



U.S. Department  
of Transportation

**Federal Motor Carrier  
Safety Administration**

**Deputy Administrator**

January 21, 2015

1200 New Jersey Avenue, SE  
Washington, DC 20590

Mr. Avelino A. Gutierrez  
Chair, Board of Directors  
Unified Carrier Registration Plan  
Staff Counsel/Legal Division  
New Mexico Public Regulation Commission  
P.O. Box 1269  
Santa Fe, NM 87504

Dear Mr. Gutierrez:

Acting Administrator T.F. Scott Darling, III asked me to respond to your letter to Administrator Ferro, in anticipation of the expected receipt by the Unified Carrier Registration Plan (UCR) of sufficient funds from registration fees to consider disbursing funds for the Plan's administrative expenses, directed several specific questions to the Federal Motor Carrier Safety Administration (FMCSA). For reasons discussed below, FMCSA's Office of Chief Counsel has determined that the Agency is not authorized to provide legal advice to the UCR Plan regarding any ethical or fiduciary obligations that might apply. Without implying the existence of any such fiduciary obligation here, we can provide this background and information in response to your inquiry.

**1. What entity is authorized to disburse funds received by the UCR Plan for administrative expenses?**

The UCR Plan is "the organization of State, Federal, and industry representatives responsible for developing, implementing, and administering the unified carrier registration agreement." 49 U.S.C. 14504a(a)(9). The UCR agreement is "the interstate agreement developed under the unified carrier registration plan governing the collection and distribution of ... fees paid ... pursuant to this section" 49 U.S.C. 14504a(a)(8). The UCR Plan and the UCR Agreement are administered by the board of directors through rules and regulations the board adopts. (49 U.S.C. 14504a(d)(1)(A) and (2)(A) and (B)). The statute also gives the board the following specific authority, in 49 U.S.C. 14504a(d)(6):

The board may contract with any person or any agency of a State to perform administrative functions required under the unified carrier registration agreement, but may not delegate its decision or policy-making responsibilities.

In view of all of these provisions, it is clear that the board of directors of the UCR Plan is the entity authorized to make disbursements for administrative expenses. The board may delegate authority to make those disbursements itself or enter into contracts with other persons that it designates.

**2. Do any federal statutes or regulations governing acquisitions of goods and services apply to the disbursement of funds for administrative expenses by the UCR Plan?**

The only provision in the statute creating the UCR Plan that addresses disbursement of funds for administrative expenses is 49 U.S.C. 14504a(d)(3). It provides:

Compensation and expenses.-

(A) In general.-Except for the [Deputy Administrator of FMCSA or other presidential appointee], no director shall receive any compensation or other benefits from the Federal Government for serving on the board or be considered a Federal employee as a result of such service.

(B) Expenses.-All directors shall be reimbursed for expenses they incur attending meetings of the board. In addition, the board may approve the reimbursement of expenses incurred by members of any subcommittee or task force appointed under paragraph (5) for carrying out the duties of the subcommittee or task force. The reimbursement of expenses to directors and subcommittee and task force members shall be under subchapter II of chapter 57 of title 5, United States Code, governing reimbursement of expenses for travel by Federal employees.

Although they apply to disbursement of funds, neither paragraph above answers the broader questions you have raised about creation of an orderly, legal, ethical and transparent process for payment of administrative costs. Paragraph (A) provides that board members other than the Deputy Administrator of FMCSA may not be compensated with Federal funds. It leaves open the matter of whether the directors can be compensated from the funds administered by the UCR Plan which, of course, are not funds “from the Federal Government.”

Paragraph (B) is similarly narrow. The purpose of the reference in paragraph (B) to “subchapter II of chapter 57 of title 5” of the U.S. Code is unclear, because those statutes (5 U.S.C. 5721 to 5739) deal with relocation expenses for new and transferred employees and other miscellaneous travel expenses. It would seem more appropriate to apply Subchapter I of that portion of the code (in particular, 5 U.S.C. 5701-5707), because those sections deal with reimbursement of ordinary business travel expenses incurred by Federal employees on official duties. The regulations implementing these statutes are issued by the General Services Administration and are found at 41 CFR, Subtitle F, Chapters 300 and 301.

