



Susan Podziba & Associates

PUBLIC POLICY MEDIATION AND CONSENSUS BUILDING

Final Report

on the

**Negotiated Rulemaking to Develop
Minimum Standards for State-Issued Driver's Licenses
and Personal Identification Cards**

**as required under the
9/11 Commission Implementation Act
of the
Intelligence Reform and
Terrorism Prevention Act of 2004**

**for the
U.S. Department of Transportation, in consultation with
U.S. Department of Homeland Security**

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INTRODUCTION

The Minimum Standards for State-Issued Driver's Licenses and Personal Identification Cards Negotiated Rulemaking was initiated by the U.S. Department of Transportation (DOT), in consultation with the U.S. Department of Homeland Security (DHS) to assist in the development of a proposed rule establishing minimum federal standards to secure state-issued driver's licenses and personal identification cards (minimum standards) as required under the 9/11 Commission Implementation Act (9/11 Act) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law No. 108-458).

DOT formally chartered the Negotiated Rulemaking Advisory Committee on Minimum Standards for Driver's Licenses and Personal Identification Cards (DL/ID Reg Neg Committee) under the Federal Advisory Committee Act (FACA) for the purpose of negotiating a consensus on the terms of a proposed rule setting forth minimum standards.

The negotiated rulemaking process included a convening assessment to identify categories of key stakeholders that would be affected by and had interests related to the minimum standards, identify key issues and concerns of those stakeholders, and recommend members for a balanced committee of representative stakeholders, who were willing and able to participate in the negotiation process in good faith. Since the 9/11 Act mandated the use of a negotiated rulemaking process to develop the minimum standards, the convening assessment did not include a determination of feasibility for the application of a negotiated rulemaking process to the minimum standards. DOT retained Susan Podziba & Associates (SP&A) to provide convening and facilitation services for the negotiated rulemaking process.

The DL/ID Reg Neg Committee held the first of its five scheduled meetings on April 19-21, 2005, after which negotiations were suspended due to that expectation that passage and enactment of the Real ID Act of 2005 was imminent. (See Appendix A for the Federal Register Notice of Suspension, published May 6, 2005.)

On May 11, 2005 the President signed into law the Emergency Supplemental Appropriations, Defense, Global War on Terror, and Tsunami Relief, 2005, which included the Real ID Act. The Real ID Act repealed Section 7212 of the Intelligence Reform and Terrorism Protection Act of 2004. The FACA Charter of the DL/ID Reg Neg Committee included a provision to terminate the committee upon enactment of legislation repealing Section 7212. Thus, passage of the Real ID Act effectively terminated the DL/ID Reg Neg Committee Charter thereby canceling all further negotiations.

BACKGROUND

On December 17, 2004, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law No. 108-458). Title VII of that Act is known as the 9/11 Commission Implementation Act of 2004 (the 9/11 Act). Subtitle B of the 9/11 Act addresses terrorist travel and effective screening and included a mandate for the issuance of minimum standards for a variety of identity documents, including driver's licenses and personal identification cards (§7212).

This provision was enacted in response to the following recommendation in the 9/11 Commission report:

Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.

In making that recommendation, the Commission noted:

All but one of the 9/11 hijackers acquired some form of U.S. identification document, some by fraud. Acquisition of these forms of identification would have assisted them in boarding commercial flights, renting cars, and other necessary activities.

PROJECT DURATION AND MILESTONES

The negotiated rulemaking process to develop the minimum standards began in January 2005 and ended in May 2005. The convening assessment was initiated in January 2005 and the Final Convening Assessment Report was completed in April 2005.

On February 23, 2005, DOT published a Federal Register Notice announcing its intent to form a negotiated rulemaking advisory committee for the purpose of developing “recommendations for minimum standards to tighten security for driver’s licenses and personal identification cards issued by States, in order for these documents to qualify for use by Federal agencies for identification purposes.” (See Appendix B for Federal Register Notice of intent to form a negotiated rulemaking advisory committee, February 23, 2005.)

