

**U.S. DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**14 CFR Part 382**

**Docket No. DOT-OST-2018-0068**

**RIN No. 2105-AE63**

**Traveling by Air with Service Animals**

**AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).**

**ACTION: Advance Notice of Proposed Rulemaking (ANPRM).**

**SUMMARY:** The U.S. Department of Transportation (DOT or Department) is seeking comment on amending its Air Carrier Access Act (ACAA) regulation on transportation of service animals. The Department has heard from the transportation industry, as well as individuals with disabilities, that the current ACAA regulation could be improved to ensure nondiscriminatory access for individuals with disabilities, while simultaneously preventing instances of fraud and ensuring consistency with other Federal regulations. The Department recognizes the integral role that service animals play in the lives of many individuals with disabilities and wants to ensure that individuals with disabilities can continue using their service animals while also helping to ensure that the fraudulent use of other animals not qualified as service animals is deterred and animals that are not trained to behave properly in the public are not accepted for transport as service animals.

**DATES:** Comments should be filed by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** You may file comments identified by the docket number DOT-OST-2018-0068 by any of the following methods:

- Federal eRulemaking Portal: go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: (202) 493-2251

*Instructions:* You must include the agency name and docket number DOT-OST-2018-0068 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Privacy Act:* Anyone can search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the *Federal Register* published on April 11, 2000 (65 FR 19477-78), or you may visit <http://DocketsInfo.dot.gov>.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or to the street address listed above. Follow the online instructions for accessing the docket.

**FOR FURTHER INFORMATION CONTACT:** Maegan Johnson, Senior Trial Attorney, Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC, 20590, 202-366-9342, 202-366-7152 (fax), [maegan.johnson@dot.gov](mailto:maegan.johnson@dot.gov) (e-mail). You may also contact Blane Workie, Assistant General Counsel, Office of Aviation Enforcement and Proceedings, Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC, 20590, 202-366-9342, 202-366-7152 (fax), [blane.workie@dot.gov](mailto:blane.workie@dot.gov).

**SUPPLEMENTARY INFORMATION:**

***Current Service Animal Requirements***

DOT considers a service animal to be any animal that is individually trained to assist to a qualified person with a disability or any animal necessary for the emotional well-being of a passenger.<sup>1</sup> U.S. airlines must transport all service animals regardless of species with a few narrow exceptions.<sup>2</sup> U.S. airlines are not required to accommodate certain unusual service animals, such as snakes, reptiles, ferrets, rodents, and spiders.<sup>3</sup> Under DOT's current rule, airlines may also refuse to carry other animals if the airline determines: (1) there are factors precluding the animal from traveling in the cabin

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<sup>1</sup>See 14 CFR 382.117(i) and Guidance Concerning Service Animals, 73 FR 27614, 27659 (May 13, 2008).

<sup>2</sup> 14 CFR 382.117(a).

<sup>3</sup> 14 CFR 382.117(f).

of the aircraft, such as the size or weight of the animal; (2) the animal would pose a direct threat to the health or safety of others; (3) it would cause a significant disruption of cabin service; or (4) the law of a foreign country that is the destination of the flight would prohibit entry of the animal.<sup>4</sup> DOT requires foreign air carriers to transport only service dogs.<sup>5</sup> However, under DOT rules, a U.S. carrier is held responsible if a passenger traveling under the U.S. carrier's code is not allowed to travel with another type of service animal (e.g., cat) on a flight operated by its foreign code share partner.<sup>6</sup>

Regarding emotional support animals (ESA) and psychiatric service animals (PSA), DOT requires airlines to recognize these animals as service animals, but allows airlines to require that ESA and PSA users provide a letter from a licensed mental health professional of the passenger's need for the animal.<sup>7</sup> To enable airlines sufficient time to assess the passenger's documentation, DOT permits airlines to require 48 hours' advance notice of a passenger's wish to travel with an ESA or PSA.<sup>8</sup> ESAs and PSAs differ from one another in that PSAs, like other traditional service animals, are trained to perform a specific task for a passenger with a disability. In contrast, ESAs provide emotional support for a passenger with a mental/emotional disability but are not trained to perform

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See 14 CFR 382.7(c). As a matter of prosecutorial discretion, the Department's Office of Aviation Enforcement and Proceedings has chosen not pursue actions against U.S. airlines when it has found these types of violations.

<sup>7</sup> 14 CFR 382.117(e).

<sup>8</sup> 14 CFR 382.27(c)(8).

specific tasks. However, DOT expects that all service animals are trained to behave properly in a public setting.

