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**Before The
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION
Washington, D.C. 20590**

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FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of:)
)
Safety Requirements for Operators of Small) **Docket No. FMCSA-2000-7017-18**
Passenger-Carrying Commercial Motor)
Vehicles Used in Interstate Commerce)

**COMMENTS OF
NATIONAL LIMOUSINE ASSOCIATION, INC.**

The National Limousine Association, Inc. (NLA), by its attorneys, hereby respectfully submits its Comments in response to the Federal Motor Carrier Safety Administration's (FMCSA) Notice of Proposed Rulemaking (NPRM) in its Docket 2000-7017.¹ Therein, FMCSA proposes to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to require that motor carriers operating commercial motor vehicles (CMVs) designed or used to transport between 9 and 15 passengers (including the driver), in interstate commerce, comply with the motor carrier safety regulations² when (i) they are directly compensated for such services, and (ii) the transportation of any passenger covers a distance greater than 75 air miles (86.3 statute miles or 138.9 kilometers). FMCSA proposes that only small passenger-carrying CMV operators who are directly compensated for their services be required to comply with the safety-related operational rules of the FMCSRs.

¹ 66 Fed. Reg. 2767 (Jan. 11, 2001) ("NPRM"). The due date for comments is April 11, 2001.

² The FMCSA is not proposing to make either the controlled substances and alcohol testing requirements or commercial driver's license (CDL) requirements of 49 C.F.R. Parts 382 and 383, respectively, applicable to operators of small passenger-carrying CMVs, because neither Section 4008 of the Transportation Equity Act for the 21st Century (TEA-21) nor Section 212 of the Motor Carrier Safety Improvements Act of 1999 (MCSIA) amends the statutory definition of a CMV for those programs (49 U.S.C. 31301). Hence, the passenger-carrying threshold for controlled substances and alcohol testing, as well as CDL, requirements will remain at 16 (including the driver).

I. STATEMENT OF INTEREST

A. National Limousine Association, Inc.

NLA is the national association of the limousine industry. NLA's membership numbers approximately 1,700 companies providing premium transportation service to individuals and limited groups of individuals on an unscheduled, contract or charter basis. NLA members are located in virtually every state of the United States and the District of Columbia, and in more than twenty foreign countries. NLA members also include more than thirty state, local and regional limousine associations, as well as suppliers to the limousine industry. As the only national representative of the limousine industry, NLA has a substantial interest in both the safety of limousine service and in the regulation of that service by the FMCSA.

B. The Limousine Industry

The limousine industry is a distinct subset of what FMCSA refers to as the "small passenger-carrying commercial motor vehicle" transportation sector. Limousine service entails a chauffeured transportation service rendered on a dedicated, pre-arranged, non-scheduled basis. The vehicle employed in rendering that service may be a premium or luxury sedan (typically, for example, a Rolls Royce, Mercedes Benz, Cadillac or Lincoln), a "stretched" vehicle (*i.e.*, a premium vehicle altered to increase its capacity and to provide additional client service features), or a specialty vehicle, *e.g.*, a restored antique vehicle. Additionally, some limousine operators render service in vans and/or buses. Limousine service is rendered under contract, typically with corporate customers, and also on a charter basis for special events such as weddings and "night on the town" occasions.

There are approximately 10,200 limousine operators in the United States.³ Most are small businesses. Fifty-four percent (54%) of the industry is comprised of operations consisting of no more than 4 vehicles.⁴ Only nine percent (9%) of the industry operates more than 20 vehicles.⁵ The median average fleet size nationwide is 5.7 vehicles,⁶ and the total nationwide fleet, including vans and buses, is comprised of approximately 145,600 vehicles.⁷ Forty-four percent (44%) of the fleets consist of sedans; nineteen percent (19%) consist of stretch limousines not exceeding 85 inches in length; sixteen percent (16%) consist of stretch limousines having a length of 85-120 inches; nine percent (9%) consist of vans, and twelve percent (12%) are buses.⁸ Client services, as measured by revenue sources, are corporate clients (24%), airport transfers (22%), weddings (20%), night on the town (17%), hotel/resort (6%), funerals (4%), and other (7%).⁹ Average annual miles per vehicle vary from a high of 44,649 for sedans to a low of 23,612 for stretch limousines 85-120 inches in length; and vans average 31,501 miles per year.¹⁰

The proposed rule potentially would impact the limousine industry with regard to the operation of stretch limousines (particularly those with a length greater than 85 inches, since those not exceeding 85 inches customarily are rated for 7 or 8 passengers, including the driver)—probably the safest vehicle operating on the roads today, due to the nature of the vehicle and its

³ *Limousine & Chauffeured Transportation 1999-2000 Fact Book ("1999-2000 Fact Book")* at 46.

