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Message from the Chair

Greetings Air & Space Law Committee Members!

As we conclude another bar year, I first and foremost want to thank each and every one of you for being a part of this Committee, and for your devotion to the wonderful and enriching practice of aviation and space law. Since we began the 2016-17 bar year, our committee has grown by 143%, which is the largest committee growth experienced by any YLD committee this year! We couldn’t have done it without your help, and we are excited for what the new year will bring.

Secondly, we wanted to update all of you on our hugely successful teleconference, “Breaking through the Clouds – Tips and Tricks for New Lawyers Looking to Start a Career in Aviation and Space Law” held on July 6, 2016. We had 35 people sign up and 19 people call in, making it one of the most successful teleconferences the YLD has had all year! Many interesting and important topics were discussed during the teleconference, including the importance of networking for attorneys looking to break into aviation and space law, and how prospective aviation and space attorneys can increase their chances of landing a job in the industry by being willing to relocate and take jobs in breakaway fields of aviation and space law, such as aviation finance and aviation litigation. For any of you who were unable to join us for the teleconference, a recording will available online shortly.

I also wanted to discuss the development of groundbreaking aviation regulatory policies that have come out since our last quarterly newsletter. Once being the release of the FAA’s new Unmanned Aerial System (UAS) rule, and the FAA Extension, Safety And Security Act of 2016 (H.B. 636) which reauthorizes the FAA until September 30, 2017 and puts in place many important regulatory reforms for the industry, including changes in airport security requirements, additional UAS registration rules and supplementary consumer protection measures. Anyone interested should check out the UAS blog produced by Pillsbury, Winthrop, Pittman & Shaw here: Pillsbury UAS Law Blog and the U.S. regulatory update put out by Eckert Seamans here: Eckert Seamans U.S. Regulatory Updates.

Lastly, I want to introduce our new Chair of the Air & Space Law Committee for 2016-17, Philippine Dumoulin. Philippine has worked with me as Co-Chair this year and I am very confident that she is ready to lead this Committee to even bigger and brighter things. As we’ve stated in previous updates, please be on the lookout for Young Aviation Lawyer Meet and Greets to be held in Washington D.C., and we hope in other major cities soon.

Like I said, it has been a pleasure to serve you all during this bar year, and please do not ever hesitate to ever reach out to me if you have a question about our Committee, aviation and space law in general or any other issue I can help you with.

Thank you so much for the opportunity.

Cheers,
Dayan Hochman
2015-16 Chair
ABA YLD Air & Space Law Committee
Dayan.hochman@gmail.com
Kenneth Quinn is a Partner and the head of the Aviation, Aerospace & Transportation group at Pillsbury Winthrop Shaw Pittman LLP in Washington, DC. The latest Chambers USA 2016 rankings once again put Kenneth Quinn “Tier 1” among aviation lawyers and listed Pillsbury’s international aviation practice as “Tier 1.” Quinn is a partner and leader of Pillsbury’s aviation, aerospace, and transportation practice, and leads its Unmanned Aircraft Systems focus team. He has served on the Governing Committee and as General Counsel and Secretary of the Flight Safety Foundation since 2004. He was Chief Counsel of the Federal Aviation Administration from 1991-93 and served as Counselor to the Secretary of Transportation from 1989-91. He has served on the Board of the International Aviation Club of Washington, DC since 2008 and as its President in 2015. He has served in several capacities for the International Civil Aviation Organization (ICAO), including as Vice Chair of its Safety Information Protection Task Force.

In 2014, he was appointed as an Arbitrator to the Experts Committee of the Shanghai International Aviation Arbitration Court. He has served on the Governing Committee of the ABA Forum on Air and Space Law since 1994, including as Chair in 1996-98, and as Editor-in-Chief of its legal journal, The Air & Space Lawyer, from 1997-2010. He was named a Fellow of the Royal Aeronautical Society in 2006, and has served as counsel on the Board of its Washington, DC Chapter since 2008. He is on the Board of the International Aviation Law Institute at DePaul University, and on the Editorial Board of the McGill University Annals of Air & Space Law.

