysis at face value or, without some verification, accept as accurate the figures given.<sup>15</sup>

First bracket. In the Board's recommendation for the fee structure, the lowest bracket includes only carriers operating one vehicle or none (*see* page 45586). This represents a change from the current fee structure, whose lowest bracket is from zero to two vehicles (*see* page 45585). The Board adopted the current bracket since it believed that the business likely to be conducted by an entity that operates one power unit and one trailer is distinct from the business operated by an entity with a larger number of vehicles. With the removal of trailing equipment from the brackets, the Board adjusted the lowest bracket to preserve this distinction. The fee structure proposed by the NPRM, on the

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<sup>14</sup> Were these particular numbers chosen because their application would yield fee amounts the closest to those in the Board's recommendation?

<sup>15</sup> *See* especially Board Responses to questions 3 through 6.

other hand, features a first bracket at zero to two power units. This discrepancy should be explained (*see* page 45597).

Inclusion of unneeded money. Finally, and by no means least important, the NPRM preserves intact the Board's request that included in the funds to which the fees contribute: (1) the sum of \$5 million for Board administrative expenses, and (2) a "reserve" fund of nearly \$600,000 (*see* pages 45588, 45592). Both these amounts should be dropped from the proposal, and the fees adjusted downward accordingly. The Act (paragraph (d)(7)(A)) provides that the UCRA fees may in fact fund the Board's costs of administering the program. Owing to the revenue shortfalls, however, the Board has never enjoyed any such funding. While FMCSA itself provided a modicum of start-up support for the Board, this also ended some time ago. Remarkably, the Board has continued to conduct its business without any special funding. The body continues to hold face-to-face meetings twice a year, and monthly telephone conference calls at other times. Travel funding would be useful for the in-person meetings, but it has not proven to be indispensable; and the costs of the telephone calls are evidently negligible. The on-line UCRA registration system has been furnished for the program free of charge by Indiana,<sup>16</sup> and the depository system is managed free of charge by the Bank of North Dakota. At a time when practically all budgets are subject to the very closest scrutiny, the Board would be exceedingly hard put to justify the continued request for any administrative funding at all, let alone funding at \$5 million a year.<sup>17</sup> FMCSA should drop this element of the proposal.

The case for the revenue reserve is even less impressive. The basis of its calculation is arbitrary, the request for it is unsupported by statute, and the concept belies the assumed precision that underlies the rest of the fee proposal. The reserve seems only an excuse to lift the states' fees even higher.

#### This Is a Significant Rulemaking

FMCSA's determination that this is not a significant rulemaking is erroneous. The similar determination in the 2007 rulemaking to set the initial UCRA fees was similarly in error, but the economic and equitable factors surrounding this rulemaking, and that were not present two years ago, make the present error much more critical.

The determination of a significant rulemaking that merits full administrative review is governed for all executive branch agencies of the federal government by Executive Order number 12866, published in the *Federal Register* on October 4, 1993. Section (3)(f) of that Order defines the term "significant regulatory action," and provides four criteria, two of which are relevant here:

"Significant regulatory action" means any regulatory actions that is likely to result in a rule that may:

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<sup>16</sup> This system is self-funding, and Indiana will soon entirely cover its costs of design, construction, and operation. Personal communication to ATA by the Indiana Department of Revenue.

<sup>17</sup> What is said in Board Responses, question 11a, is inventive, but not impressive for its accuracy.

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; ...

(4) Raise novel legal or policy issues arising out of legal mandates ....

The current rulemaking certainly has an annual effect on the economy of more than \$100 million, since, without the rulemaking, the states would be unable to collect any money at all under the Act.<sup>18</sup> Moreover, considering the state of the economy, and the sorry condition in which the motor carrier industry finds itself, this significant tax increase is almost certain to have a material adverse effect on trucking and, very possibly, on general economic productivity and jobs in the Nation's economy, both now and when a prolonged recovery begins. (See the economic analysis in these comments, above.) Finally, the very structure of the UCRA program, in which a federal government agency sets the rates of state taxes pursuant to the recommendation of a body composed of the representatives of private, state, and federal entities, is bound to raise "novel legal or policy issues," several of which are fully evident in the current rulemaking and in these comments.

