



DMV Food Truck Association  
dmvfta.org  
202-596-5236

April 3, 2018

Ms. Melinda Bolling  
Director, DCRA  
1100 4th Street, SW, Washington, DC 20024

Dear Director Bolling,

We are writing to express our opposition to DCRA's recent and surprise change to the regulations governing the eligibility for participation in the monthly Mobile Roadway Vehicle (MRV) lottery. For the reasons set forth below, we believe that the change is contrary to the public interest in that it discourages the growth of small business, directly and unreasonably discriminates against one class of small businesses in favor of another and causes real and quantifiable economic damage to the targeted small businesses. In addition, DCRA's approach is not the least restrictive means by which to ameliorate the harms that the change is supposedly designed to address. Finally, setting aside all these negative impacts, DCRA's implementation of the change without providing any notice to the public or opportunity for public comment violates the City's Administrative Procedure Act. We therefore ask that DCRA immediately desist from implementing the change until proper notice of the change is issued and the public and the parties directly impacted by the change are afforded the opportunity to comment.

**Background:**

The DMV Food Truck Association (DMVFTA) represents approximately 104 food truck businesses that operate in the DMV. Our members include single-truck businesses as well as over a dozen businesses that have grown over the years and own and operate two or more food trucks. In fact, several of our members have used the growth of their food truck business to expand into brick-and-mortar restaurants. We therefore have a keen interest in changes to regulations that impact our members.

On April 2, 2018, without notice to the public, DCRA changed its long-standing regulations governing eligibility for the monthly MRV lottery by which it assigns parking spaces in certain designated locations around the City. Specifically, businesses that own more than one MRV vehicle (food truck) who attempted to enter their trucks into the monthly MRV lottery as they have been doing since the inception of the City's new vending regulations over five years ago were surprised to learn that the system would not accept entries for more than one truck.

When some of those businesses called DCRA to find out why this was happening, they were informed that the regulations for eligibility to participate in the lottery were changed this month to prevent multi-truck businesses from entering more than one truck in the lottery. When the businesses asked DCRA why this change was being made, some were given no explanation at all and others were told that it was intended to increase the number of lottery spaces available to single truck businesses and to treat all businesses the same for purposes of the MRV lottery. When asked why the trucks didn't receive any notice that this change to the regulations was being made, DCRA didn't have an answer.

Needless to say, the multi-truck business owners were shocked that such a significant change impacting their businesses would be made in such a cavalier way. Unfortunately, the leadership of the DMVFTA was not quite as shocked. We had been informed approximately two weeks ago that DCRA was intending to make this change. When we first heard of DCRA's idea, we immediately objected to it on multiple grounds, which we describe below. We also sought out and received the opportunity to discuss the issue with Vincent Parker who appeared to be leading the charge for DCRA. During that discussion last week, we reiterated our strong concerns and proposed other solutions to the problems that the change apparently was attempting to address, but we were told that the change was being made anyway. We were also told that the change was part of a "pilot project" and that it may not be permanent.

The suddenness by which the change was made, however, caught us off guard for two reasons. First, we have been participating for several months as part of the City's Food Truck Work Group which was attempting to address certain on-street vending and parking issues and, during the course of those meetings, we never once heard mention of this idea to change the MRV lottery eligibility rules in such a dramatic way.

Second, the concerns described to us by DCRA and that it was attempting to address with this rule change were concerns that have existed for many years. We were somewhat dumbfounded to hear that all of a sudden, without notice, and right at the beginning of the prime vending season when most vendors are finally able to begin making money, DCRA was going to eliminate the long-standing right of multi-truck businesses to continue entering all of their trucks in the MRV lottery, thereby greatly diminishing their ability to recover from the very difficult winter season.

When our members began calling us on April 2<sup>nd</sup>, we had no choice but to prepare this letter to express to you our strongest opposition to DCRA's recent change to the eligibility rule governing the monthly lottery and request that you place the change on hold until our concerns are addressed.