Under the existing service animal regulations, it is generally not permissible to insist on written credentials or documentation for an animal as a condition for treating it as a service animal, except for an ESA or PSA. DOT requires airlines to accept animals as service animals based on the “credible verbal assurances” of the passengers.<sup>9</sup> Airlines may also not charge for the transport of service animals.<sup>10</sup>

The Department’s disability rule permits airlines not to transport service animals that pose a direct threat to the health or safety of others or would cause a significant disruption of cabin service. In guidance referenced in the Department’s service animal rule, DOT has advised airlines to observe the behavior of the service animal to determine if it is a properly trained animal as such an animal will calmly remain by its owner.<sup>11</sup> The animal should not run freely, bark or growl at other persons, urinate or defecate in the gate area, or bite.<sup>12</sup> Observing the behavior of the animal assists airline personnel in making a case-by-case determination as to whether the animal may pose a direct threat to the health or safety of others or may create a significant disruption in cabin service. Airlines are not required to accept for transport animals that do not behave properly in public, even if the animal performs an assistive function for a passenger with a disability or is necessary for the passenger’s emotional well-being, as the animal could pose a

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<sup>9</sup> 14 CFR 382.117(d).

<sup>10</sup> 14 CFR 382.31(a).

<sup>12</sup> See Guidance Concerning Service Animals, 73 FR 27614, 27659 (May 13, 2008).

direct threat to the health or safety of others and/or cause a significant disruption of cabin service.<sup>13</sup>

The Department's current service animal regulation does not contain a limitation on the number of service animals that may accompany an individual with a disability. The regulation references guidance that states that a single passenger legitimately may have two or more service animals.<sup>14</sup> As a matter of enforcement discretion, the Department's Office of Aviation Enforcement and Proceedings has not taken action against airlines when airlines declined requests to transport more than three service animals for a single passenger.<sup>15</sup> DOT's service animal rule also does not contain any leash, tether, muzzle, or containment requirements. Prior DOT guidance explained that a requirement for a service animal to be muzzled or harnessed would be appropriate only as a means of mitigating a direct threat to the health or safety of others, such as muzzling a dog that barks frequently.<sup>16</sup> As for transporting a service animal in a carrier, an order from the Federal Aviation Administration explained that a service animal may safely sit in the lap of its owner for all phases of flight, including ground movement, take-off, and landing if the service animal is no larger than a lap-held child (a child who has not reached his or her second birthday).<sup>17</sup>

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<sup>13</sup> *Id.* at 27658.

<sup>14</sup> *Id.* at 27661.

<sup>15</sup> DOT, Revised Service Animal Matrix, at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0150> (July 6, 2016).

<sup>16</sup> See Guidance Concerning Service Animals in Air Transportation, 68 FR 24874, 24875 (May 9, 2003).

<sup>17</sup> Flight Standards Information Bulletin for Air Transportation (FSAT 04-01A), Order 8400.10 (July 23, 2004).

## *Need for a Rulemaking*

### Consumer Complaints

The Department continues to receive complaints from individuals with service animals. DOT received 110 service animal complaints in 2016 and 70 service animal complaints in 2017 against airlines. In 2016, the third highest disability complaint area concerned service animals, and in 2017, it was the fifth highest.<sup>18</sup> U.S. and foreign airlines reported receiving 2,443 service animal complaints in 2016 and 2,499 service animal complaints in 2017. This was the fourth largest disability complaint area for airlines during both years. Over 60 percent of the service animal complaints received by the Department concern ESAs and PSAs. Most of the service animal complaints involving ESAs or PSAs are from passengers with disabilities who are upset that the airline is not accepting their animals for transport.

### Unusual Species

The use of unusual species as service animals has also added confusion. Passengers have attempted to fly with peacocks, ducks, turkeys, pigs, iguanas, and various other types of animals as emotional support or service animals. Airlines have expressed concerns about the amount of attention and resources that are expended when having to accommodate unusual service animals. Disability rights advocates have voiced

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<sup>18</sup> The four categories of disability service that typically receive the highest number of DOT-reported complaints are wheelchair assistance/transportation within the airport, delay/damage to assistive devices, seating accommodations, and service animals. See, e.g., [https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/286306/2016-summary-totals-us-air-carriers\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/286306/2016-summary-totals-us-air-carriers_0.pdf) In conjunction with stakeholders, the DOT has recently developed training material on all four of these topics for the benefit of both passengers and carrier personnel. See <https://www.transportation.gov/individuals/aviation-consumer-protection/traveling-disability>.

alarm that these animals may erode the public's trust, which could result in reduced access for many individuals with disabilities who use traditional service animals.

Advocates have also expressed concern that these animals lack the ability to be trained to behave properly in a public setting.

