

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MD

ORDER NO. 13,151

IN THE MATTER OF:

Served February 13, 2012

Rulemaking to Amend Rules of)
Practice and Procedure and)
Regulations: Regulation)
Nos. 51 & 64)

Case No. MP-2012-015

Pursuant to Title II of the Compact, Article XIII, Section 3, and Commission Rule No. 30, the Commission hereby initiates and gives notice of a rulemaking for the purpose of proposing amendments to Commission Regulation No. 51, "Definitions," and Regulation No. 64, "Safety Regulations".

The Washington Metropolitan Area Transit Commission, (Commission or WMATC), regulates private sector motor carriers transporting passengers for hire between points in the Washington Metropolitan Area Transit District (Metropolitan District), pursuant to the Washington Metropolitan Area Transit Regulation Compact,¹ (Compact). Article XI, Section 5(a), of Title II of the Compact states that each authorized carrier shall provide safe and adequate transportation service, equipment, and facilities.

The Commission's safety regulations may be found in Regulation No. 64, which provides as follows:

The Commission adopts and incorporates herein by reference the Federal Motor Carrier Safety Regulations [FMCSRs] as amended from time to time, to the extent that the said regulations apply to the operations of passenger carriers. These regulations are set out in Title 49 of the Code of Federal Regulations.

The Commission adopted Regulation No. 64 in 1991.² Regulation No. 64 replaced the safety regulations that had been in place since 1963.³ The 1963 regulations applied to carriers holding authority from

¹ Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990) (codified at D.C. CODE § 9-1103.01 (2009); MD. TRANSP. CODE § 10-203 (2009); & VA. CODE §§ 56-529, 530 (2009)).

² *In re Rules of Prac. & Proc. & Regs.*, No. MP-91-05, Order No. 3600 (Jan 17, 1991).

³ *In re Safety Regs.*, No. 37, Gen. Order No. 8 (Sept. 20, 1963).

the Commission and their drivers and "buses".⁴ Bus was defined as "any vehicle operated by a 'Passenger Carrier' over the public streets or highways within the Metropolitan District and used for the transportation of passengers for hire."⁵ Thus, under the Commission's 1963 safety regulations, all WMATC carriers, vehicles, and drivers were covered. That changed with the adoption of Regulation No. 64 in 1991.

Regulation No. 64 only applies to: (1) WMATC vehicles seating 9 persons or more, including the driver; and (2) the drivers and carriers operating such vehicles. Vehicles seating 8 persons or less, including the driver, and the drivers and carriers operating such vehicles only, are not covered. This follows from the definition of "commercial motor vehicle" in the FMCSRs adopted by Regulation No. 64.

When the Commission adopted the FMCSRs in 1991, the term "commercial motor vehicle" meant, in pertinent part, a vehicle used on public highways in interstate commerce to transport more than 15 passengers, including the driver.⁶ Early Commission decisions focused chiefly on vehicle inspections and driver qualifications.⁷

Congress expanded the statutory definition of commercial motor vehicle in June 1998 in the Transportation Equity Act for the 21st Century (TEA-21) to include smaller vehicles used on highways in interstate commerce to transport 9 to 15 passengers, including the driver, for compensation (9-15 passenger for-hire CMVs).⁸ The Act stipulated that the FMCSRs would automatically apply to the operation of such vehicles one year after enactment except to the extent exempted by the Secretary of Transportation.⁹

In an interim final rule in September 1999, the Federal Highway Administration (FHWA) conformed the commercial motor vehicle definition in the FMCSRs with the 1998 statutory amendment but exempted 9-15 passenger for-hire CMV operations from the FMCSRs for six months to allow time for consideration of a companion rulemaking to make the six-month exemption permanent while modifying it so that

⁴ *In re Safety Regs.*, No. 37, Gen. Order No. 8, App. Reg. No. 100-09 (Sept. 20, 1963).

⁵ *Id.*, Reg. No. 101-02.

⁶ See 49 C.F.R. § 390.5 (1996), at <http://www.gpoaccess.gov/cfr/index.html>; see also 49 U.S.C.S. App. § 2503(1)(B) (1990) (same).

