APPLICABLE PROVISIONS IN 14 CFR PART 382

Applicability of Part 382 to the service animal and aircraft accessibility provisions.

Part 382 applies to all U.S. carriers, regardless of where their operations take place, except where otherwise provided in the rule. Therefore, as a practical matter, Part 382's service animal provisions and aircraft accessibility provisions apply to U.S. carriers regardless of where they are operating.

With respect to foreign carriers, the application of the rule is more limited. Only flights of foreign carriers that begin or end at a U.S. airport, and aircraft used in these operations, are covered. A flight means a continuous journey of a passenger in the same aircraft or using the same flight number. The rule provides a number of examples of what constitutes a "flight" and what does not. Notably, for purposes of Part 382 a covered flight would include a circumstance where a passenger books a journey on a foreign carrier from a U.S. airport to a foreign point, the plane stops for refueling and a crew change in a another foreign point along the way, and after deplaning during the stop, the passengers originating in the U.S. either reboard the same aircraft *or* a different aircraft and the flight number remains the same, and continue to the foreign destination.

Otherwise, a foreign carrier is not covered under the rule with respect to an operation between two foreign points, even if, under a code-sharing arrangement with a U.S. carrier, the foreign carrier transports passengers flying under the U.S. carrier's code. The U.S. carrier, however, is covered under the rule with respect to the passengers traveling under its code on such an operation, such that if there is a violation of the service-related provisions (e.g. service animals, enplaning/deplaning, etc.) of Part 382 with respect to a passenger traveling under the U.S. carrier's code, the Department would hold the U.S. carrier, not the foreign carrier, responsible. Neither the U.S. carrier nor the foreign carrier would be held responsible if the foreign carrier's aircraft itself (e.g. lavatory on a twin aisle aircraft under 382.63, captioning of informational and safety-related videos under 382.69) was not accessible on an operation between two foreign points.

Finally, a charter flight on a foreign carrier from a foreign airport to a U.S. airport and back would not be covered if the carrier did not pick up any passengers in the U.S.

Rule Text: §382.7 To whom do the provisions of this Part apply?

(a) If you are a U.S. carrier, this Part applies to you with respect to all your operations and aircraft, regardless of where your operations take place, except as otherwise provided in this Part.

(b) If you are a foreign carrier, this Part applies to you only with respect to flights you operate that begin or end at a U.S. airport and to aircraft used for these flights. For purposes of this Part, a "flight" means a continuous journey in the same aircraft or with one flight number that begins or ends at a U.S. airport. The following are some examples of the application of this term:

EXAMPLE 1 to paragraph (b): A passenger books a nonstop flight on a foreign carrier from New York to Frankfurt, or Frankfurt to New York. Each of these is a "flight" for purposes of this Part.

EXAMPLE 2 to paragraph (b): A passenger books a journey on a foreign carrier from New York to Prague. The foreign carrier flies nonstop to Frankfurt. The passenger gets off the plane in Frankfurt and boards a connecting flight (with a different flight number), on the same foreign carrier or a different carrier, which goes to Prague. The New York-Frankfurt leg of the journey is a "flight" for purposes of this Part; the Frankfurt-Prague leg is not. On the reverse routing, the Prague-Frankfurt leg is not a covered flight for purposes of this Part, while the Frankfurt-New York leg is.

EXAMPLE 3 to paragraph (b): A passenger books a journey on a foreign carrier from New York to Prague. The plane stops for refueling and a crew change in Frankfurt. If, after deplaning in Frankfurt, the passengers originating in New York reboard the aircraft (or a different aircraft, assuming the flight number remains the same) and continue to Prague, they remain on a covered flight for purposes of this Part. This is because their transportation takes place on a direct flight between New York and Prague, even though it had an interim stop in Frankfurt. This example would also apply in the opposite direction (Prague to New York via Frankfurt).

EXAMPLE 4 to paragraph (b): In Example 3, the foreign carrier is not subject to coverage under this Part with respect to a Frankfurt-originating passenger who boards the aircraft and goes to Prague, or a Prague-originating passenger who gets off the plane in Frankfurt and does not continue to New York.

(c) As a foreign carrier, you are not subject to the requirements of this Part with respect to flights between two foreign points, even with respect to flights involving code-sharing arrangements with U.S. carriers. As a U.S. carrier that participates in a code-sharing arrangement with a foreign carrier with respect to flights between two foreign points, you (as distinct from the foreign carrier) are responsible for ensuring compliance with the service provisions of subparts A through C, F through H, and K with respect to passengers traveling under your code on such a flight.

