



MEMORANDUM

TO: The Hon. Ray H. LaHood
FROM: DLA Piper LLP (US)
DATE: December 4, 2017
RE: WMATA Reform Board Plan

This memorandum concerns the Board of Directors for the Washington Area Metropolitan Transit Authority (“WMATA”). Maryland, Virginia, and the District of Columbia are each signatories to the WMATA Compact. Established in 1967 with the consent of Congress, “WMATA was created by the Signatories to plan, develop, finance and caused to be operated a comprehensive mass transit system for the Washington Metropolitan Area.”¹ Currently, WMATA is governed by a 16-member Board of Directors (the “WMATA Board”), with four appointees each (two voting members and two non-voting members) from Maryland, Virginia, the District of Columbia, and the federal government.²

¹ *Metro Compact Annotated, as amended through August 2009*, Foreword, WMATA, https://www.wmata.com/about/board/upload/Compact_Annotated_2009_final.pdf (last visited Dec. 3, 2017).

² Md. Code Ann., State Gov’t § 10-204(5)(a); Va. Code Ann. § 33.2-3100(5)(a); D.C. Code Ann. § 9-1107.01(5)(a).

The WMATA signatories are considering a plan to temporarily reduce the number of directors on the WMATA Board from 16 to five. Under this “Reform Board” plan, Maryland, Virginia, the District of Columbia, and the federal government would each appoint one director; these four appointees would then unanimously select a fifth director to chair the Reform Board. This Reform Board plan would maintain the Compact’s requirements for a quorum³ and would not require an amendment to the Compact.

You have asked for a summary of the legal framework for the Reform Board plan under the laws of Maryland, Virginia, and the District of Columbia. That summary follows. In short, the authorities with the power to appoint directors to the WMATA Board would install a Reform Board in two steps: First, the appointing authorities for Maryland, Virginia, the District of Columbia, and the federal government would suspend the appointments of the 16 current directors of the WMATA Board. Then, to form a five-member Reform Board, the Governor of Maryland, the Governor of Virginia, the Mayor and Council of the District of Columbia, and the U.S. Secretary of Transportation would each choose one new director. Once selected by these four new directors, the chair would join the Reform Board by an appointment from the authority for the jurisdiction where the chair resides.⁴

³ There is a quorum of the WMATA Board when there are four directors with at least one director from Maryland, Virginia, and the District of Columbia. Any majority voting in favor of a Board action must include at least one director from Maryland, Virginia, and the District of Columbia. Md. Code Ann., Transp. § 10-204(8)(a); Va. Code Ann. § 33.2-3100(8)(a); D.C. Code Ann. § 9-1107.01(8)(a).

⁴ Depending on where the chair resides, he or she would be appointed by the Governor of Maryland, the Governor of Virginia, or the Mayor and Council of the District of Columbia.

I. Overview: Authorities with Power to Appoint Directors to the WMATA Board

The WMATA Compact vests one authority for each signatory with the power to appoint directors on the WMATA Board. For the District of Columbia, the Council of the District of Columbia has the power to select the District of Columbia's four directors.⁵ For the federal government, the U.S. Secretary of Transportation has the appointment authority.⁶

For Maryland, the WMATA Compact names the Washington Suburban Transit Commission (the "WSTC") as the appointing authority.⁷ In practice, however, because of the laws governing the WSTC, the Governor of Maryland has the ultimate authority to select Maryland's two voting directors, while the Montgomery County Executive and the Prince George's County Executive each appoint a non-voting director. Under parallel provisions of the Montgomery County Code and the Prince George's County Code, the Governor of Maryland, the County Executive of Montgomery County, and the County Executive of Prince George's County each appoint two commissioners to the WSTC.⁸ "Each [WSTC] commissioner serves at the pleasure of the respective appointing official."⁹ The Governor has the power to appoint Maryland's voting directors to the

⁵ D.C. Code Ann. § 9-1107.1(5). By tradition, however, the Council has split the appointments with the Mayor.

⁶ Md. Code Ann., Transp. § 10-204(8)(a); Va. Code Ann. § 33.2-3100(5)(a); D.C. Code Ann. § 9-1107.01(5)(a).

⁷ Md. Code Ann., Transp. § 10-204(5)(a).

⁸ Montgomery County Code § 87-5; Prince George's County Code, Wash. Suburban Transit Commission § 5. The Maryland Secretary of Transportation acts as the seventh commissioner on the WSTC.

⁹ Montgomery County Code § 87-5(a)(9); Prince George's County Code, Wash. Suburban Transit Commission § 5(a)(9).

WMATA Board because, under the Montgomery County Code and the Prince William County Code, the Governor's appointees to the WSTC "shall serve as the [WSTC's] appointees to be principal members of the [WMATA] Board of Directors."¹⁰

For Virginia, while the WMATA Compact vests the Northern Virginia Transportation Commission (the "NVTC") with the appointment power for Virginia's directors on the WMATA Board,¹¹ Virginia's WMATA Board appointments are actually split between the NVTC and the Virginia Secretary of Transportation. Under the Code of Virginia, the Virginia Secretary of Transportation or his designee is automatically a commissioner on the NVTC;¹² he or she is also automatically one of the NVTC's two appointments to the WMATA Board.¹³ So the Virginia Secretary of Transportation (who reports to the Governor of Virginia) appoints one of Virginia's voting directors to the WMATA Board while the NVTC appoints Virginia's other voting WMATA director and the two non-voting directors.

II. Step One: Suspend the Appointments of the 16 Current WMATA Directors

The first step to installing a Reform Board would be for the authorities with appointment power for Maryland, Virginia, the District of Columbia, and the federal government to simultaneously suspend the appointments of the current WMATA

¹⁰ Montgomery County Code § 87-5(a)(4)(iii); Prince George's County Code, Wash. Suburban Transit Commission § 5(a)(4)(iii).