There are several sets of federal statutes that deal with acquisitions of property and services for the government. In general, they all rely on very similar definitions that make them applicable to “executive agencies.” Each of those sets of statutes is considered below to determine whether they are applicable to the expenditures by the UCR Plan for administrative expenses.



## The Federal Acquisition Regulations

The Administrator of the Office of Federal Procurement Policy is authorized by statute to adopt the Federal Acquisition Regulations (FAR) that govern the acquisition for the government of property and services for its use. Those regulations are applicable to all “executive agencies” (41 U.S.C. § 1121).

For purposes of this analysis, an executive agency is defined as: (1) an executive department;<sup>1</sup> (2) a military department;<sup>2</sup> (3) an “independent establishment”;<sup>3</sup> or (4) a wholly owned government corporation.<sup>4</sup> 41 U.S.C. § 133. An independent establishment is defined for this purpose as “an establishment in the executive branch ... which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.” 41 U.S.C. § 133(3) and 5 U.S.C. § 104.

The UCR Plan does not, in our view, fit within the categories of entities that are subject to the FAR. It is not an independent establishment because it is not part of the executive branch.<sup>5</sup> The UCR Plan, as indicated above, is governed by its board of directors. Although 14 of the 15 members are appointed by the Secretary of Transportation (or his delegate), these members represent the interests of the participating States and the motor carrier industry. The other member is the Deputy Administrator of FMCSA (or other presidential appointee) (49 U.S.C. § 14504a(d)(1)). But the important aspect of the UCR Plan is that it is specifically designated as an organization created to administer an interstate agreement. Even though an interstate agreement creates the UCR Plan as a matter of federal law, an agency established pursuant to this agreement is considered an agency of the States participating in the agreement. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9<sup>th</sup> Cir. 1977), *aff’d in part and rev’d in part on other grounds*, 440 U.S. 391 (1979). The appointment of the board members by the Secretary or his delegate, and the designation of the FMCSA Deputy Administrator as a board member, does not overcome the essential fact that the UCR Plan is an agency of the States participating in

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<sup>1</sup> The Executive departments are: State; Treasury; Defense; Justice; Interior; Agriculture; Commerce; Labor; Health and Human Services; Housing and Urban Development; Transportation; Energy; Education; Veterans Affairs; and Homeland Security. 5 U.S.C. § 101.

<sup>2</sup> The military departments are: Army; Navy; and Air Force.

<sup>3</sup> For example, the Office of Personnel Management and the Federal Communications Commission are independent establishments. *Government Contract Disputes* § 3.22 (2014 ed.).

<sup>4</sup> Government corporation: “[O]wned or controlled by the Government of the United States.” 5 U.S.C. § 103(1).

<sup>5</sup> See *Hereford v. Tennessee Valley Auth.*, No. AT-3443-98-0200-M-1, 2001 WL 387400 (M.S.P.B. Apr. 10, 2001) (“It appears that an independent establishment must be created by statute or Executive order. See *Energy Research Foundation v. Defense Nuclear facilities Safety Board*, 917 F.2d 581, 582-83 (D.C. Cir. 1990) (finding agency to be an independent establishment based on language in enabling statute describing agency as ‘an independent establishment in the executive branch’ and noting that other enabling statutes include similar language)”).

the agreement. Therefore, it is not an independent establishment of the executive branch, and is not subject to the FAR.

### Federal Property and Administrative Services Act

Executive agencies making purchases and contracts for property and services are subject to (FPASA) and implementing regulations of the General Services Administrator. *See* 40 U.S.C. § 101 *et seq.* Under FPASA, an “executive agency” is defined as “an executive department or independent establishment in the executive branch...and a wholly owned Government corporation.” 40 U.S.C. § 102(4). The term “federal agency” means “executive agency or an establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol . . .).” 40 U.S.C. § 102(5).

For the same reasons that it is not subject to the FAR, the UCR Plan does not fit within the categories that are subject to FPASA (i.e., it is not an executive department, an independent establishments in the executive branch, a wholly-owned Government corporation, or an establishment in the legislative or judicial branches).