EXAMPLE 1 to this paragraph (c): A passenger buys a ticket from a U.S. carrier for a journey from New York to Prague. The ticket carries the U.S. carrier's code and flight number throughout the entire journey. There is a change of carrier and aircraft in Frankfurt, and a foreign carrier operates the Frankfurt-Prague segment. The foreign carrier is not subject to the provisions of Part 382 for the Frankfurt-Prague segment. However, the U.S. carrier must ensure compliance with the applicable provisions of Part 382 on the Frankfurt-Prague segment with respect to passengers flying under its code, and the Department could take enforcement action against the U.S. carrier for acts or omissions by the foreign carrier.

(d) As a foreign carrier, if you operate a charter flight from a foreign airport to a U.S. airport, and return to a foreign airport, and you do not pick up any passengers in the U.S., the charter flight is not a flight subject to the requirements of this Part.

(e) Unless a provision of this Part specifies application to a U.S. carrier or a foreign carrier, the provision applies to both U.S. and foreign carriers.

(f) If you are an indirect carrier, §§ 382.1 through 382.15 of this Part apply to you. §§ 382.17 through 382.157 of this Part do not apply to you except insofar as provided by §382.11(b).

(g) Notwithstanding any provisions of this Part, you must comply with all FAA safety regulations, TSA security regulations, and foreign safety and security regulations having legally mandatory effect that apply to you.

Rule Text: §382.9 What may foreign carriers do if they believe a provision of a foreign nation's law conflicts with compliance with a provision of this Part?

(a) If you are a foreign carrier, and you believe that an applicable provision of the law of a foreign nation precludes you from complying with a provision of this Part, you may request a waiver of the provision of this Part.

(b) You must send such a waiver request to the following address:

Assistant General Counsel for Aviation Enforcement and Proceedings, C-70

U.S. Department of Transportation

1200 New Jersey Avenue, S.E., Room W96-322

Washington, D.C. 20590

(c) Your waiver request must be in English and include the following elements:

(1) A copy, in the English language, of the foreign law involved;

(2) A description of how the foreign law applies and how it precludes compliance with a provision of this Part;

(3) A description of the alternative means the carrier will use, if the waiver is granted, to effectively achieve the objective of the provision of this Part subject to the waiver or, if applicable, a justification of why it would be impossible to achieve this objective in any way.

(d) The Department may grant the waiver request, or grant the waiver request subject to conditions, if it determines that the foreign law applies, that it does preclude compliance with a provision of this Part, and that the carrier has provided an effective alternative means of achieving the objective of the provisions of this Part subject to the waiver or have demonstrated by clear and convincing evidence that it would be impossible to achieve this objective in any way.

(e) (1) If you submit a waiver request on or before September 10, 2008, the Department will, to the maximum extent feasible, respond to the request before May 13, 2009. If the Department does not respond to the waiver request by May 13, 2009, you may continue to implement the policy or practice that is the subject of your request until the Department does respond. The

Department will not take enforcement action with respect to your implementation of the policy or practice during the time prior to the Department's response.

(2) If you submit a waiver request after September 10, 2009, the Department will, to the maximum extent feasible, respond to the request by May 13, 2009 or within 180 days of receiving it, whichever is later. If the Department does not respond to the waiver request by this date, you may continue to implement the policy or practice that is the subject of your request until the Department does respond. However, the Department may take enforcement action with respect to your implementation of the policy or practice during the time between May 13, 2009 and the date of the Department's response.

(3) If you submit a waiver request after September 10, 2008, and the request pertains to an applicable provision of the law of a foreign nation that did not exist on September 10, 2008, you may continue to implement the policy or practice that is the subject of your request until the Department responds to the request. The Department will, to the maximum extent feasible, respond to such requests within 180 days of receiving them. The Department will not take enforcement action with respect to your implementation of the policy or practice during the time prior to the Department's response.

(f) Notwithstanding any other provision of this section, the Department may commence enforcement action at any time after May 13, 2009 with respect to the policy or practice that is the subject of the request if it finds the request to be frivolous or dilatory.

(g) If you have not submitted a request for a waiver under this section with respect to a provision of this Part, or such a request has been denied, you cannot raise the alleged existence of such a conflict as a defense to an enforcement action.

Preamble Language: Conflict of Law Waivers and Equivalent Alternative Determinations

One of the most frequent comments made by foreign carriers and their organizations was that implementation of the proposed rules would lead to conflicts between Part 382 and foreign laws, rules, voluntary codes of practice, and carrier policies. These conflicts, commenters said, would lead to confusion and reduce efficiency in service to passengers with disabilities. Many commenters advocated that the Department should defer to foreign laws, rules, and guidance, or accept them as equivalent for purposes of compliance with Part 382.