⁴ *Id.* at 58.

⁵ *Id.*

⁶ *Id.* at 56.

⁷ *Limousine & Chauffeured Transportation 1998-1999 Fact Book ("1998-1999 Fact Book")* at 34.

⁸ *Id.*

⁹ *Id.* at 32.

¹⁰ *Id.* at 36.

use, and vans. The average daily use of those vehicles ranges from 65 to 96 miles, depending on category of vehicle (with a weighted average of 84.5 miles), although an individual run could exceed the 75 mile threshold of the proposed regulation.

II. BACKGROUND

This proceeding arises out of the Motor Carrier Safety Improvements Act of 1999 (MCSIA).¹¹ As recounted in the preamble to the NPRM, Section 212 of the MCSIA “requires that the FMCSA make its safety regulations applicable to (1) commercial vans referred to as ‘camionetas’ and (2) those commercial vans operating in interstate commerce outside of commercial zones *that have been determined to pose serious safety risks.*”¹²

Although Section 212 did not include a definition of the term “camioneta”, Congress did issue an explanatory statement describing camioneta operations as those that involve transporting passengers from Mexico to the United States and vice versa.¹³ The FMCSA acknowledges, however, that it “does not have information concerning the number of motor carriers with CMV operators that fit the congressional description of camioneta.”¹⁴ Indeed, in comments submitted in response to the September 3, 1999 interim final rule and notice of proposed rulemaking in FMCSA Docket 99-5710 concerning the definition of a CMV, the National Council of La Raza (NCLR) and the Farmworker Justice Fund, Inc. (FJF) stated:

Camionetas typically are older, dilapidated vans. Border guards report that balding tires, worn brakes, lack of seatbelts and fire extinguishers are the norm for these vehicles. Instead of 15 passengers that these vehicles are designed to carry, camionetas are often overcrowded with 30

¹¹ Pub. L. 106-159, 113 Stat 1748.

¹² NPRM at 2767. (Emphasis added.) While the MCSIA mandated that rulemaking to implement Section 212 be completed by December 9, 2000, that date has passed without adoption of such rules.

¹³ See, 145 Cong. Rec. H12868 at H12873, November 18, 1999.

¹⁴ NPRM at 2769.

passengers or more. To save money camioneta owners often assign only one driver for the long journey.¹⁵

Similarly in its comments in FMCSA Docket 99-5710, Casa de Proyecto Libertad, an immigrant advocacy group in the Rio Grand Valley, noted with respect to the transportation of migrant workers, immigrants and persons of Hispanic descent:

[M]any of these migrants are dying after entering the United States as victims of unregulated commercial passenger vans. These vans, or camionetas, operate on the southwest border traveling great distances between points in Mexico and the U.S. They are often operated over 12 hours a day by one driver and are packed full with migrants, vastly exceeding the 9 to 15 passenger limit . . . A majority of the deaths that result from this unregulated industry involve Hispanics; out of an estimated 250 casualties per year, 60 percent are Hispanic.¹⁶

In issuing its NPRM in the instant docket, FMCSA has taken into account not only the aforementioned comments of the NCLR, FJF and Casa de Proyecto Libertad, but also accident information presented in FMCSA Docket 99-571 by the Amalgamated Bus Association, Greyhound Lines Inc. and the Amalgamated Transit Union. FMCSA notes, however, with respect to those submissions that “the data has limitations.”¹⁷ Additionally, the NPRM, in large measure, is predicated on accident data from the National Highway Traffic and Safety Administration’s (NHTSA) Fatality Analysis Reporting System (FARS) and General Estimate System (GES) which are utilized to determine the prevalence of crashes involving larger vans. In that regard, FMCSA acknowledges:

Generally these databases do not enable the agency to identify accidents involving passenger-carrying vehicles designated or used to transport between 9 and 15 passengers for compensation in interstate commerce. However, the databases do provide information that could be used to generate estimates of the incidence of accidents involving large vans in general, and more specifically, fatal accidents involving larger vans

¹⁵ *Definition of Commercial Motor Vehicle*, Doc. Nos. FMCSA-97-258, *et seq.*, 66 Fed. Reg. 2756, 2758 (Jan. 11, 2001).