⁷ See e.g., *In re All-Star Presidential, LLC, & Presidential Coach Co., & Presidential Limo. Serv., Inc.*, No. MP-95-82, Order No. 4961 (Oct. 29, 1996); *In re Double Decker Bus Tours, W.D.C., Inc.*, No. AP-95-21, Order No. 4730 (Jan. 4, 1996); *In re Double Decker Bus Tours, W.D.C., Inc.*, No. AP-95-21, Order No. 4642 (Aug. 9, 1995); *In re D.C. Ducks, Inc.*, No. AP-94-21, Order No. 4361 (Aug. 9, 1994).

⁸ Pub. L. No. 105-178, § 4008(a)(2), 112 stat. 107, 404 (June 9, 1998).

⁹ *Id.* § 4008(b).

operators of such vehicles in the future would be subject to some minimal reporting, vehicle marking, and accident recordkeeping requirements.¹⁰

In December 1999, Section 212 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) directed the Secretary to amend the FMCRs so that at a minimum they apply to commercial vans commonly referred to as "camionetas" and those commercial vans operating in interstate commerce outside commercial zones "that have been determined to pose serious safety risks."¹¹

In January 2001, having succeeded to the motor carrier jurisdiction of the FHWA, the Federal Motor Carrier Safety Administration (FMCSA) made final FHWA's 1999 interim definition and FHWA's proposed exemption.¹² WMATC honored the new definition later that year but ignored the exemption when it cited the insurance requirements under 49 C.F.R. § 387.25 in an order revoking the WMATC Insurance Endorsements of carriers whose WMATC authority was restricted to operations in vehicles seating 15 persons or less, including the driver.¹³

In January 2003, the Commission initiated a rulemaking to resolve conflicts between the WMATC vehicle marking requirements in WMATC Regulation No. 61, on the one hand, and the WMATC vehicle marking requirements in Regulation No. 62 and the FMCSR vehicle marking requirements imported through Regulation No. 64, on the other.¹⁴ The order initiating the rulemaking noted that the FMCSR vehicle marking requirements applied to vehicles "designed or used to transport nine or more persons, including the driver."¹⁵ The order did not mention any exemption.¹⁶ The Commission resolved the conflict with Regulation No. 64 by stipulating that the FMCSRs adopted through Regulation No. 64 do not include vehicle marking requirements.¹⁷

In August 2003, in response to the 1999 MCSIA mandate, the FMCSA lifted the exemption with respect to 9-15 passenger for-hire

¹⁰ 64 Fed. Reg. 48510 (Sept. 3, 1999); see also 64 Fed. Reg. 48518 (Sept. 3, 1999) (proposed rulemaking).

¹¹ Pub. L. No. 106-159, § 212, 113 stat. 1748, 1766 (Dec. 9, 1999).

¹² 66 Fed. Reg. 2756 (Jan. 11, 2001).

¹³ *In re Epps Transp. Co., Inc.*, No. MP-01-44, Order No. 6375 (Oct. 3, 2001).

¹⁴ *In re Rulemaking to Amend Reg. No. 61 & Reg. No. 62*, No. MP-03-08, Order No. 7015 (Jan. 27, 2003).

¹⁵ *Id.* at 2.

¹⁶ A footnote mentioned that the FMCSR vehicle marking requirements differed depending on whether the carrier's operations were confined to a 75 mile radius, but that caveat was ignored in the body of the order and in the table of conflicts contained in an appendix to the order.

¹⁷ *In re Rulemaking to Amend Reg. No. 61 & Reg. No. 62*, No. MP-03-08, Order No. 7132 (Apr. 11, 2003).

CMVs "operated beyond a 75 air mile radius (86.3 statute miles or 138.9 kilometers) from the driver's normal work-reporting location."¹⁸ Operation of such vehicles wholly within a 75-mile radius was still exempt, subject only to the reduced reporting, marking, and recordkeeping requirements proposed by the FHWA in 1999 and made final by the FMCSA in 2001.¹⁹ The Commission, however, did not recognize this distinction. On the contrary, the Commission completely ignored the exemption when it cited noncompliance with 49 C.F.R. 387.35 as grounds for rejecting the WMATC Insurance Endorsement of a carrier with restricted WMATC operating authority in 2004²⁰ and as grounds for revoking the WMATC Insurance Endorsements of two other such carriers, one in 2004²¹ and one in 2007.²²

Congress eliminated the 75-mile exemption in 2005, declaring in Section 4136 of SAFETEA-LU²³ that "[t]he Federal motor carrier safety regulations that apply to interstate operations of commercial motor vehicles designed to transport between 9 and 15 passengers (including the driver) shall apply to all interstate operations of such carriers regardless of the distance traveled."²⁴ The FMCSA eventually removed the 75-mile exemption from the FMCSRs in 2010.²⁵

Thus, today, Regulation No. 64 applies to WMATC operations in vehicles seating 9 persons or more, including the driver, but not WMATC operations in vehicles seating fewer than 9 persons, including the driver.²⁶

¹⁸ 68 Fed. Reg. 47860 (Aug. 12, 2003).

