

January 29, 2016

MEMORANDUM

TO: UCRA Board of Directors
FROM: UCRA Industry Advisory Subcommittee
RE: Reducing the UCRA Fees

A list of Strategic Decisions has recently been circulated to the members of the UCR Board of Directors for their consideration. The Industry Advisory Subcommittee believes that none of the items listed there are urgent, and that the Board should – in due course – decide against most of them. More is said about these matters in the Comments of the Subcommittee on the proposed business plan and budget for the UCR repository, that have been distributed to the Board under the date January 26, 2016.

One item of pressing importance, however, was omitted from the list of Strategic Decisions – a matter that the Board needs to focus on immediately in order to remain in even nominal compliance with the terms of the UCR Act. That is the need to propose to the U.S. Secretary of Transportation a reduction in the fees charged under the Act to motor carriers and other entities. The presentation made to the Board on this topic late in 2015 is, the Subcommittee believes, incomplete and misleading.

Summary

In brief, the Subcommittee strongly believes:

The UCR Act requires the Board to make a good-faith effort toward reducing UCR fees for the 2017 registration year. If the Board acts immediately, it is not too late for this to occur.

The Board must base a proposed fee reduction not only on the expected surplus in funds for distribution, but a significant portion as well on unexpended portions of the set-aside for UCR administrative costs.

Failure of the Board to take these steps immediately will open UCR to sharp criticism that could endanger the program.

Provisions of the Act

In our analysis of the necessary reduction in the UCR fees, we begin with the relevant portions of the UCR Act. These are subparagraph (1)(E) of subsection (f) and paragraphs (3) and (4) of subsection (h) of 49 U.S. Code section 14504a. They read as follows:

(f) Contents of unified carrier registration agreement. *The unified carrier registration agreement shall provide the following:*

(1) Fees.

(E) *The board may ask the Secretary to adjust the fees within a reasonable range on an annual basis if the revenues derived from the fees—*

(i) are insufficient to provide the revenues to which the States are entitled under this section; or

(ii) exceed those revenues.

(3) Distribution of funds from repository.—*The excess funds deposited in the depository shall be distributed by the board of directors as follows:*

(A) *On a pro rata basis to each participating State that did not collect revenues under the UCR agreement equivalent to the amount such State is entitled under subsection (g), except that the sum of the gross revenues collected under the UCR agreement by a participating State and the amount distributed to it from the depository shall not exceed the amount to which the State is entitled under subsection (g).*

(B) *After all distributions under subparagraph (A) have been made, to pay the administrative costs of the UCR plan and UCR agreement.*

(4) Retention of certain excess funds.—*Any excess funds held by the depository after distributions and payments under paragraphs (3)(A) and (3)(B) shall be retained in the depository, and the fees charged under the UCR agreement to motor carriers, motor private carriers, leasing companies, freight forwarders, and brokers for the next fee year shall be reduced by the Secretary accordingly.*

These portions of the Act raise issues that may be divided into two related categories, those concerning (1) the amount of a reduction in fees, (2) the timing and process by which such a reduction should be made.

Amount of a Reduction

It is clear from the Act that UCR fees are to be reduced when there is a surplus in the depository from the fees collected in a given registration year after (1) all the distributions have been made to the participating states of the money to which they are entitled for that year, and (2) payments

have been made for the administrative costs of the plan and agreement. That is, a surplus in the depository may have two components: fees in excess of state entitlements, and unexpended UCR administrative funds. Under the Act, the existence of either one component or the other automatically triggers a fee reduction.

This plain statement, however, brings up several questions:

Although the statute is clear on what triggers a fee reduction, what is the actual amount of the reduction?

As we stated in our comments on the repository business plan and budget, the Subcommittee believes that the Board should establish a reserve fund, against a year when UCR collections do not provide administrative funds. But does the Act allow for such a reserve, or must those funds be, in effect, refunded to the industry in reduced fees?