¹⁶ *Id.*

¹⁷ NPRM at 2769.

transporting 9 or more passengers (including the driver) at the time of the accident.¹⁸

III. COMMENTS

A. **The NPRM Is Premature With Respect To Vans Other Than Camionetas and Thus Exceeds the MCSIA's Mandate.**

While Section 212 of the MCSIA requires the FMCSA to promulgate safety regulations bearing upon (1) camionetas and (2) “those commercial vans operating in interstate commerce outside of commercial zones that have been determined to pose serious safety risks,” the GES and FARS data cited fail to confirm the existence of a class of van operators posing serious safety risks warranting application of Parts 390-396 of the FMCRS under the second prong of the statutory directive. In actuality, the GES and FARS studies make no effort whatsoever to delineate between camioneta and non-camioneta operators. Moreover, as FMCSA candidly acknowledges with respect to the GES statistics:

This accident data includes all large vans (those designed to transport passengers, as well as those used for other purposes such as parcel delivery) and is not limited to vans being operated for compensation in interstate commerce.¹⁹

By the same token, FMCSA admits with respect to its FARS data:

The fatal accident number includes all larger vans and is not limited to vans being operated for compensation in interstate commerce. The reason for this is that accident information is not coded in a manner that would enable the FMCSA to determine which accidents involved the operation of larger vans in commerce, or more specifically, vans being operated for compensation in interstate commerce.²⁰

Moreover, the FARS and GES data to which the FMCSA has accorded such considerable weight not only fail to distinguish between camioneta and non-camioneta operators, but also fail

¹⁸ *Id.* at 2770. (Emphasis added.)

¹⁹ *Id.*

²⁰ *Id.*

to distinguish (1) between passenger van and property van movements, and (2) between interstate and intrastate trips. By the same token, the FARS and GES data do not distinguish between (i) movements performed pursuant to federal or state issued motor carrier authority with respect to which the van operator is directly compensated for the transportation function conducted, and (ii) movements by private van pool operators or by entities such as hotels/motels or white water rafting enterprises which are compensated for their van operations through the commercial services they otherwise render.

Notably, on the eve of the comment due date, the Department of Transportation issued a Consumer Advisory warning about the operation of 15-passenger vans. According to the underlying Research Note of the National Highway Safety Administration (NHTSA), these vans are heavily used in transporting college sports teams; and the press report of this Advisory states that these vans also are used by hotels, civic groups and senior-citizen shuttle services. None of these users would be covered by the proposed rule; however, the data relied upon by FMCSA undoubtedly includes data from these accidents.²¹

Given the aforementioned shortcomings and deficiencies in the FARS and GES data, the FMCSA is reduced to making bold and unsubstantiated assumptions about the FARS and GES statistics as its basis for proposing that non-camioneta operators also be made subject to the FMCSRs. For example, in assessing the FARS data showing that there were 1,464 fatal van accidents in 1998 resulting in 1,714 fatalities,²² FMCSA attempted to evaluate those accidents by time of day. It did so in an effort to separate fatal accidents involving commuter van pools transporting individuals to and from work from accidents likely to involve motor carriers. For

²¹ See Consumer Advisory: Warning to Users of 15-Passenger Vans, NHTSA ca 01 (April 9, 2001); Research Note, The Rollover Propensity of Fifteen-Passenger Vans, NHTSA, April 2001; *Washington Post*, NHTSA Warns of Rollover Risk in Passenger Vans, April 10, 2001, p. A2.

²² *NPRM* at 2770.

the sake of that analysis, the FMCSA assumed that van pools generally operate during the hours of 6 a.m. to 9 a.m. (the morning rush hour) and 4 p.m. to 7 p.m. (the evening rush hour), claiming that its treatment of those time frames was consistent with the Federal Highway Administration's "Summary of Travel Trends 1995 Nationwide Personal Transportation Survey," FHWA-PL-00-006, December 1999. FMCSA then noted that of the 1,464 fatal accidents involving larger vans that occurred in 1998, 537 took place between the hours of 9 a.m. and 4 p.m. and another 496 occurred between 7 p.m. and 6 a.m. In addition, 102 fatal accidents occurred on weekends. Hence, according to the FMCSA, a grand total of 1,135 fatal van accidents which occurred in 1998 likely did not involve van pools. Moreover, of the total 1,464 fatal van accidents that occurred in 1998, 58 involved large vans transporting nine (9) or more people at the time of the accident resulting in 101 fatalities. Thirty-six of those accidents occurred during non-rush hours. The extent to which this data includes accident experience involving the vans addressed in the Consumer Advisory is neither addressed nor apparent