¹⁹ *Id.*

²⁰ *In re L Thompson Enterprises, Inc.*, No. MP-04-144, Order No. 8285 (Sept. 20, 2004).

²¹ *In re Washington Shuttle, Inc., t/a Supershuttle*, No. MP-04-151, Order No. 8235 (Aug. 24, 2004).

²² *In re Fowler Trio, L.L.C., t/a AAA Transport and All American Adventures & Tours*, No. MP-07-153, Order No. 10,658 (July 25, 2007).

²³ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144, 1745 (August 10, 2005) (codified as a note to 49 U.S.C. § 31136).

²⁴ 119 Stat. at 1745.

²⁵ 75 Fed. Reg. 4996 (Feb. 1, 2010) (effective May 3, 2010).

²⁶ As with the 9-15 passenger for-hire CMV exemption, the Commission has consistently ignored the exemption for operations in the Washington, DC, commercial zone, currently codified at 49 C.F.R. § 372.219. See e.g., *In re Exec. Tech. Solutions, LLC, v. W & T Travel Servs. LLC, t/a WTTS*, No. FC-09-001, Order No. 12,282 (Jan. 14, 2010) (citing 49 CFR 396.17); *In re A Yankee Line, Inc.*, No. AP-09-086, Order No. 12,116 (Aug. 17, 2009) (citing 49 CFR 396); *In re Ride The Ducks Int'l, LLC*, No. AP-07-231, Order No. 11,246 (Mar. 31, 2008) (citing 49 CFR 391.31); *In re City Sightseeing USA Inc.*, No. AP-04-39, Order No. 8042 (June 1, 2004) (citing 49 CFR 391.31); *In re Thomas B. Howell, t/a Presidential Ducks*, No. AP-00-07, Order No. 5955 (Aug. 10, 2000) (citing 49 CFR 391.31, 396). Recognition of the commercial zone exemption would have the effect of tolling all FMCSRs as to virtually all operations

Regulation No. 64 also does not address safety issues unique to vehicles designed to accommodate disabled passengers, including those in wheelchairs. Passenger carrier regulations under the Americans with Disabilities Act,²⁷ (ADA), include vehicle safety standards,²⁸ but the Commission does not regard violations of those regulations as violations of Article XI, Section 5(a), of the Compact.²⁹

Finally, the terseness of Regulation No. 64 has required the Commission to periodically clarify which FMCSRs apply to WMATC carriers and to what extent.³⁰

The Commission therefore proposes amending Regulation No. 64 to: (1) clarify which FMCSRs have been adopted for application to WMATC carriers and the extent to which they apply; (2) prescribe safety regulations for WMATC vehicles with a maximum seating capacity of fewer than 9 persons and the operators of such vehicles; and (3) adopt federal ADA van and bus regulations for application to WMATC handicapped-accessible vehicles. To enhance enforcement, the proposed amendments also will require that all WMATC vehicles display for-hire license plates and will authorize the issuance of out-of-service notices for violations of the Commission's safety regulations.

The amendments to Regulation No. 64 will require amendment of Regulation No. 51-11, which defines the term "State" to mean "the Commonwealth of Virginia, the State of Maryland, or the District of Columbia." It is proposed that the term "State" shall be redefined to mean "a State of the United States and the District of Columbia."

The effect of these amendments will be to impart no change regarding vehicles seating 9 persons or more, restore safety regulations for vehicles seating 8 persons or less, establish safety regulations for handicapped-accessible vehicles, and enhance enforcement.

under WMATC authority, which would render the Commission's adoption of the FMCRS pointless.

²⁷ See 42 U.S.C. § 12101 et seq (2009).

²⁸ 49 C.F.R. §§ 37, 38 (2009).

²⁹ See *In re Rules of Prac. & Proc. & Regs., Nos. 51, 55 & 63*, No. MP-96-21, Order No. 4786 (Mar. 12, 1996) (finding of noncompliance with ADA regulations would be relevant to determination of whether carrier engaged in undue discrimination under Compact).