¹¹ Va. Code Ann. § 33.2-3100(5)(a).

¹² Va. Code Ann. § 33.2-1907(B).

¹³ *Id.*

directors.¹⁴ To avoid any confusion over the powers of non-voting directors when there are no voting directors on the Board, the appointing authorities should suspend both voting and non-voting directors.

To that end, the Mayor and Council of the District of Columbia Council would suspend the four directors from the District of Columbia and the U.S. Secretary of Transportation would suspend the four federally appointed directors. For Maryland, the Governor would suspend the appointments of Maryland's two voting directors by suspending their appointment to both the WSTC and the WMATA Board; the Montgomery County Executive and the Prince George's County Executive would each do the same for Maryland's two non-voting directors. For Virginia, the Virginia Secretary of Transportation would suspend his chosen WMATA director by suspending his or her appointment to the NVTC and the WMATA Board; the NVTC would suspend Virginia's remaining voting director and its two non-voting directors.

These suspensions, if made simultaneously by all appointing authorities, would bring the number of WMATA Board members from 16 to zero. At that point, the way would be clear for a Reform Board.

III. Step Two: Appoint Five New Directors to Form the Reform Board

A Reform Board would be comprised of five directors—one greater than the number required for a quorum under the WMATA Compact.¹⁵ Four of the Reform Board

¹⁴ In the absence of a codified procedure for suspending a director's appointment to the WMATA Board, the suspension would be effectuated by a letter from the appointing authority informing the director that his or her appointment has been suspended.

¹⁵ Md. Code Ann., Transp. § 10-204(8)(a); Va. Code Ann. § 33.2-3100(8)(a); D.C. Code Ann. § 9-1107.01(8)(a).

appointments would come from appointing authorities for Maryland, Virginia, the District of Columbia, and the federal government, respectively. These four directors would unanimously select a fifth director to chair the Reform Board. The appointing authority in either Maryland, Virginia, or the District of Columbia would then formally appoint the chair, depending on where he or she resided.

For the District of Columbia, the Council (and, by tradition, the Mayor) has authority to appoint directors to the WMATA Board,¹⁶ and so the Mayor and Council would name one District resident to be their appointee to the Reform Board. For the federal government, the U.S. Secretary of Transportation would appoint a Reform Board director who is a resident of either Maryland, Virginia, or the District of Columbia.¹⁷

For Maryland, the Governor has the authority to select Maryland's appointee to the Reform Board because under the statutes governing the WSTC, the Governor's appointees to the WSTC are Maryland's voting directors on the WMATA Board.¹⁸ Accordingly, the Governor would fill one of his two seats on the WSTC, and that appointee would join the Reform Board.¹⁹

Similarly, in Virginia, the power to appoint Virginia's representative on the Reform Board belongs to the Virginia Secretary of Transportation and, by extension, to the

¹⁶ See *supra* n. 5.

¹⁷ Md. Code Ann., Transp. § 10-204(8)(a); Va. Code Ann. § 33.2-3100(5)(a); D.C. Code Ann. § 9-1107.01(5)(a).

¹⁸ "The Governor's appointees shall serve as the [WSTC's] appointees to be principal members of the [WMATA] Board of Directors." Montgomery County Code § 87-5(a)(4)(iii); Prince George's County Code, Wash. Suburban Transit Commission § 5(a)(4)(iii).

¹⁹ Maryland's appointee to the Reform Board cannot be an elected official. See Montgomery County Code § 87-5; Prince George's County Code, Wash. Suburban Transit Commission § 5.

Governor. Under the Code of Virginia, the Virginia Secretary of Transportation or his designee is automatically a voting member on the WMATA Board.²⁰ So, to make an appointment to the Reform Board, the Governor—through the Virginia Secretary of Transportation—would name a new commissioner to the NVTC, who would then become Virginia’s director on the WMATA Reform Board. Finally, once the four Reform Board directors have chosen a chair, that chair would be formally installed on the Reform Board by the appointing authority for the jurisdiction where he or she resides: either the Governor of Maryland, the Governor of Virginia,²¹ or the Mayor and Council of the District of Columbia.

In addition to satisfying residency requirements for their respective jurisdictions, the appointees to the Reform Board would have to meet the minimum requirements for a WMATA director under parallel provisions of the Transportation Code of Maryland, the Code of Virginia, and the Code of the District of Columbia. Namely, he or she:

- Must reside in an area served by WMATA;
- Cannot have been a WMATA employee within the last year;
- Must be a regular patron of WMATA;
- Must have experience in a relevant area of expertise.²²

²⁰ Va. Code Ann. § 33.2-1907(B).

²¹ If the chair were a Virginia resident, the appointment would be made through the Northern Virginia Transportation Commission, as it has the formal authority to appoint Virginia’s second voting director.

²² These areas include: transit planning, transportation planning, or land use planning; transit management, transportation management, or other public sector management; engineering; finance; public safety; homeland security; human resources; or law. Alternatively, a WMATA Director can have “[k]nowledge of the region’s transportation issues derived from working on regional transportation issues.”

IV. Conclusion

Installing a Reform Board would require several different federal, state, and local government officials working together to jointly execute a series of coordinated actions with unity of purpose. If properly executed, however, this plan would make it possible to replace the current 16-member WMATA Board of Directors with a smaller, five-member Reform Board without amending the WMATA Compact.

Va. Code Ann. § 33.2-1907(B); D.C. Code Ann. § 9-1108.11(a)(2); Montgomery County Code § 87-5(a)(5)(iii); Prince George's County Code, Wash. Suburban Transit Commission § 5(a)(5)(iii).