Aviation and Space Law Upcoming Events:
Aviation Law Events

1. AUVSI – Automated Vehicles Symposium 2016 – July 18-22 (San Francisco, CA)
2. ALTA Aviation Law Americas – Sept. 7-9 (Mexico City, Mexico)
3. ABA Air & Space Law Annual Meeting – Sept. 15-16 (Atlanta, GA)
4. International Bar Association (IBA) Annual Conference – Sept. 18-23 (Washington, DC), including an aviation panel
5. ICAO 39th Assembly – Sept. 27 – 7 Oct. (Montreal, CA)
6. ICAO World Aviation Forum – Sept. 27 (Montreal, CA)
7. RAeS UAS Program with Gen. Marke “Hoot” Gibson (FAA) – Sept. 22 (Washington, DC – Pillsbury)
8. IAWA Conference – Oct. 19-21 (Montreal, CA)
11. § NBAA Business Aircraft Finance, Registration & Legal Conference – March 5-7, 2017 (Bonita Springs, FL)
12. 17th Annual Asia Pacific Air Finance Conference – Nov. 2-3 (Hong Kong)
13. ABA Aviation Finance Conference – Dec. 6 (New York, NY)

Negotiated Rulemaking in the Context of Part 382: a Worthy Alternative to Traditional Rulemaking or an Impossible Dream?
By: Drew M. Derco and Dayan M. Hochman

Changing the regulatory landscape to address new issues, policies, or business practices can be a lengthy and challenging process. For highly regulated industries such as aviation, the process is not only challenging, but sometimes contentious and extremely complex. Consequently, over the past 20 years, regulators have considered alternative approaches to traditional notice–and-comment rulemaking as a way to foster consensus among stakeholders and streamline the process of developing new laws and regulations. One such alternative approach is negotiated rulemaking; a consensus-based process through which an agency develops a proposed rule by using a neutral facilitator and a balanced negotiating committee composed of representatives of all interests that the rule will affect, including the rulemaking agency itself.

This article summarizes the history of negotiated rulemaking in the context of the U.S. Department of Transportation (DOT) regulations concerning the non-discriminatory transportation of passengers with disabilities, summarizes DOT’s recent proposal to engage in negotiated rulemaking to develop additional regulations governing the transport of such passengers, and identifies some of the challenges a negotiated rulemaking on this topic may face. It then examines the recently published Convener’s Report on DOT’s proposal and, finally, analyzes the potential outcome of DOT’s attempt at using the negotiated rulemaking process in the context of changes to 14 C.F.R. Part 382.

Negotiated Rulemaking

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The negotiated rulemaking process is generally appropriate when an agency determines that: (1) a rulemaking committee can adequately represent all interests that will be significantly affected by a proposed rule; and (2) it is feasible and appropriate to establish a committee. As part of the negotiated rulemaking process, an agency may use the services of a convener to assist by publishing a preliminary report identifying stakeholders who will be significantly affected by a proposed rule, discussing issues of concern, and ascertaining whether establishment of a negotiated rulemaking committee is feasible and appropriate for the rulemaking under consideration.

As a threshold matter, an agency may use negotiated rulemaking if it is in the public interest, which is evaluated on a case-by-case basis by consideration of a number of factors. While DOT has used negotiated rulemaking before, it generally has relied on traditional notice-and-comment rulemaking. On December 7, 2015, DOT announced its intent to explore the feasibility of conducting a negotiated rulemaking concerning accommodations for air travelers with disabilities. DOT selected Richard W. Parker, acting as Convener, to assist DOT with evaluating the feasibility of conducting a negotiated rulemaking to achieve consensus on the following six topics:

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1 5 U.S.C. § 565(a)(1) (1996) (emphasis added). If, however, the selected committee does not reach a consensus on the proposed rule, it may transmit a report specifying areas in which consensus could not be reached. Id. § 566(f).
2 Id. § 563(b).
3 Id § 563. Such factors include: (1) the need for rule; (2) if there are a limited number of identifiable interests that will be significantly affected by the rule; (3) if a reasonable likelihood exists that the rulemaking committee can reach a consensus within a fixed period of time; and (4) if the process will not unreasonably delay notice of the proposed rulemaking and issuance of the final rule.
5 Richard W. Parker is a Professor of Law at the University of Connecticut School of Law and the Policy Director for the Center for Energy and Environment Law in Hartford, CT. He teaches courses in Administrative Law, Regulation, Environmental Law, the Legislative Process and trade and the Environment. Mr. Parker previously served as Facilitator for a successful DOT negotiated rulemaking proceeding concerning issues for the Federal Motor Carrier Safety Administration, and in assisting the U.S. Department of Energy to develop new energy efficiency standards. He also has worked as a consultant to the European Commission as part of the Trans-Atlantic Trade and Investment Partnership, and as an expert advisor on the U.S. Administrative Law Panel on Rulemaking Reform.
1. Whether to require the availability of the same in-flight entertainment (IFE) options for passengers with disabilities as are already available to able-bodied passengers;