³⁰ See e.g., *In re Fowler Trio, L.L.C., t/a AAA Transport and All American Adventures & Tours*, No. MP-07-153, Order No. 10,658 (July 25, 2007) (holding that safety regulations adopted by Reg. No. 64 include insurance company qualification standards); *In re Rulemaking to Amend Reg. No. 61 & Reg. No. 62*, No. MP-03-08, Order No. 7015 (Jan. 27, 2003) (resolving conflicts between vehicle marking requirements in Reg. No. 61 and those adopted through Reg. No. 64).

The proposed amendments, if adopted without change, would cause Regulation Nos. 51 and 64 to appear as follows:

51. Definitions.

51-11. State means a State of the United States and the District of Columbia.

64. Safety Regulations.

64-01. Safety Regulations for Vehicles Seating 9 Persons or More, Including the Driver. The Commission adopts and incorporates herein by reference the Federal Motor Carrier Safety Regulations (FMCSRs) in Parts 40 (Drug and Alcohol Testing Procedures), 380 (Special Training), 382 (Controlled Substances & Alcohol), 383 (Commercial Driver's License (CDL)), 385 (Safety Fitness Procedures), 390 (General), 391 (CMV Drivers), 392 (CMV Operation), 393 (CMV Parts & Accessories), 395 (CMV Hours of Service), and 396 (CMV Inspection, Repair & Maintenance) of Title 49 of the Code of Federal Regulations, as amended from time to time. The FMCSRs adopted and incorporated herein shall apply to vehicles operated under WMATC authority and seating 9 persons or more, including the driver, and to the drivers and carriers operating such vehicles, whether such vehicles are operated in interstate commerce or not; provided, that Parts 40 (Drug and Alcohol Testing Procedures), 382 (Controlled Substances & Alcohol) and 383 (Commercial Driver's License (CDL)) shall apply only to vehicles seating 16 persons or more, including the driver, and to the drivers and carriers operating such vehicles. References to "Department of Transportation", "Federal Motor Carrier Safety Administration", "Agency", "Secretary", and "Administrator" shall be understood to refer to WMATC.

64-02. Safety Regulations for Vehicles Seating 8 Persons or Less, Including the Driver. The following regulations shall apply to vehicles operated under WMATC authority and seating 8 persons or less, including the driver, and to the drivers and carriers operating such vehicles.

(a) Driver Vehicle Inspection. Before operating a vehicle, a driver shall determine that the vehicle is in good working order.

(b) Unsafe Vehicle. No person shall operate a vehicle, and no carrier shall permit a person to operate a vehicle, that is not in good working order; has not passed a for-hire motor vehicle safety inspection conducted by the District of Columbia or one of the fifty states within the preceding twelve months; or otherwise appears unsafe to operate.

(c) Qualified Driver. No person shall operate a vehicle, and no carrier shall permit a person to operate a vehicle, unless that person:

- (i) is at least 21 years old;
- (ii) has a current, valid driver's license issued by the driver's state of residence;
- (iii) can read and speak the English language sufficiently to converse with the public, understand highway traffic signs and signals, respond to official inquiries, and make entries in reports and records;
- (iv) can, by reason of experience, training, or both, safely operate the type of motor vehicle he/she drives; and
- (v) is physically qualified to drive the type of motor vehicle he/she drives.

(d) Unfit Driver. No person shall operate a vehicle, and no carrier shall permit a person to operate a vehicle, if that person is unfit to operate a vehicle by reason of:

- (i) any alcohol in his/her system;
- (ii) any controlled substance, narcotic, or habit-forming drug in his/her system;
- (iii) any prescription medication in his/her system of a type or in an amount that might render the person incapable of operating a motor vehicle safely; or
- (iv) illness or fatigue.

(e) Disqualified Driver. No person shall operate a vehicle, and no carrier shall permit a person to operate a vehicle, while disqualified by reason of: (1) being found guilty of; (2) forfeiting bond or collateral upon a charge of; or (3) otherwise being penalized civilly or criminally for any of the following offenses:

- (i) driving a motor vehicle under the influence of alcohol;
- (ii) driving a motor vehicle under the influence of a controlled substance, narcotic, or habit-forming drug;
- (iii) leaving the scene of an accident while operating a motor vehicle;

- (iv) committing a felony or misdemeanor involving the use of a for-hire motor vehicle;
- (v) violating an out of service notice;
- (vi) violating any of the Commission's Safety Regulations;
- (vii) committing any other offense that tends to render the person unfit to operate a vehicle.

