December 1, 2017

The Honorable Elaine L. Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Docket No: DOT-OST-2017-0069 – Notification of Regulatory Review

Dear Secretary Chao:

The American Bus Association (ABA) appreciates the opportunity to comment on the U.S. Department of Transportation's (USDOT's) Notification of Regulatory Review (Notice), Docket No. DOT-OST-2017-0069, published on October 2, 2017, in the Federal Register. The ABA strongly supports the USDOT's initiative to evaluate the continued necessity, validity and efficacy of existing transportation regulations and agency actions, to determine candidates for repeal, replacement or modification, without compromising safety.

The ABA is the leading trade association for private and over-the-road passenger operators who transport the public and serve the motorcoach industry. Our Association has represented the private motorcoach industry, an industry dominated by small and family owned businesses, for over 90 years. We have over 800 bus operating company members representing large and small fleets, intercity and charter and tour operators, and rural and urban operations, in addition to tour and travel operators. Our transportation members provide all manner of passenger services, including intercity scheduled service, charter and tour operations, subcontracted public transit service, and employee shuttle services.

Based on the types of operations conducted by our members various USDOT operating administrations (OAs), in addition to the Department, exercise oversight of our industry. For this reason, our comments address regulations and other agency actions falling under the jurisdiction of several USDOT OAs, as well as the Department. For purposes of providing meaningful comment, we focused our review efforts on identifying those regulations or agency actions that for our industry: 1) inhibit job creation; 2) are outdated or unnecessary, or ineffective; 3) impose costs, that exceed benefit; 4) create serious inconsistencies or otherwise interfere with regulatory reform initiatives and policies; 5) could be revised to use performance standards; and/or 6)

represent good public policy decision-making. Based on our review, we offer the following list of issues for the Department's consideration in its regulatory review initiative.

OFFICE OF THE SECRETARY OF TRANSPORTATION

1. ADA record retention

a. Specific Reference: 49 CFR §§37.213 and 37.215

b. Description of Burden: Subsection 37.213, Information collection requirements, imposes various requirements for over-the-road-buses (OTRBs) to collect, retain and at times report certain information to USDOT concerning the provision of service in compliance with the American with Disabilities Act (ADA). Currently, the USDOT is not authorized to require compliance with the specific annual requirement for OTRBs to submit information on the number of requests for accessible bus service and service provided, to the Department. However, OTRBs still collect and retain this information, in the expectation the USDOT will at some point be re-authorized to require the submission of the information.

c. Alternatives: The USDOT ADA regulations, including the information collection requirements, have been in place since 1991, and are outdated. Specifically, the requirements concerning information collection are outdated, and could be better tailored to verify OTRBs operate in compliance with the ADA. Specifically, one such reform or modification is to eliminate the requirement for submission of specified information to USDOT, especially when the Department has allowed the collection authorization for the requirement to lapse. Clearly, this submission requirement is unnecessary, as carrier compliance with the requirement to retain the information is verified through routine carrier inspections carried out by the Federal Motor Carrier Safety Administration (FMCSA). Further, the burden on a carrier of collecting and retaining all the specified information, could be further alleviated by reviewing and refining the types and amount of information to be collected and retained. Alternatively, if not eliminate the data collection/submission requirement, then the Department should at least use the data to conduct the review required under 49 CFR 37.215 and determine the appropriate changes necessary to alleviate unnecessary burdens imposed by the USDOT current rules (see next).

d. Examples: While this information may be useful and used when verifying compliance with ADA requirements by FMCSA or DOJ, the purpose of the record keeping was to provide data to support a broad review of the USDOT ADA rules by the Department. A report comprehensively reviewing the ADA regulations and compliance by the OTRB was required to be completed under 49 CFR 37.215 by October 2006. To date, no review has been completed to our knowledge, and in October 2016 (10 years later), FMCSA issued a notice stating that they no longer had the authority to continue to collect these reports. Based on this background, it appears the reports are no longer needed or relevant.

2. ADA Requirements for Fixed Route Carriers

a. Specific Reference: 49 CFR §§37.185 and 37.215; ABA Petition and USDOT Letter of Interpretation 8/8/12 (attached).

b. Description of Burden: The prescriptive ADA fleet accessibility requirements for OTRBs, as mandated in USDOT regulations, have imposed significant burdens on OTRB operators without resulting in justified benefits, particularly in terms of meeting short term "peak period" transportation needs through use of smaller OTRB bus companies to run "sections" of service. Please note, this is not to say, in any way, the motorcoach industry does not support meeting the needs of the disabled community or complying with both the spirit and intent of the ADA. However, under the current mandate, OTRB companies are investing thousands of dollars in equipment (approximately, $30,000 for lift on a new vehicle; and up to $50,000 to retrofit a vehicle) that is only needed on a limited basis, and yet is very costly to acquire, and costly and challenging to maintain. The OTRB industry believes the needs of the disabled community can be equitably, if not better served, through a more performance based, cost beneficial regulatory approach. Further, the ADA does not explicitly require 100% fleet accessibility, as the USDOT regulations currently require.