2. Whether to require carriers to provide greater access to in-flight medical oxygen for passengers with a demonstrable need, consistent with federal safety and security requirements;

3. The determination of an appropriate definition of service animal in the specific context of transportation by air and the consideration of safeguards necessary to reduce the likelihood that passengers travelling with pets may falsely claim that their pets are emotional support service animals;

4. The feasibility of requiring accessible lavatories on new single-aisle aircraft;

5. Whether premium economy should be treated as a separate class of service from standard economy given that airlines are currently required to provide seating accommodations to passengers with disabilities within the same class of service; and

6. Whether to require airlines to report annually to DOT the number of requests for disability assistance received and the time period within which wheelchair assistance is provided to passengers with disabilities.⁸

The Convener’s Report

On February 8, 2016, Mr. Parker, as part of the initial evaluation process, released his Convener Report analyzing the potential to achieve consensus on the six proposed issues utilizing the negotiated rulemaking process,⁹ and the feasibility of developing new rules related to air transportation of passengers with disabilities using negotiated rulemaking. His report analyzed each of the six topics, and examined

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⁹ Richard W. Parker, “Report Regarding the Feasibility of a Negotiated Rulemaking on Six Issues Involving Air Carrier Accommodations for Air Travelers with Disabilities,” U.S. Dept. of Transportation Office of Secretary of Transportation (Feb. 8, 2016) (Convener Report) at 18.
how negotiated rulemaking could be beneficial or detrimental to the process of developing new regulations.

Challenges in Using Negotiated Rulemaking under Part 382

As noted in Mr. Parker’s report, DOT’s proposal to use negotiated rulemaking raises important questions and faces numerous challenges. By far the most significant challenge is the potential inability of stakeholders to achieve consensus on one or more of the proposed issues. ¹⁰ Prior to publishing his report, Mr. Parker convened a preliminary committee of 45 stakeholders representing DOT, domestic airlines, and other interest groups to acknowledge and understand the various parties’ views on industry-related regulatory activities. Despite possible challenges raised by group dynamics between industry stakeholders and DOT agency culture, and whether such interactions would allow for productive negotiations in the Part 382 context, Mr. Parker concluded that the prospects for reaching consensus depended heavily upon the specifics of each issue.

Although a vast majority of stakeholders interviewed indicated a general willingness to participate in the negotiated rulemaking process,¹¹ Mr. Parker ultimately recommended the establishment of individual Working Groups to discuss and independently evaluate the potential for consensus on each issue due to the “extraordinary heterogeneity” of the matters involved.¹² The variety of issues considered by the Committee also included general legal challenges beyond the scope of the immediate rule, such as the airlines’ concerns with DOT’s potential jurisdictional overreach in attempting to regulate IFE technology utilized in a variety of contexts beyond aviation. Mr. Parker concluded that such issues were

¹⁰ When DOT used negotiated rulemaking for the original Part 382 rulemaking, it failed to produce a stakeholder consensus. DOT’s decision to defer final action in 1990 was based largely on the inability of the committee convened to reach consensus using the negotiated rulemaking process. Julia R. Beechinor, “Negotiated Rulemaking: A Study of State Agency Use and Public Administrators’ Opinions,” Southwest Texas State University (1998) at 30-31 (citing 55 Fed. Reg. 12341 (Apr. 3, 1990)).
¹¹ Convener Report at 2.
¹² Id.
likely to pose challenges due to the likely unwillingness of industry stakeholders to accept regulation from DOT given these limitations.

**Issues Where Consensus May be Achievable**

Mr. Parker recommended the use of negotiated rulemaking to consider three issues on which he believed participants could reach a consensus: 1) addressing the appropriate definition of a service animal; 2) safeguards against passengers falsely claiming pets traveling with them are service animals; and 3) appropriate ways in which carriers may attempt to reduce passenger abuse of wheelchair service.

