

April 10, 2001

Docket No. FMCSA-2000-7017  
U.S. DOT Dockets, Room PL-401  
U.S. Department of Transportation  
400 Seventh Street, SW  
Washington, DC 20590

**Safety Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles Used In Interstate Commerce - Notice of Proposed Rulemaking  
66 FR 2767 *et seq.*, January 11, 2001**

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Motor Carrier Administration (FMCSA) proposed rule to apply some of the Federal Motor Carrier Safety Regulations (FMCSR) to certain directly compensated for-hire passenger-carrying motor carriers transporting between 9 and 15 passengers including the driver. This rulemaking fulfills a legislative mandate to the agency to regulate the application of motor carrier safety standards to carriers and their drivers pursuant to Section 4008 of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), Pub.L. 105-178, 112 Stat. 107 (June 9, 1998) and Section 212 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA), Pub.L. 106-159, 113 Stat. 1748 (December 9, 1999). Congress directed the Secretary in TEA-21 to subject for-hire passenger-carrying commercial motor vehicles in interstate commerce transporting between 9 and 15 passengers, including the driver, to the FMCSR except to the extent that the Secretary exempts such commercial motor vehicles through a rulemaking. Congress subsequently also directed the Secretary to make the FMCSR applicable to “camionetas” which transport passengers from Mexico to points within the southern U.S. commercial border zones, as well as to any passenger-carrying for-hire motor carriers in other parts of the country which the Secretary determines to be serious safety risks.

The FMCSA has proposed that the FMCSR apply to both camionetas and other passenger-carrying commercial vehicles transporting less than 15 but more than 8 passengers except for (1) the requirement that they procure a commercial driver license, and (2) that they be subject to existing controlled substances and alcohol testing regulations. However, the agency has proposed two qualifications governing the potential application of the FMCSR to such passenger-carrying operations:

first, the operation must be outside of a perimeter exceeding 75 air miles<sup>1</sup> “as the crow flies”; second, the operator of the affected conveyance must be *directly* compensated. The FMCSA provides no independent operational definition of *direct* compensation, but rather contrasts it with *indirect* compensation which it characterizes as “a total package charge or some other assessment or concession is given for the transportation performed.” 66 FR 2767, 2768 (January 11, 2001). Presumably, this is understood by the FMCSA as involving the “assess[ment of] a fee, monetary or otherwise, directly for the transportation of passengers.” *Id.* at 2769. As construed, this definition would exclude many hundreds of

small passenger-carrying CMVs for compensation by operators, such as hotel/motel shuttle transporters, rental car shuttle services, whitewater river rafters, etc., [which] would not be subject to the safety-related operational regulations, irrespective of the distance traveled. Since these businesses do not hold themselves out to the public as providers of transportation services, the FMCSA does not intend to impose the safety-related operational regulations on them at this time.

*Id.* These examples, however, appear to minimize the dangers of the agency’s proposed exemption based on indirect compensation. Scores of schools transporting children in vans under contract arguably receive only indirect compensation and these operations would be entirely excluded from required compliance with the federal safety regulations. Similarly, employer-provided van services would also be exempt from the vehicle and the driver safety standards of the FMCSA. Advocates is thoroughly unpersuaded that Congress intended that vulnerable, small children be subjected to a lower standard of commercial passenger transportation safety than adults who directly pay a fee out of hand to a for-hire passenger carrier. Also, there is no cogent reason based on safety considerations alone for arguing a case that thousands upon thousands of workers are less entitled to federal safety protection simply because patrons of a van or shuttle service do not have to directly pay a daily or trip fee for passenger transportation.

Advocates strongly opposes all of the proposed exemptions of this rulemaking action. The agency’s proposal appears to be geared primarily to reducing oversight burdens by public authorities, including the increased extent of its own jurisdiction, rather than the need to advance public safety by subjecting for-hire passenger-carrying motor carriers to the panoply of important safeguards contained in the FMCSR. Although the agency conducts an extensive exercise in this rulemaking to rationalize

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<sup>1</sup>An air mile is the same length as a nautical mile, *viz.*, 1.15 statute miles. Therefore, 75 air miles equals 86.3 statute miles.

the distance traveled by these smaller passenger-carrying motor vehicles as justification for its operational distance requirement of 86.3 statute miles, this analysis clearly fails to protect a very large segment of the U.S. people from being subjected to unsafe passenger-carrying operations. Similarly, exempting many thousands of operations from partial safety regulation on the basis that they do not directly request a passenger fee is irrelevant to the safety quality of these operations. In like manner, the notion that either directly or indirectly compensated passenger transportation services carrying up to 15 persons for what can be hundreds of miles of daily travel without exceeding a 86.3 statute mile boundary do not require comprehensive safety regulation, will simply not bear close scrutiny.