### Pets

Many airlines also indicated that they believe passengers wishing to travel with their pets may be falsely claiming that their pets are service animals so they can take their pet in the aircraft cabin or to avoid paying a fee for their pets. The increase in the number of service animals in aircraft cabins has led some to believe that many these animals are really pets but are being passed off as service animals. There is also concern that vests, harnesses, and other items, which traditionally have been considered to be physical indicators of a service animal's status, are easily purchased online by fliers trying to misrepresent their pets as service animals. Airlines have also reported to the Department that certain entities may, for a fee, be providing individuals with pets a letter stating that the individual is a person with a mental or emotional disability and that their animal is an ESA or PSA, when in fact they are not.

### Misbehavior by Service Animals

Airlines and airline associations have contacted the Department to express concerns that passengers are increasingly bringing untrained service animals onboard aircraft and putting the safety of crewmembers and other passengers at risk. According to one airline, there has been an 84 percent spike since 2016 in the number of behavior-related service animal problems, including urinating, defecating, or biting. Another airline reports that there has been a 75 percent increase in the number of emotional

support animals that it transports when comparing calendar year 2016 to calendar year 2017. This airline appears to believe that this has resulted in a significant increase in onboard incidents. In addition, there have been a few highly-publicized reports of service animals biting passengers. While the current rule anticipates that airline personnel will assess service-animal behavior in the gate area and weed out misbehaving service animals prior to boarding the aircraft, airlines have indicated gate staff are oftentimes too busy to observe the behavior of service animals. Airlines also note that even if they were to observe an animal prior to entering the aircraft, the animal may act differently once exposed to the confinement in the cabin or once the aircraft departs.

#### Airport

Another concern is the differences, in the airport terminal context, between DOT's ACAA regulations that apply to airlines, and their facilities and services, contrasted with the Department of Justice's (DOJ) Americans with Disabilities Act (ADA) regulations that apply to airports, and their facilities and services. DOJ's Title II rules for State and local governments govern airports owned by a public entity; DOJ's Title III rules for public accommodations and commercial facilities govern privately owned airports and airport facilities operated by businesses like restaurants and stores. DOJ defines "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.<sup>19</sup> Emotional support animals

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<sup>19</sup> See 28 CFR 36.104. Service animal means 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. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but

are not recognized as service animals under Title II and Title III of the ADA.<sup>20</sup> However, under the ACAA, a service animal is any animal that is individually trained to provide assistance to a qualified person with a disability or any animal that assist persons with disabilities by providing emotional support.<sup>21</sup> Consequently, a restaurant or store in an airport could, without violating DOJ rules, deny entry to a properly documented emotional support animal or service cat that an airline, under the ACAA, would have to accept. Further, some airports are exercising their authority under the ADA to require that emotional support animals be contained in a pet carrier when traversing through areas of the airport not owned, leased, or controlled by airlines.

#### Request for Rulemaking

The Psychiatric Service Dog Society (PSDS), an advocacy group representing users of psychiatric service dogs, petitioned the Department in 2009 to eliminate a provision in the Department's Air Carrier Access Act regulation that permitted airlines to require documentation and 48 hours' advance notice for users of psychiatric service animals.<sup>22</sup> PSDS emphasized that the Department should not equate psychiatric service

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are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

<sup>20</sup> See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 FR 56236, 56269 (September 15, 2010). "In the final rule, the Department [of Justice] has retained its position on the exclusion of emotional support animals from the definition of "service animal."

<sup>21</sup> See Guidance Concerning Service Animals, 73 FR 27614, 27658 (May 13, 2008).

<sup>22</sup> See *Psychiatric Service Dog Society*, DOT-OST-2009-0093-0001 at <https://www.regulations.gov/document?D=DOT-OST-2009-0093-000> (April 21, 2009).

animals to emotional support animals. It noted that PSAs differ significantly from ESAs in that PSAs are trained to behave properly in public settings and trained to mitigate the effects of a mental health-related disability. PSDS also asserted that the Department is discriminating against and stigmatizing individuals with mental health-related disabilities who use PSAs by imposing additional procedural requirements on users of PSAs that are not imposed on service animals used by individuals with physical disabilities. PSDS further raised practical concerns with the current documentation requirement (e.g., financial hardship on PSA users without health insurance) and advance notice requirement (e.g., difficulty PSA users experience when they need to fly on short notice because of a family emergency). The Department subsequently issued a notice in the Federal Register seeking comment on the group's petition and related questions to assist the Department in determining whether to grant the petition by initiating a rulemaking or to deny the petition and retain the provision without change.<sup>23</sup> Interested parties can read the entire petition and comments received at DOT-OST-2009-0093. The Department is granting the petition by issuing this advance notice of proposed rulemaking.