In anticipation of this concern, and in keeping with the Department's obligation and commitment to giving due consideration to foreign law where it applies, the Foreign Carriers NPRM proposed a conflict of laws waiver mechanism. Under the proposal, a foreign carrier would be required to comply with Part 382, but could apply to DOT for a waiver if a foreign legal requirement conflicted with a given provision of the rule. If DOT agreed that there was a conflict, then the carrier could continue to follow the binding foreign legal requirement, rather than the conflicting provision of Part 382. Foreign carriers commented that this provision was unfair, because it would force them to begin complying with a Part 382 requirement allegedly in conflict with a foreign legal requirement while the application for a waiver was pending. Some commenters also objected to DOT making a determination concerning whether there really was a conflict between DOT regulations and a provision of foreign law.

In order to determine whether a foreign carrier should be excused from complying with an otherwise applicable provision of Part 382, the Department has no reasonable alternative to deciding whether a conflict with a foreign legal requirement exists. The Department cannot rely solely on an assertion by a foreign carrier that such a conflict exists.

Comments from a number of foreign carriers asked the Department to broaden the concept of the proposed waiver, by allowing foreign carriers to comply with recommendations, voluntary codes of practice, etc. We do not believe such a broadening is necessary to comply with the Department's legal obligations. Nor would it be advisable from a policy point of view, as it would not provide the consistency that passengers with disabilities should expect, regardless of the identity or nationality of the carrier they choose.

We therefore want to make clear, for purposes of this waiver provision, what we mean by a conflict with a provision of foreign law. By foreign law, we mean a legally binding mandate (e.g., a statute, regulation, a safety rule equivalent to an FAA regulation) that imposes a nondiscretionary obligation on the foreign carrier to take, or refrain from taking, a certain action. Binding mandates frequently can subject a carrier to penalties imposed by a government in the event of noncompliance. Guidance, recommendations, codes of best practice, policies of carriers or carrier organizations, and other materials that do not have mandatory, binding legal effect on a carrier cannot give rise to a conflict between Part 382 and foreign law for purposes of this Part, even if they are published or endorsed by a foreign government. In order to create a conflict, the foreign legal mandate must require legally something that Part 382 prohibits, or prohibit something that Part 382 requires. A foreign law or regulation that merely authorizes carriers to adopt a certain policy, or gives carriers discretion in a certain area that Part 382 addresses, does not create a conflict cognizable under the conflict of laws waiver provision.

For example, Part 382 says that carriers are prohibited from imposing number limits on passengers with disabilities. Suppose that Country S has a statute, or the equivalent of an FAA regulation, mandating that no more than three wheelchair users can, under any circumstances, travel on an S Airlines flight. S Airlines would have no discretion in the matter, since it was subject to a legal mandate of its government. This would create a conflict between Part 382 and the laws of Country S that could be the subject of a conflict of laws waiver. However, suppose that the government of Country S publishes a guidance document that says limiting wheelchair users on a flight to three is a good idea, has a regulation authorizing S Airlines to impose a number limit if it chooses, or approves an S Airlines safety program that includes a number limit. In these cases, the conflict of laws waiver would not apply, since in each case there is not a binding government requirement for a number limit, and S Airlines has the discretion whether or not to adopt one.

We note one exception to this point. If a foreign government officially informs a carrier that it intends to take enforcement action (e.g., impose a civil penalty) against a carrier for failing to implement a provision of a government policy, guidance document, or recommendation that conflicts with a portion of the Department's rules, the Department would view the government action as creating a legal mandate cognizable under this section.

While retaining the substance of the conflict of laws provision of the NPRM, the Department has, in response to comments, modified the process for considering waiver requests.. We agree with commenters that it would be unfair to insist that carriers comply with a Part 382 provision that allegedly conflicts with foreign law while a waiver request is pending. Consequently, we have established an effective date for the rule of one year after its publication date. We strongly encourage carriers, even where a provision of Part 382 itself explicitly allows an exception in order to comply with a foreign law (i.e., section 382.87(a)), to consider filing a conflict of law waiver request as outlined in section 382.9(a) whenever a carrier believes itself bound by a legal mandate that requires something Part 382 prohibits or prohibits something Part 382 requires. If a carrier sends in a waiver request within 120 days of the publication date of the final rule, the Department will, to the maximum extent feasible, respond before the effective date of the rule. If we are unable to do so, the carrier can keep implementing the policy or practice that is the subject of the request until we do respond, without becoming subject to enforcement action by the Department. The purpose of the 120-day provision is to provide an incentive to foreign carriers to conduct a due diligence review of foreign legal requirements that may conflict with Part 382 and make any waiver requests to DOT promptly, so that the Department can resolve the issues before the rule takes effect.