c. Alternatives: The USDOT regulations implementing the ADA for OTRBs provide an opportunity to consider a performance-based regulatory approach. As previously noted, USDOT is required, by statute and pursuant to 49 CFR 37.215, to review its ADA regulations and determine if changes are necessary. This report was to be completed by October 29, 2007. This regulatory reform initiative undertaken by the USDOT provides an opportunity now to conduct a review and update the regulations. A review of the current ADA requirements in 49 CFR 37 Subpart H, would enable the Department to gather current data, pursuant to 37.213 requirements, on fleet accessibility and better understand the needs of the disabled community, in terms of OTRB use. As well, USDOT should revisit its legal interpretation of §37.185 in terms of the treatment of "section" service as demand-responsive service, not subject to the 100% accessibility requirement. Finally, USDOT should consider developing a performance-based rule that sets ADA-based standards for OTRBs to meet in serving the disabled community and allows operators greater flexibility in meeting those standards. The ADA does not explicitly require 100% fleet accessibility, as do the current USDOT regulations. By providing increased flexibility through a performance-based regulation, USDOT would encourage innovation, perhaps even the evolution of better technology, to better fulfill the transportation needs of the disabled community whether through scheduling practices or equipment. Further, to abate any concerns with complying with the ADA, USDOT can build in safeguards to the performance regulation, including a routine review of its effectiveness in meeting the transportation needs of the disabled community and fulfilling the goals of the ADA.

d. Examples: Often during peak travel periods (e.g. holiday travel), large regional and national fixed route carriers find they must expand their service offerings in order to keep pace with customer demand. Due to the USDOT ADA regulation, in conjunction with an administrative determination in 2012, the class I operators subject to the 100% accessible fleet requirement must also ensure all subcontractors contracted to supplement their operations comply with eth 100% requirement. Due to this regulation and interpretation, often carriers forego the business opportunity of providing additional capacity and meeting the additional demand, because of the difficulty in finding available subcontractors that have available lift-equipped buses. This dilemma has nothing to do with whether a request was made, or a need identified for an accessible vehicle, but instead to simply meet the 100% fleet requirement. As a result of the constraints on capacity, able-bodied, willing customers are forced to seek alternative options,

despite the fact requests for lift-equipped service is limited. A performance-based standard, rather than a static fleet requirement, would address capacity constraints for all passengers and facilitate business opportunities without interfering or hindering compliance with the ADA.

3. DOT Service Animal definition
a. Specific Reference: 49 CFR 37.3, 28 CFR 36.104

b. Description of Burden: Currently, the USDOT regulations concerning the provision of transportation service in compliance with the American with Disabilities Act (ADA), include a definition for *service animal* (49 CFR 37.3*)*. However, this definition differs from the definition of service animal under the United States Department of Justice's (USDOJ's) regulations (28 CFR 36.104). The lack of a consistent definition has led to confusion and misuse, at times placing motorcoach operators in an awkward position in terms of meeting customer needs. The operator of a motorcoach should not be placed in the position of unnecessarily endangering other passengers on a transportation vehicle, or in an awkward position from a customer service standpoint by denying access based on relying the USDOT definition, when the operator is making a good faith effort to comply with the law.

c. Alternatives: This issue concerns an inconsistency between USDOT regulation and another agency's regulation, therefore we seek clarity and uniformity in terms of the definition of service animals for use on transportation vehicles that serve the public. The ABA believes the USDOJ definition appropriately satisfies the requirements of the ADA, and USDOT should adopt the USDOJ definition for service animal. This action would provide clarity and uniformity under the regulations implementing each department's respective provisions of the ADA.

d. Examples: Based on a lack of consistency in the market in terms of defining "service animal" any number of animals or pets are being presented as "service animals" for purposes of bringing an animal on a motorcoach. Such terms as "emotional support animals" (ESA), "psychiatric service animals," and "therapy animals" have caused confusion in terms of complying with ADA regulations. Further, according to the medical community, all domesticated animals may qualify as an ESA (cats, dog, mice, rabbits, birds, snakes, hedgehogs, rats, mini pigs, ferrets, etc.) and be of any age (i.e. young puppies and kittens). These animals do not necessarily receive specific task-training because their very presence mitigates the symptoms associated with a person's psychological/emotional disability, unlike a working service dog. In terms of passenger travel, motorcoach operators must take into consideration the needs and sensitivities of all passengers, and the lack of a consistent definition has increased the difficulty of their job. A uniform, consistent definition, based on the USDOJ definition is necessary.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION (FMCSA)

1. <u>Lease & Interchange of Vehicles: Motor Carriers of Passengers</u>
a. Specific Reference: 49 CFR Part 390, specifically: 390.5, 390.21; Subpart F.

b. Description of Burden: The rule poses a significant threat to the private motorcoach industry in multiple ways. It inappropriately broadens the term "lease" to capture charter and like operations, turning current industry practices on their head. It will limit operations, raise

costs, reduce transportation service and capacity, and likely push good operators, long standing family owned businesses, out of business. Specifically, the rule requires a passenger carrier with FMCSA operating authority who wishes to engage another carrier with FMCSA operating authority, to execute a lease and assume full regulatory compliance responsibility and legal liability for the leased carrier even though the lessee carrier has no control or authority over the leased carrier's operations. This is not the current industry practice in terms of arrangements between two or more carriers with FMCSA operating authority. The rule negatively affects large and small carriers as, faced with these risks and burdens, carriers will no longer partner with other carriers to provide service. Rather than stop bad actors which was the intent of the rule, to avoid the rule's burdens, it will likely lead to expansion of the broker industry, an industry FMCSA does not, and claims it cannot, regulate, thus enabling non-compliant carriers to flourish. In fact, motorcoach insurers have informed clients they will not insure vehicles leased under the rule, and have instead counseled clients to pursue a brokerage operation to avoid the burdens of the rule. As well, the rule imposes burdensome marking requirements that are impractical and burdensome, demonstrating a lack of understanding of how the industry operates.