An accurate characterization of this rulemaking as significant would require the agency to engage in a number of further analyses of the effect of the rule, and OIRA to consider the adequacy of the rulemaking in their light. The rulemaking would benefit greatly from these analyses, of which, in its current form, it exhibits no sign.<sup>19</sup>

It is no surprise that the UCRA participating states are eager to have this rulemaking completed with a minimum of administrative review, for then they may begin to collect fees under the program. For that very reason, FMCSA should be cautious about unduly expediting a final rule in this matter. In fact, however, the agency's determination, against the facts, that the rulemaking is not significant, the agency's provision of a mere fifteen-day period for public comment on the NPRM, and some of the agency's language that accompanies its grant of an additional ten days for comment (at page 47912, 74 *Federal Register*, September 18, 2009) all exhibit an impatience with the regulatory review process that is inappropriate for a matter of such significance to an industry whose health is critical to the U.S. economy. No imagined need for haste in the completion of the rulemaking should deter FMCSA from a more rigorous analysis of the basis and the consequences of its proposal than it has conducted to this point.

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<sup>18</sup> FMCSA may say, as the agency did in its determination on the 2007 rulemaking, that only if a rulemaking makes a *change* of \$100 million does it qualify under this criterion. Not only does that contradict the plain language and meaning of the Order, but ignores the fact that states could collect nothing at all in 2010 – or in 2007 – without the rule.

<sup>19</sup> More important in this respect would be the analyses required by sections 6(a)(3)B(ii) (general costs and benefits), 6(a)(3)C(ii) (effect on the economy), and 6(a)(3)C(iii) (feasible alternatives). Section 6(a)(3)D permits a somewhat expedited review of even a significant rulemaking – if warranted.

In comments by ATA submitted on March 12, 2009, to the Office of Information and Regulatory Affairs (OIRA) of the federal Office of Management and Budget, we observed:

[In a] 2007 action establishing the fees for the Unif[ied] Carrier Registration Agreement (UCRA), the Federal Motor Carrier Safety Administration (FMCSA) acknowledged that its action was significant for its impact upon states, but simultaneously declared that the rule was “not economically significant” because the rule restructured a previous registration program at the direction of Congress. Although the effect on the economy of the restructured program remained greater than \$100 million annually, it appeared that the OIRA review of this rule was abbreviated due to the restructured program ‘caveat’ provided by FMCSA and the conclusion that the rule did not impose an additional \$100 million economic impact. Once a federal regulatory agency determines a rulemaking to be a significant regulatory action under the published definition, a full OIRA review should proceed accordingly.<sup>20</sup>

These observations apply even more sharply to the current rulemaking, which deserves a full administrative review under the Executive Order cited above.

#### ATA Would Accept an Appropriate Level of Fees

ATA worked with the states for the enactment of the UCRA program. ATA worked with the states to achieve the removal of trailing equipment from the calculation of motor carriers’ fees under the UCRA program. We recognize the participating states’ need for the revenues they derive from that program. For the reasons set out in these comments, however, we believe strongly that the level of fees proposed by the NPRM is excessive and unreasonable, and contrary to the Act. In place of the proposed fees, ATA would accept fees and a fee structure that accommodates the elimination of trailing equipment alone. The structure reflected in Tables 4 and 12 in the NPRM (pp. 45587 and 45592) approximates such fees, although both these tables are based on a revenue goal that improperly, in our view, includes both administrative expenses for the Board and a revenue reserve.

The amendment of the Act last year means that the basis of the calculation of UCRA fees has changed. As a result, some carriers paying fees under a structure similar to that reflected in Tables 4 and 12 would pay more in fees, and some would pay less. On the whole, however, ATA believes that fees imposed at this level reflect an adequate compromise between the states’ need for revenues under the UCRA program, and the industry’s ability to pay in these very difficult times.

FMCSA urgently needs to rethink its proposed rule. As it stands, it will needlessly and unfairly penalize compliant motor carriers in a time of economic troubles the like of which the deregulated trucking industry has never seen. As it stands, the proposal fails

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<sup>20</sup> ATA letter to Mabel Echols, OIRA, fn. 8.

the test of reasonableness prescribed by the statute. FMCSA must do a better job of balancing the various interests involved in this significant rulemaking.