

# Holland & Knight

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December 10, 2012

Ms. Alice Kelly  
Manager  
Policy Branch, Policy, Planning and Sustainability Administration  
District Department of Transportation  
55 M Street, S.E., 5<sup>th</sup> Floor  
Washington, DC 20003

Re:       Comments on Proposed Rulemaking - Title 13. Sign Regulations  
          Presented on Behalf of Open Top Sightseeing Washington, D.C., LLC

Dear Ms. Kelly:

This firm represents Open Top Sightseeing of Washington, D.C., LLC. ("Open Top"). Open Top is a predominant provider of tour bus services in the District of Columbia serving the central tourist core of Washington, D. C. Open Top was recently selected to operate the former Tourmobile routes within the federal core under an agreement with the National Park Service.

On behalf of Open Top, we are providing the following comments regarding the proposed Title 13 -- Sign Regulations, appearing in the August 17, 2012 issue of the District of Columbia Register at pages 010022 et. seq.

Of specific concern to Open Top are the provisions of Section 609 of the proposed regulations that would prohibit signs and other advertisements on the exterior of motor vehicles using public rights of way and other public spaces within the District of Columbia, excepting in very limited circumstances specified in that Section. Open Top has an active advertising program on the sides of its tour buses that promotes not just its own operations, but those of others looking to reach residents and visitors to the District. While promoting its own operations would be permitted by the proposed regulations, the promotion and marketing of unrelated parties would be prohibited by the proposed rule. Open Top generates revenue from those promotions and as a result of that revenue pays to the District significant amount of taxes related thereto. As an example, Open Top does use the sides of its buses to advertise cities elsewhere in the world where Open Top has excursion operations. The same happens on Open Top's buses in other locations where Open Top promotes Washington, D.C. The provisions of this Section if

adopted would seem to preclude Open Top from making use of its tour buses for these promotional and marketing activities.

If we correctly understand the provisions of Section 609 of the proposed regulations, Open Top first objects to these proposed provisions for reasons related to violation of the First Amendment rights of Open Top and others who travel in and through the District with promotional and marketing materials affixed to the exterior of vehicles that do not relate to the "*bona fide* business of the owner" of the motor vehicle. I append to this letter a memorandum of this firm regarding this subject, which lays out our First Amendment concerns regarding this proposed section of these draft regulations. It should be noted that Open Top has not been advised that the National Park Service has objected to Open Top's similar operations at the federal core tour bus routes administered by the Park Service.

Second, we believe that these provisions if adopted would be practically unenforceable. The Department of Consumer and Regulatory Affairs (DCRA) from our knowledge, does not have the staff or the fiscal resources to enforce these provisions, or, if enforced, the ability to do so in a manner that could be deemed consistent and regular. This comment is made with no disrespect to DCRA, but fully recognizing its resources and its principal purpose to look to the health and safety of the District residents within private property.

We also do not see visual clutter concerns to which these provisions would seem to be aimed to rise to the level of a health and safety concerns of the District of Columbia. And we should not expect that MPD would be in any better position to enforce these provisions. One need only look at the enforcement of handheld cell phone usage and text messaging by drivers operating motor vehicles within the District.

Beyond the local purveyors such as Open Top who traverse the District's roadways daily, there are others coming into the District from outside with promotional materials displayed on the exterior of their vehicles clearly unrelated to the operator of the vehicle. These restrictions create other Constitutional issues as well as practical issues of enforcement related to these operators of motor vehicles. As an example, how does this provisions apply to a tractor trailer cab of one company hauling a trailer of another company? Another obvious example of concern would be for the taxi cab companies that post advertisements of others as part of signage packages on their vehicles.

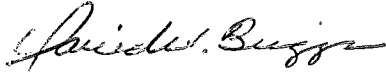
Finally reserving advertising rights unto WMATA and the DC Circulator creates a public monopoly without in our opinion legitimate, or rationale basis for doing so.

We strongly urge the Department to delete the provisions of Section 609 of the proposed Sign Regulations, or certainly recast these provisions in way that are constitutionally supportable and do not infringe upon the rights of Open Top and others who are legitimately exercising their rights.

Ms. Alice Kelly  
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Sincerely yours,

HOLLAND & KNIGHT LLP

A handwritten signature in cursive script, appearing to read "David W. Briggs".

David W. Briggs

Encl.

cc: Nicholas Majett, Director,  
District of Columbia Department of Consumer and Regulatory Affairs

Ruth Best, National Marketing & Operations Manager  
Open Top Sightseeing of Washington, D.C., LLC

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