c. Alternatives: The FMCSA needs to act on this rule, per its previous statements (August 31, 2016 [81 Fed. Reg. 59951]; June 16, 2017 [82 Fed. Reg. 27766]), because it is unduly burdensome, particularly on small business, and the costs far outweigh any identified benefit. The ABA supports FMCSA's goal to reduce opportunities for non-compliant carriers, who have lost their authority to operate, from continuing operations. However, the current rule is too broad to effectively accomplish this goal, with costs that far exceed any benefit to be gained as it unduly penalizes compliant carriers. Alternatively, FMCSA could revise the rule and narrowly tailor it to impose a requirement for the execution of a lease document for arrangements between a carrier with operating authority and another carrier without operating authority. This limited type of rule, without imposing any additional marking or impractical emergency notification requirements, would enable FMCSA to explicitly target those carriers identified as the problem to be addressed by the initial rule in 2013. Or, FMCSA could simply repeal the rule altogether and seek other courses of action to address the identified problem of carriers continuing to operate after losing their authority.

d. Examples: Although FMCSA has voluntarily delayed enforcing compliance under the rule (although it had an effective date of July 2015), we received notice from ABA members of lost contract opportunities now because these members would not place themselves in a position of assuming the compliance responsibilities and liability imposed under the rule, as required under the contract terms. As well, several ABA member companies engaged in interstate scheduled operations have given notice of their plans to reduce operations, rather than assume compliance responsibility and liability under a lease arrangement, when face with covering peak holiday periods and the need for additional vehicles. Smaller family businesses, comprising approximately 85% of the private motorcoach industry, have also announced their intent to limit operations and pass on large event contracts, to avoid being put in the position of having to comply with the burdens of the rule. Still other operators have started exploring the merits of converting their businesses into brokerage operations to entirely avoid regulation, a disconcerting outcome in terms of safety.

2. HOS, establishing full preemption of state/local laws/regulations/ordinances affecting HOS

a. Specific Reference: 49 USC §§14501, 31136, 31141 and 31502(b); 49 CFR 382.109 and Part 395

b. Description of Burden: Congress saw fit to grant USDOT the authority to establish regulations for the safe operation of a commercial motor vehicle (CMV) (49 USC 31136), along with specific authority to prescribe requirements concerning the qualifications and hours of service (HOS) for drivers of CMVs (49 USC 311202). In turn, FMCSA, under a delegation of authority from USDOT, has exercised the authority to set requirements for both driver qualifications (49 CFR parts 383 and 391) and driver HOS (49 CFR Part 395). Further, to ensure a uniform safety approach, facilitate both compliance and enforcement, and facilitate interstate commerce by avoiding the costly burdens associated with multiple individual state schemes, FMCSA regulations are the national standard and generally preempt state action. However, USDOT and/or FMCSA has not clarified and established the preemptive nature of its HOS jurisdiction, and this in turn has led to confusion, inconsistent dual regulatory schemes in some jurisdictions, and costly litigation.

c. Alternatives: Action by the USDOT/FMCSA on this issue would eliminate conflicts and inconsistencies between the USDOT/FMCSA authority and rules of state and local governments. The USDOT/FMCSA should, pursuant to 49 USC 31141, clarify that no state or local authority may enforce a state or local law, ordinance or regulation concerning the hours of service of a CMV driver, including a state or local law, ordinance or regulation concerning rest breaks, because such law/ordinance/ regulation is in addition to or more stringent than the regulations prescribed by the USDOT/FMCSA under 49 USC §§31136 and 31502, and the state or local law is incompatible with and/or causes an unreasonable burden on interstate commerce.

d. Examples: In California, Wage Order 9 is a prime example of a state ordinance concerning HOS that is incompatible with federal regulation and imposes an unreasonable burden on interstate commerce. Wage Order 9 establishes requirements for bus companies to provide meal and rest breaks, to occur entirely "off-duty", based on an operator's hours of service. This Order conflicts with federal HOS requirements. The federal HOS requirements limit bus drivers to 10 hours of driving time and 15 hours of on-duty time, after 8 hours of off-duty time, but do not require off-duty time for meal and rest breaks. In other words, meal and rest breaks occur during scheduled stops, but the driver is not considered "off-duty." In addition to being in conflict, efforts to comply with the Order are costly and unduly burdensome. For example, a second driver could be added to the trip, however this would significantly increase the cost of the trip, and eventually lead to an increase in ticket prices. Further, the costs are only exacerbated by the driver shortage currently faced by the industry. Alternatively, trips would need to be shortened or cancelled altogether, or ticket prices could be increased and jeopardize an affordable transportation option. Neither outcome is desirable, and places an unnecessary burden on interstate commerce.

3. <u>Form MP-1</u>

a. Specific Reference: 49 CFR 369.4

b. Description of Burden: The FMCSA requires the annual filing of motor carrier financial and operating statistics. Class I motor carriers of passengers are required to file these reports using the Form MP-1, which mirrors the Form M used by Class I carriers of property. FMCSA recently renewed its request to collect this information (FMCSA–2017–0046), after rescinding the quarterly filing requirements that previously existed on December 17, 2013 (78 Fed. Reg. 76241). These reports have not been published or even referenced in any publication or website since 2003. As noted in FMCSA's renewal filing, only 2 motor carriers of passengers currently submit these reports. While many more companies are likely eligible to submit these reports, the FMCSA appears to have no interest in obtaining the information or enforcing the requirement. As the information is not of use and does not correlate with safety activities, motor carriers should not bear the burden of preparing/submitting the report or risk of noncompliance with the requirement.

c. Alternatives: The FMCSA should eliminate this regulation because it is outdated and not serving a purpose other than imposing a burden on passenger carriers. Currently, as the submitted reports or information are not being used by the Agency, there is no apparent need for the regulation. Further, as the mission of FMCSA is to reduce crashes, injuries and fatalities involving large trucks and buses, there is no correlation between the collection of this information and the mission. Alternatively, it does take time and resources for passenger motor carriers to collect and report the information.

d. Examples: Currently, only 2 carriers annually comply with the regulation, as detailed in FMCSA–2017–0046, while the agency estimates that more than 400 carriers likely would qualify to submit them, although it has not pursued enforcement. With a demonstrated lack of interest on the agency's part, and the rescission of the quarterly filing requirements in 2013, it is difficult to make a safety case for the continuance of this regulation. benefit or endeavor to fulfill FMCSA's safety mission from the collecting financial, operating, equipment and employment data from motor carriers of passengers.