**Concerns:**

1. The change to the regulations discourages the growth of single-truck and multi-truck businesses.

The businesses of multi-truck owners, and virtually every food truck business licensed in the City, rely on the revenues generated by vending in the designated MRV locations each month. By definition, these are the most popular vending locations in the City. Not winning a good location in the MRV lottery can literally mean the difference between making money or losing money for the month, especially during the winter months.

Single truck businesses rely on revenue from vending in MRV locations to grow their businesses. For example, one of our members, Captain Cookie, started with one truck and used the MRV locations to grow to two and then three trucks. If all three trucks were not able to vend in the monthly MRV lottery, he states that he would not have had sufficient resources to open the brick-and-mortar shops that he now owns and operates along with his trucks. In fact, he indicates that as a result of DCRA's recent change limiting his business to one MRV lottery entry, his food truck operation will lose money. And Captain Cookie's experience is not unique. By removing the ability of multi-truck businesses to generate revenues from each of their trucks in MRV locations, they will lose money. Similarly, the prohibition against a business entering a second truck in the lottery handcuffs single-truck businesses by making it more difficult for them to expand their operations.

DCRA will argue that by limiting multi-truck owners to one lottery entry, there will be more MRV spaces available to single-truck owners and that will help those trucks grow. That argument, however, fails to recognize the concomitant price that the change imposes on those same businesses, namely the limit on their growth beyond one truck. Moreover, that argument also fails to recognize the obvious work-around that multi-truck operators will be forced to undertake if the change remains in effect, namely licensing their trucks as separate businesses. At that point, the current regulatory change will have been successful not in creating more vending spaces for more trucks but in forcing a business to go through a wasteful exercise that drastically increases the number of entities that DCRA's vending staff will have to track and manage, while reducing transparency and clarity into the structure and ownership of the trucks.

2. The change directly and unreasonably discriminates against one class of small businesses in favor of another and causes tangible economic damages.

What DCRA euphemistically wants to call a change to "improve efficiency" of the lottery program is, in reality, a discriminatory shift in policy to favor single-truck owners over multi-truck owners. Multi-truck owners are required to license each of their trucks in the same manner as single-truck owners. They pay the same permit, licensing and health department fees. Importantly, they pay for and receive an MRV site permit for each of their trucks. What DCRA's change is doing, however, is effectively making every MRV site permit beyond the first one less valuable than the same exact permit issued to single-truck owners. MRV site permits issued to multi-truck owners after the first such permit do not carry with them the same right to participate in the lucrative monthly MRV lottery program, yet the fee

paid for the permits are the same regardless of how many trucks one owns. We fail to understand how this natural result of the rule change is reasonable.

If DCRA wants to diminish the value to businesses of having more than one truck licensed in the City by revoking the right of those trucks to participate in the MRV lottery, the licensing fees associated with those additional trucks should be lower as well. This would help offset the loss of revenue that multi-truck owners are facing as a result of the rule change. As explained under item 4, below, if DCRA wants to change the rules now, particularly in a way that on its face discriminates against a particular category of vendor, that may be okay but it needs to do so in a manner that's consistent with Section 105 of the Administrative Procedure Act rather than pretend that this is a change designed to improve the efficiency of the lottery program and thereby conveniently avoid the required public notice and comment process.

Finally, it is a basic tenant of administrative law and important that business owners be given a consistent and fair set of rules under which to operate -- rules that are not subject to change by random decisions of administrators. DCRA can't simply change the rules and say that it is conducting a pilot program to see how things turn out without first providing the opportunity for public notice and comment. Making such a change without the required notice costs the government nothing but imposes real costs in the form of losses and damages to businesses that have made investments in hard assets, employees, permits, and product to be able to operate based on a clear, fair, and objective reading of the regulations. When those rules change, particularly without notice, the damages are immediate and consequential.