DOT published a Federal Register Notice announcing the dates of five meetings of the DL/ID Reg Neg Committee on March 29, 2005. (See Appendix C for Federal Register Notice of meetings of advisory committee.) The first meeting of the DL/ID Reg Neg Committee was held on April 19-21, 2005. Four additional 3½-day meetings were scheduled between May 10 and July 15, 2005. All meetings were to be held at DOT Headquarters in Washington, D. C. The schedule was prepared to enable the DL/ID Reg Neg Committee and DOT to meet the September 17, 2005 statutory deadline for submission of the DL/ID Reg Neg Committee recommendations to the Secretary of Transportation.

On May 3, 2005, the DOT Under Secretary for Policy informed the DL/ID Reg Neg Committee of the cancellation of its second meeting, which had been scheduled for May 10-12, 2005, as well as the suspension of all its activities. The committee was terminated after enactment of the Real ID Act on May 11, 2005. (See Appendix D for May 26, 2005 Federal Register Notice of termination of advisory committee.)

NEGOTIATED RULEMAKING COMMITTEE MEMBERS

The Negotiated Rulemaking Advisory Committee on Minimum Standards for Driver’s Licenses and Personal Identification Cards included DOT and DHS, representing the federal government, and 14 public members, who represented the following six categories of stakeholder groups: state offices that issue driver’s licenses or personal identification cards, elected state officials, applicants for and holders of driver’s licenses and personal identification cards such as consumers and non-citizens and immigrants, privacy and civil liberties groups, law enforcement officials, and technological and operational experts in document security. As required under FACA, DOT and DHS sought to ensure balanced representation from affected and interested stakeholder groups.

The organizational members of Negotiated Rulemaking Advisory Committee on Minimum Standards for Driver’s Licenses and Personal Identification Cards were:

- Alabama Department of Public Safety, Driver License Division
- American Association of Motor Vehicle Administrators (AAMVA)
- AAA
- American Civil Liberties Union

Center for Democracy and Technology/Markle Foundation
Florida Department of Highway Safety and Motor Vehicles
Information Technology Association of America
Industry Advisory Board to AAMVA
International Association of Chiefs of Police
National Conference of State Legislatures
National Governors Association
National Immigration Law Center
New York State Department of Motor Vehicles
Texas Department of Public Safety
U.S. Department of Homeland Security
U.S. Department of Transportation

(See Appendix E for a listing of the principal negotiators for each organizational member.)

PRODUCTS AND OUTCOMES

The expected outcome, a report or recommendations for proposed regulatory language for the minimum standards for state-issued driver's licenses and personal identification cards, was not produced because the negotiated rulemaking effort was terminated after one negotiation session.

The products developed as part of the negotiated rulemaking process include the *Final Convening Assessment Report for the Negotiated Rulemaking Process to Develop Minimum Standards for State-Issued Driver's Licenses and Personal Identification Cards as required under the 9/11 Commission Implementation Act of the Intelligence Reform and Terrorism Prevention Act of 2004*, the agenda and final meeting summary of the first meeting, the list of issues to be negotiated, the DL/ID Reg Neg Committee ground rules, and the draft agenda for the second meeting. These documents are attached as appendices, and all but the last are available from the DOT Docket Management System (DMS) website at <http://dms.dot.gov/search/searchFormSimple.cfm?CFID=8578535&CFTOKEN=43297657>. The docket number is 20434.

NEGOTIATED RULEMAKING PROCESS

The negotiated rulemaking process includes two phases: the convening assessment and the negotiations. DOT initiated the convening phase of the negotiated rulemaking process to identify key issues to be negotiated, and key stakeholder groups as well as representatives to negotiate on behalf of those stakeholder groups. Negotiations were scheduled to occur from April through July 2005, but ended after one meeting due to the passage and enactment of the Real ID Act.

Susan Podziba, Public Policy Mediator, Susan Podziba & Associates (SP&A) served as convener and facilitator for the negotiated rulemaking process. She was assisted by Alexis Gensberg, Associate Mediator, SP&A.

Convening Assessment

The convening assessment was conducted in accordance with parameters set out by the Department of Transportation including adhering to the legislative requirement that the negotiated rulemaking committee have representatives from “among state offices that issue driver’s license or personal identification card; state elected officials; Department of Homeland Security; and interested parties. The convener interviewed 57 representatives of the U.S. Department of Transportation, U.S. Department of Homeland Security, state offices that issue driver’s licenses and personal identification cards, state elected officials, organizations that represent applicants for and holders of driver’s licenses – including consumer organizations and those that represent immigrants and non-citizens, privacy and civil liberties groups, law enforcement officials, the 9/11 Commission, and organizations with technological and operational expertise in document security to identify:

- the principal categories of stakeholders that would be affected by and were interested in the minimum standards;
- key issues and concerns of stakeholders relative to the minimum standards and the interdependence of interests among stakeholders;
- organizations that could best represent the views and perspectives of each category of relevant stakeholders for the negotiated rulemaking; and
- a balanced committee of representatives of stakeholders who were willing and able to participate in the negotiation process in good faith.