4. <u>Commercial Drivers' License Program Reforms</u>
a. Specific Reference: 49 CFR Part 383

b. Description of Burden: Drivers of commercial motor vehicles who, with limited exceptions, operate in interstate, intrastate or foreign commerce must obtain and hold a valid commercial driver's license (CDL). The FMCSA establishes the requirements, qualifications and testing standards for obtaining and holding the license, while states programs are responsible for conducting testing and issuing the CDL. However, by leaving the testing and issuance of CDLs, including relevant license endorsements and/or restrictions, to the states the CDL framework has led to inconsistencies between state programs. For example, in terms of license restrictions, states may vary on how the restrictions are coded on a CDL. This in turn, has led to confusion in the enforcement community, sometimes misleading officers to issue citations to valid license holders because the officer did not understand the license coding on an out-of-state license. Another issue concerns CDL testing, and impacts from how states administer testing, while the industry is currently challenged with a driver shortage. Specifically, there are issues with state delays in administering tests, thus delaying or worse dissuading qualified driver candidates from the profession; issues with the requirement of holding a CLP for 14 days before

a driver can obtain a CDL, also dissuading qualified driver candidates from the profession ; and issues with not allowing drivers to use check-lists, like aviation pilots, when conducting pre-trip inspections during the skills test – which in the real driving world, is unrealistic scenario. Collectively, these issues present unnecessary obstacles to the motorcoach industry, particularly at a challenging time with the scarcity of qualified drivers.

c. Alternatives: This issue concerns the facilitation of employment opportunities and interstate commerce, by eliminating inconsistencies between federal regulations and state programs implementing the regulations. The FMCSA should review the current CDL regulatory framework, and working with states and/or the American Association of Motor Vehicle Administrators, establish uniform coding for CDL license, and seek ways to eliminate barriers to entry for prospective motorcoach drivers through the CDL process, such as investing more resources to address testing delays; reviewing testing procedures, to ensure testing reflects real world situations and focus on assessing candidates ability to manage actual safety risks; and by considering a graduated approach to CPL to CDL waiting periods, perhaps modifying the waiting period based on a candidate's experience or record.

d. Examples: Motorcoach drivers holding CDLs identifying restrictions pursuant to one state's scheme, run the risk of being cited in another state for an improper license because the CDL restriction was coded differently in that jurisdiction. For example, in Michigan, the "K" restriction is for intrastate-only operation, while in Florida, the "K" restriction requires a CDL holder to wear a hearing aid when they drive. Further, it is not unusual for a company to invest considerable resources in screening and then training a prospective driver candidate, only to lose the candidate (and the investment) due to delays in CDL testing or CDL waiting periods. Generally, driver candidates are seeking employment for income, and the delays in obtaining their CDL often force them to seek other opportunities because they cannot afford to wait.

5. <u>Public Display of CSA Scores</u>

a. Specific Reference: FAST Act §5223, 49 CFR 385, various policy guidance/reports

b. Description of Burden: Since the inception of FMCSA's Compliance Safety Accountability (CSA) program, the motor carrier industry has raised concerns with the data used to support the program. Namely, the data relied upon for the CSA calculations is flawed, incomplete and has a questionable correlation to safety. Based on these concerns, Congress responded by including provisions in the FAST Act to evaluate the CSA program, and specifically address concerns raised with the data relied upon for use in evaluating the safety of motor carriers. As part of these provisions, Congress directed FMCSA not make available to the general public "information regarding analysis of violations, crashes in which a determination is made that the carrier or commercial motor vehicle driver is not at fault, alerts or the relative percentile for each BASIC [Behavior Analysis and Safety Improvement] developed under the CSA," until further action is taken by FMCSA with regard to addressing data issues. However, the FAST Act gave FMCSA the discretion to allow the data analysis of motorcoach operators to remain publicly available on-line, in effect removing only property carrier CSA scores from public viewing. Considering the material flaws with the CSA data affect the scores of motorcoach operators equally to those of property carriers, if not more so due to the inappropriate comparison between

the two operations, the data analysis for motorcoach operators should also be removed from public viewing.

c. Alternatives: As with property carriers, FMCSA should remove information regarding analysis of violations, crashes in which a determination is made that the carrier or commercial motor vehicle driver is not at fault, alerts or the relative percentile for each BASIC developed under the CSA. This action should be taken as the practice of publishing the scores is ineffective, and misleading; further, it is inconsistent to continue to publish such information on passenger motor carriers while removing such information on property motor carrier, when both groups share the same exposure and biases due to flawed data, and when passenger carriers are placed in an even more vulnerable position as they are unfairly evaluated against property carriers rather than passenger carriers.