### Competition in Contracting Act

The Competition in Contracting Act (CICA), codified at scattered titles in the U.S. Code, Title 10 (Armed Forces), Title 31 (Money and Finance), Title 40 (Public Buildings, Property, and Works), and Title 41 (Public Contracts) of the U.S. Code, governs government contract law, federal acquisition process, and bid protest procedures.

All of these sections apply to either: military departments (inapplicable here); “executive agencies” (executive department, military department, independent establishment, wholly owned Government corporation, or instrumentality in the executive branch); or “federal agencies, which are defined as “executive agency or an establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol...).” The same definitions govern CICA that govern FPASA, particularly 40 U.S.C. § 102(5). An executive agency is: (1) an executive department; (2) an independent establishment in the executive branch; or (3) a wholly owned Government corporation, none of which the UCR Plan fits under. Further, UCR Plan is not an establishment in the legislative or judicial branches. Thus, CICA does not apply to the UCR Plan.

### Contract Disputes Act of 1978

When executive agencies make express or implied contracts for the procurement of property, services, construction, alteration, repair, or maintenance of real property, or disposal of personal property, they are subject to the Contract Disputes Act (CDA). 41 U.S.C. § 7102(a)(1)-(4). Here, an “executive agency” is again defined as (1) an executive department, (2) a military department, (3) an independent establishment, or (4) a wholly owned Government corporation. 41 U.S.C. § 7101(8)(A)-(D). Again, for the same reasons already discussed, the UCR Plan does fit within the categories subject to CDA.



Clinger-Cohen Act of 1996 (CCA)

Executive agencies must comply with the Clinger-Cohen Act (CCA) when acquiring, using, and disposing of information technology. 40 U.S.C. § 11311. "Executive agency" is defined as (1) an executive department, (2) a military department, (3) an independent establishment, or (4) a wholly owned Government corporation. 40 U.S.C. § 11101(2). Thus, the UCR Plan is not subject to CCA.

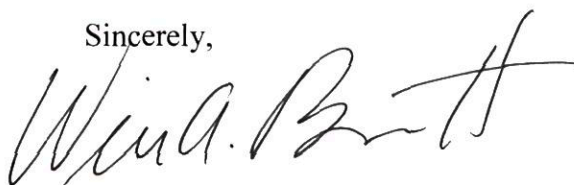
**3. What ethical or fiduciary obligations apply to the collection and disbursement of such funds?**

As indicated, the UCR Plan is not subject to the several Federal acquisition statutes with regard to the collection and disbursement of administrative funds, and is not an agency of the United States government for this purpose. FMCSA's Office of Chief Counsel has determined that it is not authorized in these circumstances to provide legal advice to the UCR Plan regarding any ethical or fiduciary obligations that might apply.

We strongly recommend that the board obtain advice on these matters from knowledgeable attorneys either within the State governments that are members of the UCR Plan or from private attorneys. They can provide advice on any State laws and regulations that might apply, as well as any ethical or fiduciary obligations generally applicable to organizations such as the Plan and individually to the members of its board of directors. The board has authority to issue rules and regulations for administering the UCR agreement (49 U.S.C. § 14504a(d)(2)(B)), which could include rules and regulations governing the conduct of board members in authorizing expenditures for administrative expenses.<sup>6</sup> The legal services the board purchases to support issuance of such rules and regulations might itself be deemed an eligible administrative expense.

I hope this information is helpful. Please let us know if there is any additional assistance we can provide by contacting either Charles Fromm at (202) 366-3551 or Frederic Wood at (202) 366-8542 in our Office of Chief Counsel.

Sincerely,

A handwritten signature in black ink, appearing to read "W.A. Bronrott", with a stylized flourish at the end.

William A. Bronrott  
Deputy Administrator

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<sup>6</sup> For the FMCSA UCR director, the Standards of Conduct for Employees of the Executive Branch (5 C.F.R. Part 2635) will take precedence over any UCR-promulgated ethics rule or regulation in the event of a conflict between the two.