What a foreign carrier obtains by filing all its conflict of laws waiver requests within the first 120 days is, in effect, a commitment from DOT not to take enforcement action related to implementing the foreign law in question pending DOT's response to the waiver request. For example, if S Airlines filed a waiver request with respect to an alleged requirement of a Country S law requiring number limits for disabled passengers within 120 days of the rule's publication, then the Department would not commence an enforcement action relating to an alleged violation of Part 382's prohibition of number limits that occurred during the interval between the effective date of Part 382 and the date on which DOT responds to S Airline's waiver request. This would be true even if the Department later denies the request.

However, if S Airlines did not file its request until 180 or 210 days after the rule is published, DOT could begin enforcement action against the carrier for implementing number limits inconsistent with Part 382 during the period between the effective date of the rule and the Department's response to the waiver request. If the Department granted the waiver request, any enforcement action relating to the carrier's actions during that interval would probably be dismissed. However, if the waiver request were denied, the enforcement action would proceed. S Airlines thus would have put itself at somewhat greater risk by failing to submit its waiver request on a timely basis.

We also recognize that laws change. Consequently, if a new provision of foreign law comes into effect after the 120-day period, a carrier may file a waiver request with the Department. The carrier may keep the policy or practice that is the subject of the request in effect pending the Department's response, which we will try to provide within 180 days. Again, the carrier would not be at risk of a DOT enforcement action relating to the period during which the Department was considering the waiver request concerning the new foreign law.

Carriers should not file frivolous waiver requests, the stated basis for which is clearly lacking in merit or which are filed with the apparent intent of delaying implementation of a provision of Part 382 or abusing the waiver process. In such cases, the Department may pursue

enforcement action even if the frivolous waiver request has been filed within 120 days. As a general matter, a carrier that does not file a request for a waiver, or whose request is denied, cannot then raise the alleged existence of a conflict with foreign law as a defense to a DOT enforcement action.

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Many foreign carriers and their organizations also said that a conflict of laws waiver, standing alone, was insufficient. They said that their policies and approaches to assisting passengers with disabilities, or laws or policies relating to disability access of foreign carriers' countries (either single-country laws or those of, for example, the European Union) should be recognized as equivalent to DOT's rules. Compliance with equivalent foreign laws and carrier policies, they said, should be sufficient to comply with Part 382.

U.S. disability law includes a concept – equivalent facilitation -- that can address these comments to a reasonable degree. This concept, which is embodied in such sources as the Department's Americans with Disabilities Act (ADA) regulations and the Americans with Disabilities Act Accessibility Guidelines (ADAAG), states that a transportation or other service provider can use a different accommodation in place of one required by regulation if the different accommodation provides substantially equivalent accessibility. The final rule permits U.S. and foreign carriers to apply to the Department for a determination of what the final rule will call an "equivalent alternative." (We use this term is used in place of "equivalent facilitation" to avoid any possible confusion with the use of "equivalent facilitation" in other contexts.). If, with respect to a specific accommodation, the carrier demonstrates that what it wants to do will provide substantially equivalent accessibility to passengers with disabilities than literal compliance with a particular provision of the rule, the Department will determine that the carrier can comply with the rule using its alternative accommodation. This provision applies to equipment, policies, procedures, or any other method of complying with Part 382

It should be emphasized that equivalent alternative determinations concern alternatives only to specific requirements of Part 382. The Department will not entertain an equivalent alternative request relating to an entire regulatory scheme (e.g., an application asserting that compliance with European Union regulations on services to passengers with disabilities was

equivalent to Part 382 as a whole). It should be emphasized that the fact that a carrier policy or foreign regulation addresses the same subject as a provision of Part 382 does not mean the carrier policy or foreign regulation is an equivalent alternative. For example, both Part 382 and various carrier policies address the transportation of service animals. A policy or regulation that was more restrictive than Part 382 would not be viewed as an equivalent alternative, since it provided less, rather than substantially equivalent, accessibility for passengers who use service animals.

As with the conflict of laws waiver, if a carrier submits a request for an equivalent alternative determination within 120 days of the publication of this Part, the Department will endeavor to have a response to the carrier by the effective date of the rule. If the Department has not responded by that time, the carrier can implement its proposed equivalent alternative until and unless the Department disapproves it. However, with respect to a request filed subsequent to that date, carriers must begin complying with the Part 382 provision when it becomes effective, and could not use their proposed equivalent alternative until and unless the Department approved it.