(f) Disqualification Period. Drivers disqualified under Regulation No. 64-02(e) shall be disqualified for a period of:

- (i) 90 days to 1 year after the date of the first conviction or forfeiture of bond or collateral;
- (ii) 1 year to 5 years after the date of a second separate conviction or forfeiture of bond or collateral within a 10-year period;
- (iii) 3 years to 5 years after the date of a third or subsequent separate conviction or forfeiture of bond or collateral within a 10-year period.

(g) Driving Record. A carrier shall not employ a person as a driver without first obtaining a certified copy of the person's complete driving record maintained by each state from which the person held a motor vehicle operator's license or permit during the preceding ten years. Every twelve months thereafter a carrier shall obtain a certified copy of the person's driving record maintained by each state from which the person held a motor vehicle operator's license or permit during those twelve months.

(h) Criminal History Record. A carrier shall not employ a person as a driver without first obtaining a certified copy of the person's complete criminal history record maintained by each state in which the person resided during the preceding ten years. Every twelve months thereafter a carrier shall obtain a certified copy of the person's criminal history record maintained by each state in which the person resided during those twelve months.

64-03. Adoption of ADA Safety Specifications. Vehicles operated under WMATC authority and used to transport passengers seated in wheelchairs shall be equipped with securement devices and with lifts or ramps and shall comply with Americans with Disabilities Act (ADA) Specifications for Transportation Vehicles in Subparts B (Buses & Vans) and G (Over-the-Road Buses) of Part 38 of Title 49 of

the Code of Federal Regulations, as amended from time to time, as follows:

(a) Over-the-Road Buses. Over-the-road buses, as that term is defined in 49 C.F.R. § 37.3, shall comply with the following provisions of 49 C.F.R. Subpart G:

- (i) Vehicle lifts shall comply with 49 C.F.R. § 38.159(b);
- (ii) Vehicle ramps shall comply with 49 C.F.R. § 38.159(c); and
- (iii) Securement devices shall comply with 49 C.F.R. § 38.159(d).

(b) All Other Vehicles. Vehicles other than over-the-road buses, as that term is defined in 49 C.F.R. § 37.3, shall comply with the following provisions of 49 C.F.R. Subpart B:

- (i) Vehicle lifts shall comply with 49 C.F.R. § 38.23(b);
- (ii) Vehicle ramps shall comply with 49 C.F.R. § 38.23(c); and
- (iii) Securement devices shall comply with 49 C.F.R. § 38.23(d).

64-04. For-Hire License Plates. No person shall operate a motor vehicle under WMATC authority, and no carrier shall permit a person to operate a motor vehicle under WMATC authority, without for-hire license plates.

64-05. Vehicle Out of Service: The Executive Director, or designee, may require a carrier to present a motor vehicle for inspection by Commission staff. The Executive Director, or designee, shall issue written notice directing a carrier to withdraw from service any vehicle not presented for inspection upon request and any vehicle presented for inspection and found not to be in compliance with one or more provisions of Regulation No 64. No vehicle directed to be withdrawn from service may be returned to service absent a Commission order or written notice from the Executive Director, or designee, stating that the vehicle may be returned to service.

64-06. Driver Out of Service: The Executive Director, or designee, may require a carrier to produce driver records for inspection by Commission staff. The Executive Director, or designee, shall issue written notice directing a carrier to withdraw from service any driver whose records have not been produced upon request and any driver whose records have been produced and who have been found not to be in compliance with one or more provisions of Regulation No 64. No driver directed to be withdrawn from service may be returned to service absent a Commission order or written notice

from the Executive Director, or designee, stating that the driver may be returned to service.

THEREFORE, IT IS ORDERED:

1. That a rulemaking is hereby initiated for the purpose of proposing amendments to the Commission's Rules of Practice and Procedure and Regulations, Regulation Nos. 51 and 64.

2. That Commission staff shall publish notice of this proceeding on the Commission's website and in a newspaper of general circulation in the Metropolitan District, no later than February 17, 2012.

3. That written comments must be submitted no later than March 30, 2012, by faxing them to (301)588-5262, emailing them to rulemaking@wmatc.gov, or mailing them to 8701 Georgia Avenue, Suite 808, Silver Spring, MD 20910.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER AND HOLCOMB:



William S. Morrow, Jr.
Executive Director