Mr. Parker determined that the service animal definition issue would be a suitable topic for the negotiated rulemaking process because DOT and industry stakeholders appeared to be in agreement as to the necessity and justification for new regulations on the issue. Mr. Parker attributed this potential for consensus primarily to the industry’s willingness to adopt a new standard in light of Department of Justice precedent under the Americans with Disabilities Act (ADA) and DOT precedent under the Air Carrier Access Act (ACAA). Although Mr. Parker observed general dissatisfaction with the status quo and the potential for abuse created by the current ACAA standard, he noted that some participants were not willing to abandon the ACAA approach because it is specifically tailored to the air transportation environment. Therefore, in Mr. Parker’s opinion, the negotiated rulemaking process would be ideal in this context because it would provide regulators and stakeholders a platform by which they could collaborate to construct a rule combining the positive attributes of the ADA standard (which is unanimously viewed as offering superior guidance), but suitably tailored to the aviation context.

13 The ADA defines a service animal as: “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by a service animal must be directly related to the individual’s disability.” 28 C.F.R. § 36.104 (1990). The ACAA, meanwhile, defines a service animal as: “any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. If the animal meets this definition, it is considered a service animal regardless of whether it has been licensed or certified by a state or local government.” 49 U.S.C. § 41705 (1986).

14 See Convener Report, supra note 9 at 5.
Issues Where Consensus May Be Difficult to Achieve

Mr. Parker found that other topics might be more challenging to address. Regarding IFE, Mr. Parker believed that industry representatives may argue that requiring installation of accessible IFE could fall outside the scope of DOT’s jurisdiction to regulate air transportation, thereby potentially rendering the issue too complicated or contentious for resolution via negotiated rulemaking.\(^{15}\) The Convener’s Report also identified potential challenges as to the necessity of a rule concerning IFE by suggesting carrier adoption of a “bring your own device” policy that would offer hearing- or vision-impaired passengers the option to stream their own content using in-flight wi-fi services in whatever captioned or video-described format necessary – offering a practical solution to the problem without the need for government intervention.\(^{16}\) However, Mr. Parker also observed that as long as carriers offer and charge passengers for IFE services, either separately or as part of the ticket price, such practices remain discriminatory as long as passengers with disabilities remain unable to use carrier-supplied IFE until complete accessibility is achieved.\(^{17}\)

Similarly, Mr. Parker observed that those participating in the negotiated rulemaking process may also have trouble reaching a consensus on increasing passenger access to carrier-supplied in-flight medical oxygen.\(^{18}\) Under the current regulatory framework, carriers are not required to provide in-flight medical oxygen to passengers with disabilities, and many – especially foreign carriers – choose not to offer this service due to burdensome logistical issues associated with long-haul operations. Furthermore, this issue could face opposition related to deregulation, conflict with foreign laws, and concerns over the extraterritorial application of U.S. law to foreign air carrier operations.

\(^{15}\) Id. at 6.
\(^{16}\) Id. at 6-7.
\(^{17}\) Id. at 7.
\(^{18}\) Id. at 18.
Of all topics considered, Mr. Parker found that installation of accessible restrooms on single-aisle aircraft posed the biggest challenge to reaching consensus on a unified rule.\textsuperscript{19} In its current form, the rule does not specify precisely what is meant by “accessible,” but does state that an accessible lavatory must “permit a qualified individual with a disability to enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft’s onboard wheelchair.”\textsuperscript{20} This is the same standard currently required for wide-body aircraft in 14 C.F.R. Part 382. “Accessible” lavatories on single-aisle aircraft are not required under the current regulatory framework, and some carriers, especially ultra-low cost and domestic carriers whose operations are heavily reliant on single-aisle aircraft, will likely challenge any data provided by DOT to justify such requirement. Moreover, adding an accessible lavatory would be enormously expensive for operators of single-aisle aircraft because in most cases it requires a significant cabin retrofit and frequently (depending on the aircraft and its configuration) results in the loss of at least one row of seats. The costs associated with these retrofits and loss of seats would be passed on to consumers in the form of increased ticket prices, rendering the benefits of this requirement potentially difficult for DOT to justify in the face of the cost involved and the lack of consensus on the issue. At a minimum, Mr. Parker reasoned, such costs would have to be factored into a cost/benefit analysis of any proposed rule.