3. There are other less problematic and more effective solutions available to address the problems identified by DCRA

The change as described to us by DCRA was being made for three reasons: First, it primarily is intended stop certain multi-truck owners from gaming the lottery system and unfairly occupying a disproportionate number of the MRV spaces. Second, the change was viewed as being fairer to single-truck owners and would result in each business being assigned more locations each month. Third, it was intended to eliminate some of the spaces that go unused each month. We address each of these goals below and explain why there are other, more effective and less problematic solutions to these concerns. Tellingly, however, it is instructive to note one thing that DCRA never mentioned to us as a reason for making the change: improving efficiency.

Rather than imposing a discriminatory and ineffective regulation that restricts growth in the false name of fairness, why doesn't DCRA do something to address the real problem here as they have explained it to us -- a handful of bad actors who are using multiple truck ownership as a means to game the lottery system? We stand with DCRA in its desire to prevent such businesses from using trucks that never see the light of day as lottery tickets, thereby increasing the number of MRV spaces won, and then abusing valuable DCRA resources to conduct multiple internal "trades" to consolidate their winnings under one or two trucks, leaving some of the spaces they win vacant. However, the recently implemented change is not the answer. It punishes those "good" actors that own and operate multiple vending vehicles and who follow the rules. These truck owners value their brands and their employees' time. They do not

participate in the many parking schemes and other violations that the Food Truck Work Group is focused on. Yet here they are, caught-up in a misguided attempt to cure a problem that they neither created nor had any role in perpetuating.

There are many better and more effective solutions to achieve the goal of preventing gaming of the lottery in this manner. First, DCRA could restrict multi-truck businesses from trading their winning locations. This would not only help prevent the gaming that occurs but also greatly reduce the administrative burden placed on DCRA by having to review and approve the large number of trades requested by multi-truck businesses. This change would achieve the same administrative efficiency associated with eliminating the apparently large number of internal trades among certain multi-truck businesses while avoiding the unfairness and discrimination associated with prohibiting multi-truck owners from entering more than one truck in the lottery. And making this change truly would be a change to “improve efficiency” of the lottery system. Inasmuch as there is no existing rule or regulation governing trades, DCRA could make this change without the need for a notice and comment proceeding.

Combining this approach with better enforcement of the existing DMV regulations (which require VIN numbers on every vehicle and license plates that match the VIN numbers) and existing vending regulations (which impose a fine of \$2000 for vending in an unauthorized location or having a MRV site permit that doesn’t correspond to the vehicle’s license plate and VIN number) would all but solve the problem identified by DCRA. The final loophole could be closed at the time of a vehicle safety or initial inspection where a tampered-with VIN number would be discovered. If the VIN number of a truck has been altered or tampered with on the vehicle to conceal that it does not match the license plate, the business should be ticketed, fined, and charged with the relevant and appropriate criminal counts.

For vending violations, DCRA could place an inspector at each MRV location as it used to do to confirm that each truck that is in the MRV is supposed to be there. If there is a truck in the MRV location from a business that won the MRV location but that doesn’t have an MRV site permit that matches the license plate and the VIN number of the truck, then under existing regulations, that truck is subject to a Class 1 violation. DCRA has made the somewhat silly argument in the past that they don’t know where to find a food truck’s VIN number but this problem is easily solved by simply knowing where to look or asking the truck manager to show the inspector the VIN number.

We have other ideas for curing the problems that DCRA has identified and would be happy to present them as well, assuming we and others are afforded the opportunity to do so in the context of the required rulemaking proceeding.

4. DCRA’s implementation of the change without providing notice to the public or opportunity for public comment violates the Administrative Procedure Act.

The lottery program, as described in the regulations, is intended to assign MRV vehicles to spaces. Specifically, Section 24-540 of the regulations comprehensively governs the “Assignment of Mobile Roadway Vending Locations.” All of the regulations contained therein governing the assignment of MRV locations refer to “MRV vehicle” not to “vendor” or “business.” This makes it clear that MRV

spaces were intended to be assigned on a per-vehicle basis, not on a per-vendor or per-business basis. Nowhere in the regulations is there a mention of assigning spaces by vendor or business. There can be no better evidence that spaces were intended to be assigned on a per-vehicle rather than a per-business basis than the fact that since the inception of the lottery system, spaces have been assigned by MRV vehicle. To now claim that certain trucks are no longer eligible to be included in the lottery is a major change in the regulations that, again, we submit requires proper notice and opportunity to comment.