Is there a *de minimis* level of surplus funds that would *not* trigger a fee reduction?

What is the proper disposition of interest accruing on a surplus in the depository?

Given that the timing of a reduction in fees is problematic, how will delays in a reduction affect the amount of the reduction?

Reduction Amount

The final word of paragraph (4) of subsection (g) – “accordingly” – seems to provide an answer to the first question: The reduction in fees must be sufficient so that after collections, distributions, and administrative payments for “the next fee year,” other things being equal, there will not again be a surplus in the depository. (By other things being equal, we are referring to such factors as changes in the industry and in the general economy.)

This interpretation is in agreement with the entire tenor of the Act in setting up the UCR program: Fees are capped; no more is to be charged to the industry in fees than will yield the states’ full entitlements, with a set-aside for “the administrative costs of the UCR plan and UCR agreement.” These costs, considering the statutory definitions of UCR plan and UCR agreement, should be quite minimal. (It may be that not every expenditure made by a projected UCR repository might qualify as an administrative cost of the the UCR plan or agreement.) Therefore, when in a given year more is collected, the excess is held for distribution and administrative costs in “the next fee year,” and the fees for that succeeding year are reduced “accordingly,” so that no more is collected than will meet the Board’s obligations.

The Subcommittee agrees with the proposal made to the Board on this matter last month that the amount of a fee reduction should be applied on an equal percentage basis to each of the fee brackets, so that, for instance, each bracket might be reduced by 2 percent.

Reserve Fund

The Subcommittee does not believe it stretches the meaning of the Act unduly for the Board to provide for a reserve fund as a cushion against reduced UCR collections. Payment into such a fund, provided always that it is reasonable in amount, should, we believe, fall within the statute.

De minimis

The full phrase is: *De minimis non curat lex* – The law does not deal in trifles. Although the saying is not entirely apposite here, the Subcommittee believes that at some level, an excess in the depository remaining after “distributions and payments” should not trigger a fee reduction. We are inclined to believe that level is an excess insufficient to cause a reduction of less than 1 percent. (If, however, the process for reductions can be simplified and routinized, there may be no longer a need for a *de minimis* in this connection, and then any surplus at all would trigger a reduction, although perhaps a very small one.)

Interest

For several years, interest on deposited funds truly has been *de minimis*. Now, however, the Federal Reserve appears to be raising rates slowly, and this raises the question of how the Board should deal with interest on surplus funds in the depository. Since interest is simply the effect of time on money, the Subcommittee believes strongly that the interest on such funds must also be “refunded” to industry by serving to lower the UCR fees more.

Delayed Reductions

Although it is regrettable, it seems very unlikely that a fee reduction can, at least for the next few years, actually be achieved in “the next fee year,” as the statute requires. As the discussion below makes clear, however, it is possible that by the time fee reductions can actually be calculated, the delays will mean that more than a single year’s excess collections may be residing in the depository. In that event, the reduction should take those funds into account as well. The Subcommittee differs in this point with the presentation made to the Board on this topic in 2015. We believe it is critically important that the Board show its good faith in expediting fee reductions, when these are warranted, rather than unduly extending the effect of administrative delays.

Timing & Process for a Reduction

Although in the event of a surplus in the depository the Act requires a fee reduction in “the next fee year,” two factors could delay an actual reduction in fees past that time. The first of those factors is late collections in fees for a given registration year, the second the time consumed by FMCSA’s rulemaking process in setting fees. All the more reason, therefore, that the Board act expeditiously in pursuing a fee reduction at as early a date as possible. To do otherwise would invite pointed criticism of the UCR program and possibly lead to litigation.