FMCSA's interpretation of the aforementioned 1998 accident statistics is based on assumption, built upon assumption. In fact, van pools are by no means restricted to operating during the hours of 6 a.m. and 9 a.m. or 4 p.m. and 7 p.m. As FMCSA most certainly is aware, numerous federal and state employees reliant upon van pools are accorded the opportunity by their employer to adopt flexible work schedules that deviate from the typical 9 a.m. to 5 p.m. workday. Some private industries also afford employees flexible schedules. Hence, the van pools in which they participate often begin to operate prior to 6 a.m. or 4 p.m., or may indeed be on the road after 9 a.m. or 7 p.m. Consequently, to assume, as FMCSA has, that all van accidents in 1998 that occurred between 9 a.m. and 4 p.m. and between 7 p.m. and 6 a.m. involved commercial vans, rather than van pools, would at best be highly questionable. Indeed,

many of the vans described in the Consumer Advisory likely were operated during non-rush hour time periods. In addition, it must be noted that the FARS data fails to disclose how many of those 58 fatal accidents actually involved camioneta operators, as distinguished from other commercial van enterprises.

Given the foregoing considerations, while it is clear that Section 212 of the MCSIA necessitates that camionetas be subjected to safety regulation that will mandate compliance with Parts 390 to 396 of the FMCSRs, Section 212 certainly did not suggest that *all* other operators of small CMVs carrying between 9 and 15 passengers which operate interstate on a for-hire basis more than 75 miles in one direction necessarily pose serious safety risks that would warrant that they too be subjected to FMCSR operational compliance. Rather, the statute calls upon FMCSA first to determine exactly what categories of operators truly deserve to be so regulated. NLA, therefore, respectfully submits that FMCSA must defer regulating such other passenger-carrying motor vehicles (i.e., vehicles other than camionetas) until further definitive study is completed that demonstrates conclusively that such commercial operators pose the “serious safety risks” the statute was designed to address.

Significantly, on the basis of its deliberations in Docket 99-5710, the FMCSA has now adopted a final rule requiring, *inter alia*, that motor carriers operating CMVs designed or used to transport between 9 and 15 passengers (including the driver) maintain an accident register pursuant to 49 C.F.R. 390.15. That being the case, the FMCSA henceforth will have access to a valuable and insightful resource for determining which CMV operators transporting between 9 and 15 passengers (including driver) interstate pose serious safety risks. FMCSA certainly enjoys the power, should it choose to do so, to require such operators to report the data reflected in those registers. Clearly, analysis of that data would form a far more valid basis for drawing

conclusions than the exercise the FMCSA has undertaken in relying upon unsubstantiated assumptions to evaluate and interpret the undifferentiated FARS and GES data. Until the FMCSA has amassed sufficient evidence documenting exactly which components, if any, of the small passenger carrying CMV operator universe pose the “serious safety risks” with which Section 212 is concerned, the FMCSA should refrain from adopting final regulations that unduly and improperly encompass segments of the industry whose operators have not violated the public trust. In essence FMCSA’s action in the subject NPRM effectively “places the cart before the horse” by imposing onerous regulations before adequately determining the need therefore. As such, the NPRM is violative of, rather than consistent with, MCSIA Section 212, as well as the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* See, *St. James Hosp. v. Heckler*, 760 F.2d 1460 (7th Cir.,1985) (Medicare rule invalidated due to flawed statistical analysis); *see also*, *Natural Res. Defense Council v. Herrington*, 768 F.2d 1355 (D.C. Cir., 1985) (energy conservation rules invalidated due, *inter alia*, to flawed model analysis, further noting that “it would be patently unreasonable ... to begin further proceedings ... based on data half a decade old,” *id.* at 1408, both factors present in FMCSA’s instant NPRM).

B. The Proposed 75 mile Test Is Arbitrary and Unduly Restrictive.

The 75 mile test is arbitrary in two additional respects: in triggering application of the regulations to vehicles used once, or only very occasionally, to transport passengers more than 75 miles, and in reducing the 100 mile “risk zone” due to assumptions of commuting use of the CMVs. As to the former, as evidenced by the statistics set forth in section I.B., *supra*, stretch limousines and vans utilized by limousine operators are used an average of less than 100 miles per day (including an average of only 65 miles per day for stretch limousines in excess of 85 inches in length). This is understandable when one considers the primary customer services:

corporate personnel transportation, airport transfers, weddings, and night-on-the-town events. These are convenience uses, not point-to-point inter-city transportation services. On occasion, a client will hire a limousine for a trip in excess of 75 miles, e.g., New York to Atlantic City; or a night-on-the-town client (e.g., school prom event) may instruct the driver to tour the city, thereby exceeding the 75 mile threshold for full application of the FMCRS. Such occasional and exceptional use should not serve to trigger responsibility for full FMCSR compliance.