DCRA will argue that Section 540.2 allows it to make the change it made to restrict multi-truck owners to entering only one vehicle per month in the lottery. Specifically, Section 540.2 states that “[t]he DCRA Director shall establish the format of the MRV location permit lottery program and may modify the format as necessary to improve efficiency or to incorporate technological advancements.” When we questioned DCRA’s authority to impose this rule change without regard to the requirements of the Administrative Procedure Act, DCRA suggested that changing the eligibility rules is a change to the format of the lottery program designed to “improve efficiency.” We respectfully disagree.

As noted above, Section 24-540 of the regulations comprehensively regulates the assignment of MRV locations. Despite the provisions of Section 540.2 which allow the DCRA Director to modify the format of the lottery to improve efficiency, DCRA is not free to modify anything it wants in the name of “improving efficiency” without regard to the requirements of the Administrative Procedure Act. For example, Section 540.3 states that “the lottery shall be conducted monthly with MRV locations allocated to MRV vehicles” by the days of the week. Does this mean that the DCRA Director could decide to conduct the lottery every quarter if it thought it would “improve efficiency?” Perhaps, but it would certainly require a notice and comment rulemaking proceeding because it would require a change to the wording of Section 540.3.

Likewise, Section 540.6 provides that prior to the lottery, MRV vendors shall have the option of listing MRV locations “in order of their preference.” What if DCRA decided that it would “improve efficiency” if vendors were not allowed to list their preferred locations “in order of their preference” but instead spaces were simply assigned on a completely random basis? After all, it is the listing of preferences that makes the current “snake” methodology so complicated and a random selection process like the one used for the sidewalk vendor lottery would be significantly more efficient. Perhaps DCRA could make such a change but as it would require amending the language of Section 540.6 it would certainly require a rulemaking proceeding.

More to the point, we submit that DCRA is essentially attempting to amend Section 540.5 of the rules without regard to the requirements of the Administrative Procedure Act. Specifically, Section 540.5 limits eligibility to participate in the lottery as follows: “There shall be only one (1) MRV location permit lottery entry per MRV vehicle.” (emphasis added). Under the guise of “improving efficiency,” DCRA is now attempting to amend this participation rule to read essentially as follows: “There shall be only one (1) MRV location permit lottery entry per business.” Section 540.5 can’t be amended in this way absent a proper notice and comment proceeding. To suggest otherwise is blatantly contrary to Section 105(a) of the Administrative Procedure Act, which states in part that:

“ . . . each independent agency shall, prior to the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register . . . notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice.” (emphasis added).

The bottom line is that if DCRA wants to amend Section 540.5 to change the eligibility rule for participation in the lottery to say “per business” instead of “per MRV vehicle,” it may do so but only after a proper notice and comment proceeding as required under the Administrative Procedure Act. To claim that it is amending the rule under its authority to “improve efficiency” is simply an after-the-fact attempt to cover what is an arbitrary and capricious action taken without proper public notice.

**Conclusion:**

For the foregoing reasons, we respectfully ask that DCRA immediately desist from implementing the rule change that prohibits multi-truck businesses from entering all of their vehicles in the MRV lottery until proper notice of the change is issued and the public and the parties directly impacted by the change are afforded the opportunity to comment. If you agree to place the change on hold, we would welcome the opportunity to meet to discuss the concerns and ideas we’ve just described and others. The local food truck industry is growing and will continue to grow and contribute to the vitality of the City but only if the government allows the thriving individual businesses that makeup the industry to continue to thrive through common-sense and well-thought-out regulations which, unfortunately, the recent change does not represent.

Sincerely,

*Samuel Whitfield*

Sam Whitfield  
Chairman,  
DMV Food Truck Association