Last, the notion that many thousands of operations which expose passengers to the daily risks of travel without the need for their drivers to qualify for commercial driver licenses or to periodically verify that they are not abusing drugs or alcohol, has no rational basis in the rulemaking record. These drivers are no less susceptible to drug and alcohol abuse, thereby creating serious risks for both themselves and their passengers, than larger passenger carrying conveyances which incidentally transport more than 15 passengers. Relying on a legal technicality about a legislative oversight to conform amended federal motor carrier law for drivers as well as for vehicles as justification to exclude the operators of smaller passenger transportation services from major parts of the FMCSR governing driver licensure and testing for use of illicit substances, reflects poorly on the quality and sincerity of the FMCSA's safety mission to enhance motor carrier safety to the maximum extent feasible, as directed in the agency's enabling statute. Moreover, in light of the recent release by the National Highway Traffic Safety Administration (NHTSA) of the Research Note about small van rollover crash propensity when transporting up to 15 passengers,<sup>2</sup> the demand for comprehensive safety regulation to ensure the highest level of safety for the operators of these transportation services is even more compelling and undoubted.<sup>3</sup> This is clearly an instance when the FMCSA should exercise its ample statutory discretion nevertheless to require the full complement of driver qualification and testing apparatus provided for in

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<sup>2</sup>W.R. Garrott, *et al.*, *The Rollover Propensity of Fifteen-Passenger Vans*, National Highway Traffic Safety Administration, National Center for Statistics and Analysis, April 2001. Also see, *e.g.*, the Washington Post of April 10, 2001, p. A-2.

<sup>3</sup>In its review of the study's main findings, the Associated Press emphasized early on that one of NHTSA's main recommendations in its Research Note was that these small passenger-carrying vans should be operated only by experienced drivers. Nedra Pickler, *Feds Warn of Van Rollover Risk*, Newsday.com, April 9, 2001. There is little doubt that only adequate training accompanied by proof of competence through the acquisition of a CDL should be the minimum required of these drivers when transporting passengers for compensation.

the FMCSA to ensure the highest feasible level of safety for passenger-carrying vans of 15 passengers or fewer.

Accordingly, Advocates believes that the FMCSA is sidestepping its safety responsibilities to ensure that comprehensive safety regulation govern these heretofore unregulated movements of passengers in interstate commerce for compensation. The agency has not justified the exemption of major elements of the FMCSR from application to these motor carriers. In addition, the FMCSA is providing opportunities for many passenger-carrying operations affected by this proposed rule to evade required compliance even with the abbreviated reach of the FMCSR either by curtailing their operations within a 86.3 statute miles perimeter or altering their systems of compensation to qualify for legal characterization as a passenger-carrying motor carrier receiving only *indirect* compensation. This would permit hundreds of passenger-carrying operations essentially to engage in contrived or scofflaw responses to these definitions in order to evade all control by the FMCSR. Advocates does not believe that Congress intended the agency to provide opportunities for motor carriers of less than 15 passengers to reorder the nature of their operations in order to avoid all federal safety regulation.

In addition, the agency cannot confine application of this proposed rule to only interstate passenger transportation services:

Interstate commerce is determined by the essential character of the movement, manifested by the shipper's fixed and persistent intent at the time of shipment, and is ascertained from all of the facts and circumstances surrounding the transportation. When the intent of the transportation being performed is interstate in nature, *even when the route is within the boundaries of a single State*, the driver and CMV are subject to the FMCSRs.

58 FR 60734, 60744 (November 17, 1993) (emphasis supplied); 57 FR 19812 *et seq.* (May 8, 1992). There will be countless instances where the intent of transporting passengers for compensation is to effect the interstate movement of persons even if a motor carrier operates only within a single state and stops its transportation services at a state border. Indeed, confining the application of this proposed rule to only explicit interstate passenger transportation would provide yet another opportunity for innovative evasion of compliance with the law: many for-hire passenger-carrying businesses can alter their routes to deliver passengers at a state's boundaries without crossing into an adjacent state in order to explicitly avoid the costs and burdens of compliance with the FMCSR, or they may form separate, incorporated businesses from a prior single interstate passenger transportation operation for the express purpose of being deemed an intrastate motor carrier in order to evade FMCSR compliance. Congress did not intend the FMCSA to issue a rule which provides multiple opportunities

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for passenger-carrying motor carriers to evade compliance with federal motor carrier safety standards by distorting their operations in obvious ways.

Advocates supports application of all of the FMCSR to all interstate motor carriers of 8 to 15 passengers regardless of the distance traveled and regardless of whether these businesses receive either direct or indirect compensation for their passenger-carrying services. In addition, there will be numerous instances where the purpose and effect of passenger transportation services is the interstate movement of people<sup>4</sup> and, accordingly, these motor carrier operations should be made subject to the governance of the FMCSR. We also strongly support a federal requirement making the adoption and enforcement of compatible safety regulations applicable to small passenger-carrying commercial motor vehicles which have operations interstate in character. We also support the adoption and enforcement by each state of intrastate regulations which apply to the operations of commercial motor vehicles transporting 8 to 15 passengers which are arguably wholly intrastate in character. *Id.* at 2773.

Respectfully submitted,

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<sup>4</sup>Airport shuttle services are an obvious example of the immediate continuity of interstate commerce of a for-hire motor carrier transporting passengers for flights across state lines.