Second, in evaluating its FARS data regarding fatal van accidents between 1996 and 1998, FMCSA noted:

Overall, approximately 63 percent of the fatal accidents involving large vans occurred between 100 and 2,200 statute miles from the *driver's* residence with the longest distances linked typically to the trips that were most likely interstate in nature.²³

It is not possible to determine the distance drivers may have traveled to get to their work-reporting locations, or to determine whether the van was operated by an individual working from home. However, the FMCSA has factored into its analysis a distance of 25 statute miles between the driver's residence and a possible work-reporting location. The FHWA's "Summary of Travel Trends 1995 Nationwide Personal Transportation Survey," cited above, indicates that the average commute to work for individuals participating in the survey was 11.63 miles. To decrease the likelihood of underestimating the average commuting distance of drivers of small passenger-carrying CMVs, the FMCSA used an estimate of 25 miles, slightly more than twice the average in the nationwide survey. When the estimated 25 statute miles for commuting to work is deducted from the estimates of the distance between the driver's residence and the crash

²³ *Id.* at 2771.

location, the result is an estimate of 75 statute miles as the distance the driver may have traveled from the work-reporting location to the crash site. Based on this analysis, the FMCSA concludes a mileage threshold of 75 air miles (86.3 statute miles or 138.9 kilometers) should be used for determining the applicability of the safety regulations to for-hire operations of small passenger-carrying vehicles operating in interstate commerce.²⁴

One major problem with FMCSA's treatment of the aforementioned data is that it assumes--without valid foundation--that the CMV drivers who would be covered by the proposed rule commute to and from their work reporting station in the van they have been assigned. In the limousine industry, some drivers are dispatched directly from home. Others, and particularly those who work part time for a limousine company, commute to and from the equipment location in their own vehicles. Consequently, in setting the threshold for the proposed regulation, the FMCSA erroneously has taken into account an 11.63 miles average commute of drivers, based only on assumptions and data from the "Summary of Travel Trends 1995 Nationwide Personal Transportation Survey;" and FMCSA then has compounded its effect by arbitrarily more than doubling that figure to 25 miles and deducting that 25 miles from the estimated 100 mile qualifying length of trip. The effect of this compounding of erroneous assumptions is to expand the universe of operations that would be subject to FMCSR compliance if the NPRM is adopted. Hence, instead of subjecting only operators that exceed 100 miles to FMCSR regulation, the FMCSA, without adequate foundation for doing so, has ultimately reduced the critical threshold to one of 75 miles.

* * *

²⁴ *Id.*

In conclusion, the National Limousine Association respectfully submits that the FMCSA has exceeded its statutory duty and mandate, by proposing to impose the FMCSRs on limousine operators, and other classes of small-passenger carrying commercial motor vehicle operators, none of whom qualify as “camionetas,” without a determination that such operators “pose serious safety risks.” The proposed extension of the regulation to non-camioneta operators is based on a flawed analysis of data which relies on compound assumptions. Such analysis is contrary to both the statutory mandate of the MCSIA as well as the reasoned decision-making requirements of the Administrative Procedure Act. The proposed application to the limousine industry further is arbitrary in that a single (or a very occasional) trip in excess of 75 miles would subject a limousine operator to the full scope of the FMCSRs, notwithstanding that average daily use is less than 100 miles (and for the longer stretch limousines, less than the 75 mile threshold for rule application).

WHEREFORE, THE PREMISES CONSIDERED, the National Limousine Association, Inc., respectfully urges the Federal Motor Carrier Safety Administration to limit application of the proposed new regulation to “camionetas,” as proposed at Section 398.2 of the FMCSRs, and not to section 390.3(f)(6)(ii), consistent with the Motor Carrier Safety Improvement Act of 1999, unless and until the FMCSA has made a record determination that other classes of commercial motor vehicles “pose serious safety risks” and also should be subject to the full scope of the Federal Motor Carrier Safety Regulations.

Respectfully submitted,

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