d. Examples: Many contracts and service arrangements are dependent on FMCSA's CSA scores. If a carrier gets an alert (fairly or unfairly) or has a significant point swing due to a statistical change in an event grouping, they can lose business. Several monitoring services (e.g. STATZ, Go Ground, TSX, etc.) have been created to aid in purchasing decisions for colleges, universities and school districts based upon the public availability of CSA scores. In addition, as a result of our outreach in partnership with FMCSA, more and more tour operators and individual travelers are evaluating safety before they select an operator for business. Even the Department of Defense utilizes some of the information provided by the CSA data in its assessments of its approved carriers list.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (NHTSA)

1. Seat Belts on Entertainer Coaches
a. Specific Reference: 49 CFR 571.3, 49 350.105

b. Description of Burden: Entertainer motorcoaches are a unique form of transportation specifically designed for small groups such as music bands or political candidates traveling by these luxury passenger vehicles between locations. Although built on the same bus chassis or platform as a 55 passenger motorcoach originally, entertainer coaches generally are built in 2 or more stages from an "incomplete vehicle" and finished to seat less than 16 persons (49 CFR 350.105), while providing the amenities more closely associated with a "motor home." (49 CFR 571.3) Amenities in entertainer motorcoaches typically include couch seating, galleys, tables, showers, bunk beds, satellite television, a cooking area with counter tops, and refrigeration units. These vehicles, which typically include side facing, perimeter seating, are custom built, rather than mass produced. Each piece of furniture is custom made and unique to that coach. The 3-point seatbelts required to be installed in all new second stage vehicles manufactured after November 28, 2017 have never been tested for sideways facing seats. They were only tested for forward facing seats as were their anchorages (75 Fed. Reg. 50958). There is concern that serious injury to passengers could be a result of the good faith effort made by operators and manufacturers to comply with this rule.

The Notice of Proposed Rulemaking, 75 Fed. Reg. 50958 (August 18, 2010) proposed to apply the seat belt requirements to a motorcoach defined as a vehicle having at least two rows of

passenger seats, rearward of the driver's position, and forward facing (or can be converted to face forward without the use of tools). See 78 Fed. Reg. at 70427. This would have excluded many "entertainment buses," which generally have seating positions around the perimeter of the vehicle.

On July 6, 2012, however, the President signed into law the Motorcoach Enhanced Safety Act, Title II, Subtitle G of MAP-21, Pub. L. No. 112-141. Section 32703 of MAP-21 provided, "Not later than 1 year after the date of enactment, the Secretary shall prescribe regulations requiring safety belts to be installed in motorcoaches at each designated seating position." Under the Motorcoach Enhanced Safety Act, ''motorcoach'' means an over-the-road bus, but does not include a bus used in public transportation provided by, or on behalf of, a public transportation agency, or a school bus. Because the statute extended the requirement for seat belts to all motorcoaches and at each designated seating position, the final rule dropped the definition of motorcoach and "requires all designated seating positions on the over-the-road buses to have lap/shoulder belts regardless of the seating configuration of the bus or the vehicle GVWR." 78 Fed. Reg. at 70420. There were no hearings, debate or consideration in Congress on the effect of this seat belt mandate on entertainer coaches.

There are two possible exceptions to this general requirement. First, the seat belt rule would not apply to perimeter seating buses that are not OTRBs if they have 7 or fewer forward-facing designated seating positions, not including the driver's seat. 78 Fed. Reg. at 70435. An OTRB is defined as "a bus characterized by an elevated passenger deck located over a baggage compartment." 78 Fed. Reg. at 70417, n.4. NHTSA noted, "To the extent that these niche vehicles are body-on-frame construction (not over-the-road buses) they could qualify to be exempted as perimeter-seating buses." 78 Fed. Reg. at 70434, n. 65.

Second, the rule does not apply to vehicles with fewer than 10 overall designated seating positions, not including the driver's seat, as these vehicles do not meet the definition of a "bus." 78 Fed. Reg. at 70434, n.65; 49 CFR 571.3.

c. Alternatives: The NHTSA should revise the regulation to address the unique nature of entertainer motorcoaches, due to the burdens it places on small entities and because it is too broad and inappropriately imposes unnecessary burdens. In brief, NHTSA should exempt entertainer motorcoaches from this rule in a similar fashion to school buses, transit buses and prison buses by creating a new definition under 49 CFR 571.3 that applies to 16 or more passengers, including the driver. Motor homes are also currently exempt. In addition, grant a 90-day waiver of the November 28, 2017 application of the rule to allow motorcoach manufacturers and operators to petition for a revised definition of a "bus" for purposes of the seatbelt rule. Alternatively, rewrite this rule to include the language (NHTSA-2010-0112) included in the NPRM for this rule that exempted perimeter seating or buses that have less than 2 rows of forward facing seats.

d. Examples: NHTSA's report titled "NHTSA's Motorcoach Safety Research Crash, Sled, and Static Tests" (DOT HS 811 335, May 2010) details how only severe frontal crashes and forward-facing seat configurations were evaluated and considered within controlled testing conditions prior to the completion of the final rule.