Based on an evaluation of the information derived from these interviews, the Convener recommended proposed members for the advisory committee to DOT and DHS. The findings of the Convener are documented in the *Convening Assessment Report for the Negotiated Rulemaking Process to Develop Minimum Standards for State-Issued Driver’s Licenses and Personal Identification Cards as required under the 9/11 Commission Implementation Act of the Intelligence Reform and Terrorism Prevention Act of 2004 (April 15, 2005)*. This report identifies categories of stakeholders, substantive issues by stakeholder group, key issues across stakeholder groups, procedural issues, participation, process design, protocols and procedures, and recommends organizational members for the advisory committee. (See Appendix F for the Convening Assessment Report.)

In proposing organizational members for the DL/ID Reg Neg Committee, the Convener acted in accordance with parameters set out by DOT including following the 9/11 Act requirements that members be selected from “among state offices that issue driver’s license or personal identification card; state elected officials; Department of Homeland Security; and interested parties. In addition, she sought to recommend to the Department a balanced committee of relevant stakeholders which would include a combination of organizations that represent individuals who would be directly affected by the minimum standards, individuals who would interact directly with the public in implementation of the minimum standards, and those who would work on various components of implementation of the minimum standards.

Efforts were made to propose state members that represented diversity among the states with regard to size, geographic region, rural/urban character, proximity to foreign borders, and over-the-counter/centralized systems for delivering licenses.

Negotiations

The Negotiated Rulemaking Advisory Committee on Minimum Standards for Driver’s Licenses and Personal Identification Cards negotiations occurred on April 19-21. The meeting followed a formal agenda. (See Appendix G for the Meeting Agenda.)

The meeting began with procedural issues. The facilitator provided an overview of the negotiated rulemaking process (See Appendix H for slides.) and assisted the committee in developing its ground rules. (See Appendix I for committee ground rules.) The committee then reviewed and agreed upon its list of issues to be negotiated (See Appendix J for list of issues.), which was derived from the statutory language of Section 7212 of the 9/11 Act. The DL/ID Reg Neg committee discussed, in some detail, each of the 13 issues that were to be addressed in the minimum standards. In addition, expert presentations were given on the subjects of document security, privacy issues, driver’s license issuance process, Electronic Verification of Vital Events (EVVE) pilot program for verifying DL/ID applicants’ birth certificates, AAMVA Security Framework, and the Driver’s License Agreement.

As required under FACA, the meeting was open to the public and time was set aside for public comment, during which members of the public addressed the committee to offer recommendations, and comment on issues under discussion.

The facilitation team drafted the meeting summary, which was approved by the DL/ID Reg Neg Committee members by email. (See Appendix K for the meeting summary.) During the period after the first meeting and the suspension, the facilitation team maintained on-going contact with DOT, DHS, DL/ID Reg Neg Committee members, and the public.

Additional expert presentations were planned for the second meeting on the issues of machine readable technologies, documentation accepted for establishing identity for DL/ID issuance in states that do not require legal presence, domestic immigration documents used to establish identity for DL/ID issuance, and foreign documents. (See Appendix L for the draft agenda of the cancelled May 10-13 meeting.) A safety work group was also planned.

LESSONS LEARNED

The 9/11 Act provided a compressed timeframe for development of final minimum standards to secure state-issued driver's licenses and personal identifications cards for acceptance as identification at federal agencies and by federal officials. In addition, the law granted authority for the minimum standards to DOT and required that they be developed in consultation with DHS. DOT and DHS worked to meet these challenges by involving high level officials and creating mechanisms for coordination and cooperation between the two agencies. In addition, DHS and DOT committed extensive time and resources to the negotiated rulemaking effort. This commitment was mirrored by a significant commitment of time and resources to be expended by the non-federal members of the DL/ID Reg Neg Committee.