The Risk of Delay Due to Negotiated Rulemaking

A final consideration addressed in the Convener Report was whether the negotiated rulemaking process could be completed in a timely manner. It is axiomatic that in a dynamic, innovative industry such as aviation, government regulation can inhibit innovation and the introduction of new services that benefit consumers. As Mr. Parker noted, implementation of notice-and-comment rulemaking in the context of air travel by passengers with disabilities has been a protracted endeavor filled with uncertainty.

\textsuperscript{19} Id. at 4.
\textsuperscript{20} Id. at 9.
much to the industry’s detriment. Like notice-and-comment rulemaking, the negotiated rulemaking process can sometimes take years to complete, and does not guarantee success.

Based on DOT’s prior regulation in this area, Mr. Parker warned that a negotiated rulemaking process to address disability-related issues could take years to finalize – assuming the parties to the negotiation could even reach agreement. In an industry that rewards companies that are quick to act, this disadvantage could damage the potential of reaching consensus because industry representatives would likely become concerned over the duration of a negotiated rulemaking. However, in assessing whether a negotiated rulemaking committee to address all issues could ultimately be successful, Mr. Parker opined that the exercise itself, even if it failed to reach consensus, would be useful in providing insights into the options available to DOT, and in evaluating the costs and benefits of those options – thus placing DOT in a better position to decide in each case how best to act, or whether modification of the existing rules should be undertaken at all.  

The Convening Notice

In partial contravention of the recommendations included in the Convener’s Report, DOT on April 7, 2016 released a Notice of Intent to convene a negotiated rulemaking committee to negotiate and develop proposed amendments to DOT’s disability regulations three issues: (1) whether to require accessible IFE and strengthen accessibility requirements for other in-flight entertainment communications; (2) whether to require an accessible lavatory on new single-aisle aircraft over a certain size; and (3) whether to amend the definition of “service animals” that may accompany passengers with a disability on a flight. Thus, DOT endorsed the use of Negotiated Rulemaking for consideration of two of three issues Mr. Parker specifically advised DOT against – while reserving the issues of supplemental

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21 Id. at 9.
medical oxygen, seating accommodations and carrier reporting of disability service requests for a subsequent rulemaking or other action.\footnote{Nondiscrimination on the Basis of Disability in Air Travel; Establishment of a Negotiated Rulemaking Committee, 81 Fed. Reg. 20,265 (Apr. 7, 2016) (to be codified at 14 C.F.R. Pt. 382).}

Despite warnings in the Convener’s Report that the contentious and complex nature of both the IFE and lavatory access issues could undermine consensus in a negotiated rulemaking, DOT justified its decision by citing the recommendations in the Convener Report, nearly 90 comments received, and statutory factors included in the Negotiated Rulemaking Act. In terms of implementation, DOT proposed to convene the “Accessible Air Transportation Advisory (ACCESS) Committee” beginning in May 2016 and continuing until October 2016. Under DOT’s selection criteria, the ACCESS Committee will consist of stakeholders from DOT, domestic and foreign airlines, disability and consumer advocacy groups, professional associations, service animal advocacy groups, aircraft manufacturers, and IFE service providers (one to two members from each category) – for a total of twenty-five committee members. The ACCESS Committee will meet for two days each month in Washington D.C., and will be open to the public, except for intermittent “working group” meetings of non-committee member consultants and representatives, which will address specific issues.

**Conclusion**

While certain to face challenges, DOT’s use of the negotiated rulemaking process in the context of Part 382 is a worthy alternative to traditional notice-and-comment rulemaking, provided it is done in a manner that promotes collaboration. Taking into consideration the current regulatory framework and DOT’s enforcement posture regarding customer protection issues, negotiated rulemaking could be used as a tool to develop new rules that are thoughtful, balanced, and beneficial to passengers with disabilities, while also reflecting a realistic approach to the costs and complexities of airline operations. Nonetheless, DOT’s decision to pursue negotiated rulemaking for two of the most contentious and potentially complex
issues - contrary to the recommendation of its own appointed Convener - is problematic and could jeopardize the success of the negotiated rulemaking process.

YLD News and Announcements

American Bar Association
2016 Annual Meeting
San Francisco, CA
August 4-9
For more information and to register go to:
http://www.americanbar.org/calendar/annual.html