FEDERAL TRANSIT ADMINISTRATION (FTA)

1. Charter Bus Rule
a. Specific Reference: 49 USC 5323(d) and 49 CFR Part 604

b. Description of Burden: The FTA Charter Service Regulations to fulfill 49 USC 5323(d) are intended to protect private charter bus operations from unauthorized competition from federally subsidized transit operators. However, the rules have not effectively protected privately owned bus operators from unfair competition from transit agencies, and could be modified to provide better protection. Based on the nature of transit operations, transit operators have found ways to skirt the charter rule. Such activities have included requesting exemptions from the rule based on misleading information; masking the true costs of providing a service to underbid a private competitor; and by creating superfluous connections to the broader transit network for a closed route operation (e.g. a campus shuttle) to avoid the appearance of competing as a charter operation.

c. Alternatives: The FTA should revise the regulations as they are ineffective and do not adequately accomplish the intended goal of protecting private charter operations from unfair competition from public transit providers. The charter rule should be amended to refine the requirements to ensure the costs of providing a service are transparent and properly reflected in any bid to provide service; moreover, a transit operator receiving federal funding must certify that it has met the enhanced requirements of 49 CFR Part 604, the FTA should audit compliance with this requirement, and the FTA should withhold federal funds from any recipient that fails to comply with the charter rule requirements.

d. Examples: Routinely, ABA receives complaints from its members concerning instances where transit operators have engaged in questionable practices. For example: 1) a transit operator seeks an exemption under the rule, asserting lack of interest or practicality by private operators due to distance, however the actual distance for the private operator is mischaracterized. 2) a group of local businesses sought to fund a trolley service using the local transit authority, however when the arrangement was questioned by private operators, the business owners then paid the city which in turn paid the transit operator for the service, thereby avoiding the characterization of charter. Alternatively, a local transit operator was paid to provide a shuttle service for a university's "game day" events, however, when a private operator expressed interest in providing the service, the university changed its payment arrangements to instead pay the transit operator for "advertising," to avoid the appearance of being a charter. 3) A transit operator competes with a private operator to obtain rights to provide a campus shuttle currently run by a private operator, a closed route operation, by offering access to the entire transit network to students/faculty at a discounted rate not reflecting the true cost of service. 4) A transit operator, working with a potential charter customer, has the customer include a requirement for "low-floor" vehicles as part of a solicitation for service in effect excluding bids from private motorcoach operators.

2. Recourse for Displaced Operators of Private Scheduled Service
a. Specific Reference: 49 USC 5323(a)(1)(C)

b. Description of Burden: Unlike charter operations, private scheduled service operators do not have protection from or recourse for unfair competition by federally subsidized transit operators. Although there is a statutory provision in place at 49 USC 5323, private companies have means to enforce the statute. Specifically, 49 USC 5323(a)(1)(C) allows the use of federal funds to a State or a local governmental authority to acquire an interest in, or to buy property of, a private company engaged in public transportation, or to operate a public transportation facility or equipment in competition with, or in addition to, transportation service provided by an existing public transportation company, only if "just compensation under State or local law will be paid to the company for its franchise or property." However, the federal courts have generally held there is no private right of action to bring a lawsuit, and the FTA has never established any complaint mechanism or remedial process for administrative relief. Moreover, the FTA grant criteria for recipients of federal funds do not include this requirement as a limitation on the use of federal funds.

c. Alternatives: The FTA should act to address this issue as it is conflicts with other statutory/regulatory provisions to protect private operators from unfair competition by public transit providers. It is bad public policy to use taxpayer dollars to compete with private sector employers. It discourages private investment and inflates the cost of providing a service that may adequately be offered in the marketplace. The FTA should establish a complaint mechanism or remedial process to provide administrative relief pursuant to the statute. Further, to provide additional protection and enable fair and equitable competition, FTA grant criteria for recipients of federal funds should include requirements the requirement for just compensation, as a limitation on the use of federal funds, in addition to other protections to discourage unfair competition. Congress and the FTA should adopt a mechanism to protect private operators offering scheduled bus service from unwarranted competition by federally-funded transit agencies, and enable compensation for the private companies subject to such competition under 49 U.S.C. 5323(a)(1)(C).

d. Examples: Recently, a private operator that held a contract with the University of Southern Maine (USM) to provide campus shuttle service for over 20 years, lost its contract to the Greater Portland Transit District (GPTD). The basis for losing the contract was the ability of GPTD to offer an "Unlimited Access Transit Pass Program" (U-Pass), to USM which would supplant the current service provided by the private operator and connect the service to its main network. The expense for the new transit service reportedly will include an estimated at $4-4.5 million in capital costs, to be funded with a combination of Federal Transit Administration (FTA) grants and local funds, with the federal funds expected to cover 80% of the project costs. Further, the added annual operating cost to operate the two new bus lines is estimated to be $1.6-1.7 million, with the expectation these costs will be funded by the Federal Highway Administration's Congestion Mitigation and Air Quality Program (CMAQ), U-Pass program and new fare revenue from added ridership, advertising and local contributions from the community.

3. Private Bus Operators as Subcontractors to Federal Transit Authorities
a. Specific Reference: 49 CFR Parts 391, 395 and 396

b. Description of Burden: Motorcoach operators who serve as subcontractors to local or metropolitan transit entities subsidized with FTA funds, should be subject to the same operating regulations as other FTA grantees, and not be forced to comply with dual regulatory schemes. Local units of government (49 CFR 383.5) are exempted from FMCSA operational safety requirements and follow the rules of the FTA. Contractors to FTA subsidized services should be able to do the same thing and be similarly exempted from FMCSA Driver Qualification (49 CFR Part 391), Hours of Service (49 CFR Part 395) and Vehicle Maintenance and Repair requirements (49 CFR Part 396), while under contract and provided service to public transportation entities. This would put competing operational realities on an even playing field, harmonize all entities operating within a transit system, and ensure compliance with the new requirements for FTA safety plans (49 CFR 673).

c. Alternatives: The FTA and FMCSA should address this issue to eliminate conflicts and inconsistencies and clarify requirements, between overlapping regulatory schemes of two USDOT OAs. The FTA should exempt private operators who are serving in the shoes as contractors to public transportation entities from the FMCSA safety regulations and make them exclusively under the FTA safety regulations while operating in contracted service.

d. Examples: New Jersey Transit, Cal Trans and other publicly funded transportation entities contract for thousands of private motorcoaches in various subsidized transit capacities, including commuter bus service (49 USC 5307), congestion mitigation air quality initiatives (23 USC 149), rural transportation (49 USC 5311) and other contracted services utilizing federal funds. In instances where private operators stand in the shoes of public transportation entities, all drivers should be held to the same regulatory standards.