The actions taken by DOT and DHS provide useful lessons for other federal agencies contemplating negotiated rulemakings.

Commitment of Senior Executive Time

DOT established a biweekly meeting of Senior Executives to discuss issues related to the negotiated rulemaking. The meetings were called by the General Counsel and included the Assistant Secretary for Transportation Policy, the National Highway Traffic Safety Administrator, Federal Motor Carrier Safety Administrator, Deputy Assistant Secretary of the Office of the Assistant Secretary for Governmental Affairs and their staff. On occasion, a DHS executive or staff also participated. This top-level oversight enabled decisions to be made quickly and efficiently to meet the time constraints imposed by statutory deadlines.

In addition, responsibility for implementation of the negotiated rulemaking was given to Senior Executive Service (SES) staff at both DOT and DHS. They created a structure for cooperation and coordination of decision-making on implementation of the negotiated rulemaking process and to develop joint agency positions on issues related to the minimum standards.

Coordination of Federal Information and Positions

DOT and DHS created teams to address the issues to be negotiated as part of the minimum standards in order to facilitate coordination and make pre-decisional recommendations for potential federal positions. These teams included personnel from offices across DOT and DHS as well as other federal agencies. Each issue team had a leader who was responsible to the DOT and DHS lead officials, and the work of each team was accomplished on an expeditious schedule.

Commitment of Staff Time and Resources

All necessary staff and resources were made available to support the negotiated rulemaking process. In addition to the teams that coordinated potential federal positions, DOT Office of General Counsel staff were available to prepare and review FACA documents and responses to legal questions as they arose, the DOT FACA specialist provided expertise on FACA Notice requirements and requirements for appointing members to the Federal Advisory Committee, and the DOT Chief Economist was prepared to develop cost estimates of options discussed and agreed to by the DL/ID Reg Neg Committee as well as to prepare a cost benefit analysis of the proposed minimum standards as had been required under the 9/11 Act.

In addition, materials were prepared for distribution to the committee members and the public. At short notice, space was made available at DOT Headquarters.

Commitment of Time and Resources by Public DL/ID Reg Neg Committee Members

In response to the high level commitment of the federal agencies, the non-federal organizational members of the DL/ID Reg Neg Committee were represented by high level officials that included CEOs, a State Senator, a State Secretary of State, Commissioners of departments of motor vehicles, Chiefs of law enforcement agencies, and senior experts in issues of electronic privacy protection, civil rights, immigration, and technology.

Each negotiator committed to volunteer their time for 3½-day meetings, every third week for five meetings, and committee members' organizations covered all travel costs for their negotiators.

Willingness to Provide Expertise and Information by DL/ID Reg Neg Committee Members

In addition to the expertise DL/ID Reg Neg Committee members and their staff brought to the issues related to the minimum standards for state-issued driver's licenses and personal identification cards, committee members were also set to commit

organizational resources to support the negotiations. Several Committee members provided and planned to provide data and information to answer specific questions posed by negotiators. For example, a Committee member assembled and delivered a panel presentation for the third day of the April meeting to address questions raised during the first day of the meeting.

After the first meeting, papers and information that had been requested were provided by committee members and distributed in preparation for the second meeting. One committee member had committed to survey her organizational members to provide data on specific questions that had emerged from committee discussions. Committee members also provided experts for planned panel presentations for the second meeting.

CONCLUSION

As required under the 9/11 Commission Implementation Act of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law No. 108-458), Section 7212, the U.S. Department of Transportation, in consultation with the U.S. Department of Homeland Security, initiated a negotiated rulemaking process to develop minimum standards for state-issued driver's licenses and personal identification cards.

This effort was terminated with enactment of the Real ID Act of 2005, which repealed Section 7212 of the 9/11 Act.

We will never know if the DL/ID Reg Neg Committee would have succeeded in reaching consensus on minimum standards for state issued driver's licenses and personal identification cards. However, we do know that DL/ID Reg Neg Committee members, among whom were individuals with passionate and potentially antagonistically divergent opinions concerning the issues under discussion, were committed to and engaged in three days of respectful and civil deliberations to develop national standards that would meet the intended public policy goals of increased national security and limit unintended consequences of reduced privacy and restrictions of civil liberties in the United States.

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