Undue Delay to Be Avoided

The Subcommittee differs strongly with the implication in the presentation received by the Board last month that the initiation of the process to reduce fees must await a final, exact tally of fee collections for a given year. Adhering to such a rule would push back the start of the process not merely one full year, as was suggested, but several, as fees continue to dribble in for month after month. The presentation set out an example that suggested a reduction on account of the expected surplus for 2015 would not take effect until 2018 (and, very likely, not until 2019). That is clearly unacceptable. The need for as rapid a change as circumstances allow outweighs any imagined need for precision.

A Suggested Procedure

In fact, of course, the Board will know well before the end of a calendar year that collections will produce a surplus, and will know quite accurately how much that surplus will be. The Board will also know at that time how much it has expended or will expend in administrative costs for that year, and how much will be left over. In other words, it will know enough to recommend a fee reduction. It is at that point, certainly no later than the end of the following January, and preferably several months before, that the Board should notify FMCSA to initiate a fee reduction rulemaking to take effect the following autumn – that is, eight or perhaps nine months after the end of the year that produced the surplus. During the rulemaking process, there should be opportunities for the Board to advise FMCSA more accurately of the year’s actual collections, if an adjustment in that respect proves to be necessary.

As the December presentation suggested, we believe it is possible for the fee reduction process, if events warrant, to become so routine that a formal DOT rulemaking may not be necessary, and the entire process might be shortened somewhat more, even actually to permit a reduction in the “next fee year,” as the Act stipulates.

The 2015 Surplus

The schedule we suggest seems quite practicable, and delays the effective date of a fee reduction by only one year past the date stipulated by the Act. Regrettably, although the Board expects a sizable surplus for 2015 – small in undistributed fees but large in unexpended administrative costs -- it has not yet made a recommendation to FMCSA for the necessary rulemaking. *The Board should do this as soon as possible.* Not only may the first fee-reduction rulemaking consume more time than those that will come later, but it is especially desirable for the Board to show the utmost in good faith to industry in complying promptly with the fee provisions of the Act, most particularly in this first instance of fee reduction.

If it should prove already too late for the Board and FMCSA to take action that enables a fee reduction in 2017 on account of the 2015 results, it is all the more important that the process begin soon enough to *ensure* a reduction for the 2018 registration year.

The reduction following from the 2015 surplus would be significant -- not from the projected \$75,000 in undistributed fees, but from the unexpended portion of the administrative set-aside.

Considering how little was spent on administration in the calendar year just ended, even allowing for what the Subcommittee believes to be a necessary step to establishment of a UCR reserve fund, the 2015 surplus will be in the neighborhood of \$4 million, yielding a fee reduction of approximately 3.5 percent.

The 2016 Surplus

Pushing the effective date for the first reduction back to 2018, as may – regrettably - be necessary, raises another issue. The Board can confidently expect a surplus in 2016 collections, both from revenues over entitlements and from unexpended administrative funds. This surplus could easily be \$7 million, if projections are as accurate as they have proven in the past. If the fee reduction process for 2015 drags on past the end of calendar 2016, the Board should amend its recommendation to FMCSA to include the additional decreases necessitated by those 2016 results. This will conform the process more closely to what the Act requires, and relieve the Board from the potential embarrassment of holding \$7 million or more in surplus for the best part of a year. And it would, once again, clearly demonstrate to those who must pay UCR fees that the Board is fairly considering their interests.

Conclusion

As the Subcommittee noted at the beginning of these comments:

The UCR Act requires the Board to make a good-faith effort toward reducing UCR fees by reason of the surplus for 2015, to take effect for the 2017 registration year. It is not necessarily too late for this to occur, if the Board acts immediately.

The Board must base the proposed fee reduction not only on the expected surplus in funds for distribution, but, with respect to the 2015 surplus, primarily on unexpended portions of the set-aside for UCR administrative costs.

Failure of the Board to take these steps immediately will open UCR to sharp criticism that could endanger the program.

The Industry Advisory Subcommittee appreciates the Board's consideration of these comments.

Robert C. Pitcher

Chair, UCR Industry Advisory Subcommittee
Vice Chair, UCR Board of Directors