4. Facilitating Public-Private Partnerships to Address Pubic Transportation Needs: §5311(f) 15% requirement

a. Specific Reference: 49 USC 5311(f); FTA Circular 9040.1G

b. Description of Burden: Currently, pursuant to 49 USC 5311(f), intercity bus transportation, directs states to spend at least 15% of their 5311 grant funding annually to support intercity bus transportation, unless the Governor of the state certifies to USDOT, after consulting with intercity bus service providers, that intercity bus service needs of the state are being met. However, it is unclear whether states are complying with the statue in terms of properly consulting and assessing the intercity needs of the state, when making the annual certification. The certification process lacks transparency, and requires increased oversight by the FTA.

c. Alternatives: In the interest of job creation and the policy goal of supporting rural transportation needs, the FTA should amend certification requirements to require enhanced transparency including requiring audits of the governor certifications that enable funds to be diverted to other purposes; publication by DOT/FTA of listing of the governor certifications; restrictions on where or for what purpose the funding can transferred to as an alternative use; and an enforcement mechanism to ensure compliance with the law.

d. Examples: Obtaining information regarding examples is difficult, as there are no current requirements to publish the certifications or make public the documentation used to support the certifications, such as a needs review. Further, the only way to determine whether a state has

filed a certification, and this is based on the belief that it is acting in good faith, is to monitor each state's annual 5311 apportionments to determine what amounts, if any, were spent on 5311(f) activities.

5. Facilitating Public-Private Partnerships to Address Pubic Transportation Needs: §5311(f) –eligibility
a. Specific Reference: 49 USC 5311(f); FTA Circular 9040.1G

b. Description of burden: Supporting a national intercity bus network is hampered by inconsistencies in state-by-state definitions of what a national intercity bus network is, particularly as it relates to "intercity bus meaningful connections" in terms of meeting 5311(f) funding requirements. Some states rely on FTA Circular 9040.1G, to provide the defining criteria to meet the definition, while other states do not, causing disparate outcomes in terms of 5311(f) funding. This, in turn, hampers the purpose of 5311(f) to facilitate intercity bus service and limits options to meet rural transportation needs.

c. Alternatives: In the interest job creation and the policy goal of supporting rural transportation needs, the FTA should establish a national, uniform definition of "meaningful connection" as it relates to intercity bus service, based the FTA Circular 9040.1G.

d. Examples: In Kentucky, some services claimed as 5311(f) intercity services, do not consider connection times, the connections are not reciprocal, and the connections are not clearly advertised nor easily accessible to the general public, such as through coordinated ticketing, marketing etc. Alternatively, Minnesota, relying on FTA Circular 9040.1G, defines "intercity bus meaningful connection" as one that meets all the following criteria:

- Each of the connecting routes meets the criteria to be considered "intercity bus", as defined [elsewhere in this brief]; and
- The connection occurs at a common location; and
- The scheduled connection window is long enough to guarantee the connection under normal operating conditions, but is no longer than 2 hours, to avoid excessive wait time;
- The connection is reciprocal (i.e., allows for outbound and return travel between the community in question and any other destination on either route); and
- The connection is clearly advertised and easily accessible to the general public, such as through coordinated ticketing, marketing, and/or customer service.

6. Facilitating Public-Private Partnerships to Address Pubic Transportation Needs: §5311(f) – Eligible Subrecipients
a. Specific Reference: 49 USC 5311(a)(2); FTA Circular 9040.1G, p. 85.

b. Description Burden: Pursuant to the law, and as reflected in FTA Circular 9040.1G, eligible subrecipients for 5311 funding include "an operator of intercity bus service." However, several states, in fulfilling the requirements to receive 5311 grant funding, have added an extra bureaucratic layer of that leads to unwarranted competition for the 5311(f) funds between rural transit providers and intercity bus operators. Specifically, in certain states, the intercity bus operator seeking to be a "subrecipient" for purposes of obtaining 5311(f) funding, must rely on

the local rural transit provide (its competitor), to submit its grant application to the state, in effect making the intercity bus operator a "sub-subrecipient." Neither the law or the Circular require this added layer of bureaucracy. Further, it leads to inefficiencies and unwarranted competition, when the goal is to facilitate intercity bus service to rural areas.

c. Alternatives: The FTA Circular 9040.1G should be amended to clarify that states must recognize operators of intercity bus service as **direct subrecipients** for 5311(f) funding, and accept applications directly from intercity bus operators when seeking such funding. States should not impose another layer of bureaucracy on intercity bus operators seeking grant funding. Further, the FTA, when approving state management plans for execution of grant requirements, should review such plans for compliance with this provision under the amended Circular.

d. Examples: Currently, the Kentucky State Management Plan, issued by the Kentucky Transportation Cabinet (KYTC) and approved by the FTA on March 8, 2017, states: "In order to promote coordination of and to prevent the duplication of services (KYTC) will not contract directly with for-profit intercity companies." This position by the state has forced private intercity bus operators to rely on local rural transit operators for submissions of their grant requests, and unnecessarily "pitted" the pitted the public operators against the private operators, limiting access to the 5311(f) funding.

6. Facilitating Public-Private Partnerships to Address Pubic Transportation Needs: Joint Use

a. Specific Reference: 49 USC §§5309, 5323(r); FTA Circulars 70501.1A, 9300.1, and other guidance documents.

b. Description Burden: Although there is statutory language requiring recipients of financial assistance under Chapter 53, not to deny reasonable access for private intercity or charter transportation operators to federally funded public transportation facilities, it often occurs. Further, the current federal transit regulatory and policy framework does little to promote joint use of federally funded facilities, in the interest of providing more effective transportation service to the public. Denied or restricted access to FTA funded facilities has caused hardship to motorcoach operators, either by making the mode of transportation less attractive due to limited ability to interconnect with other modes or by forcing private operators to change long standing routes/stops based on usurpation of road lanes for public transit uses. Considering the increasing costs to build and maintain public transit facilities, coupled with ever dwindling federal resources for transportation infrastructure needs, this is a time for the Administration to seek innovative approaches using public-private partnerships to meet the transportation needs of the public.

c. Alternatives: For the purposes of job creation and good public policy, the USDOT, in conjunction with FTA, should review the various regulations and programs administered by the FTA to seek modifications promoting joint use of transit facilities, and eliminate barriers for partnerships with private operators. Such barriers include barriers to access transit terminals or stations, park and rides, and Bus Rapid Transit and bus only lanes. Further, in promotion of sound public policy, FTA should require as a condition for funding under Chapter 53, that recipients ensure any facility constructed using such funds, is designed to accommodate and then must provide access to private motorcoach operators. The private motorcoach industry is well

positioned to support public transportation needs on a broader scale, and when faced with growing concerns over public transit demands for increased federal funding and challenges involved in managing the safety aspects of transit operations, it is good public policy to seek innovated approaches to meeting public transportation needs.

d. Examples: In January 2017, the Washington Metropolitan Area Transit Authority (WMATA) announced, as part of its plans to accommodate transportation needs for the presidential inauguration, that intercity buses are prohibited from accessing all WMATA rail stations, including those in the suburbs of Washington, D.C. This came as a shock to the intercity motorcoach industry, as many operators routinely access WMATA rail stations. When ABA contacted WMATA president Paul Wiedefeld, he maintained that WMATA's position was current policy at all times for the transit agency, although WMATA could not produce a copy of it. Further, as a basis for the policy, Mr. Wiedefeld stated WMATA was concerned that intercity buses "were not properly trained to access the facilities," although this appeared not to be a concern for the numerous hotel/corporate shuttle buses and other large vehicles that access rail stations. The WMATA's position, particularly considering the tight parking/access restrictions put in place for the presidential inauguration, placed numerous motorcoach operators in the difficult position of canceling trips or risking enforcement action by WMATA. Additionally, private motorcoach operators have faced restrictions from road lanes in the wake of public transit operators using federal funding to design or implement dedicated bus lanes, forcing private operators to find alternative routes and stops.

FEDERAL HIGHWAY ADMINISTRATION (FHWA)

1. Tolling/HOV Guidance

a. Specific Reference: FAST Act §1411 (P.L. 114-94); FHWA Docket No. FHWA-2017-0006

b. Description of Burden: On April 28, 2017, FHWA issued a notice and request for comment on a guidance proposal to implement §1411 of the FAST Act. The statutory provision amends 23 USC §§ 129 and 166 to ensure OTRBs receive the same treatment as public transit buses in terms of rates, terms and conditions on federally funded toll facilities and access to HOV/HOT lanes. This action occurred over a year after the statute was enacted, and occurred only after several meetings with FHWA staff and numerous requests from the motorcoach industry for the Agency to act. However, ABA is still waiting for FHWA to finalize the guidance. It is now two years since enactment of the FAST Act, and for purposes of toll collections, *over two years* that OTRBs have been subjected to disparate treatment under the law, since FHWA informed us the Agency marks October 1, 2015, as the operative date. Further, FHWA has informed ABA it has no authority to require tolling facilities to reimburse OTRB operators for toll receipts inappropriately collected since October 2015. The FHWA has provided no explanation for the delay in issuing guidance.

c. Alternatives: For purposes of executing the law and clarifying its applicability, FHWA should immediately finalize and publish guidance to implement §1411 of the FAST Act. This guidance should include an identification of the tolling facilities subject to the provision, including contact information for the relevant authority. Additionally, FHWA should amend and supplement the 2012 Guidance on General Tolling Programs to Division Administrators as it

relates to OTRB, including directing the affected tolling facilities to comply with §1411 as a condition of receiving past or future federal funding, and reserve the discontinuation of tolling authority as a potential consequence of noncompliance. The FHWA guidance should also make clear to Division Administrators and tolling facilities subject to the FAST Act provision that the HOV and tolling requirements are already effective and have been in effect since October 1, 2015, and do not depend on any further guidance or other action by FHWA to be enforceable. Further, in the interest of transparency, FHWA should require states to include a list of affected tolling facilities in their annual reports; and require toll facilities subject to the FAST Act provision to publish the rates, terms and conditions for use of their facilities as applied to both public transportation buses and OTRBs.

d. Examples: Based on the list of Section 129 covered facilities accompanying the FHWA notice in the docket, ABA was able to identify numerous facilities routinely used by OTRBs. However, without benefit of transparency, it is unclear which facilities make accommodation for public transit operators by providing free or reduced toll passage.

We look forward to continuing our strong partnership with the USDOT to ensure the safety of the traveling public. We appreciate that the USDOT is taking the initiative to request public input and support this effort of reviewing existing regulations, policies and guidance with an eye towards easing the burdens currently being borne by small businesses.

Sincerely,

Brandon Buchanan
Director of Regulatory Affairs

Attachments: ADA Petition and Letter of Interpretation, 8/8/12