A few months ago, the Department also received a request to initiate a rulemaking to amend its service animal regulation from Airlines for America (A4A). A4A asks that DOT harmonize its service animal definition under its Air Carrier Access Act regulation with the DOJ's Americans with Disabilities Act regulation. A4A would also like the Department to allow airlines to require all service animal users to provide a letter from a licensed physician or mental health professional stating that the passenger is under his or her care for the condition requiring the service animal and specifying that the passenger

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<sup>23</sup> See 74 Fed. Reg. 47902, 47905 (September 18, 2009).

needs the animal for an accommodation in air travel or at the passenger's destination. It asks that DOT delete all mentions in DOT's ACAA regulations or guidance suggesting that items such as vests, harnesses, ID cards, or other potential indicators other than a letter described above should be accepted as proof that the animal is qualified to be carried. A4A further asks that if DOT allows ESAs and PSAs, it limit the types of ESAs and PSAs that airlines are required to accommodate.<sup>24</sup> In a subsequent letter to the Department, A4A stressed the need to amend the Department's service animal regulation to protect the health and safety of passengers and crew because of an increase in passengers bringing animals onboard that have not been properly trained as service animals. In that letter, A4A noted that it expects airlines will be taking the appropriate steps to ensure the safety and health of passengers and crew.<sup>25</sup> In February 2018, ten disability advocacy organizations expressed concern to the Department with the revised service animal policies announced by two airlines and urged the Department to take action to stop the proliferation of patch work service animal access requirements.<sup>26</sup>

In response to the President's direction in Executive Orders (E.O.) 13771, E.O. 13777, and E.O. 13783, as well as other legal authorities, the Department published a

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<sup>24</sup> Comments of Airlines for America Part II - Proposals for Repeal or Amendment of Specific DOT Economic Regulations, DOT, DOT-OST-2017-0069-2751, 26-32 at <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2751> (December 1, 2017).

<sup>25</sup> Letter from Sharon L. Pinkerton, Airlines for America, to James Owens, Deputy General Counsel, Department of Transportation (January 31, 2018) at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0314>.

<sup>26</sup> Letter to Secretary Chao from American Association of People with Disabilities, Bazelon Center for Mental Health Law, Christopher and Dana Reeve Foundation, Disability Rights Education and Defense Fund, National Association of the Deaf, National Disability Rights Network, Paralyzed Veterans of America, The Arc of the United States, The National Council on Independent Living, and United Spinal Association (February 6, 2018) at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0315>.

Notice of Regulatory Review in the Federal Register on October 2, 2017, inviting public comment on existing rules and other agency actions that are good candidates for repeal, replacement, suspension, or modification.<sup>27</sup> The Department received comments from airlines and airline associations regarding the need to revise the Department's ACAA service animal regulations, raising a number of issues that will be explored in this rulemaking.<sup>28</sup>

### FAA Extension, Safety and Security Act of 2016

The FAA Extension, Safety, and Security Act of 2016 requires that the Department issue a supplemental notice of proposed rulemaking on five issues – (1) supplemental medical oxygen; (2) service animals; (3) accessible lavatories on single-aisle aircraft; (4) carrier reporting of disability service requests; and (5) seating accommodations. With respect to service animals, the rulemaking needs to address, at a minimum, species limitations and the documentation requirement for users of emotional support and psychiatric service animals.<sup>29</sup>

### *ACCESS Advisory Committee*

In April 2016, DOT established an Advisory Committee on Accessible Air Transportation (ACCESS Advisory Committee) to negotiate and develop a proposed rule

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<sup>27</sup> 82 Fed. Reg. 45750 (Oct. 2, 2017).

<sup>28</sup> See, e.g., Comment from Airlines for America at <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2751> (December 4, 2017); Comment from International Air Transport Association at <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2697> (December 1, 2017); Comment from Kuwait Airways at <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2679> (December 1, 2017); and Comment from National Air Carrier Association at <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2771> (December 4, 2017).

<sup>29</sup> FAA Extension Safety and Security Act of 2016, 114 P.L. 190, Section 2108 (July 15, 2016); In-Flight Medical Oxygen and other ACAA issues, RIN 2015-AE12, <https://cms.dot.gov/regulations/significant-rulemaking-report-archive> (June 2016).

concerning accommodations for air travelers with disabilities addressing in-flight entertainment/communications, accessible lavatory on new single-aisle aircraft, and service animals.<sup>30</sup> The ACCESS Advisory Committee, comprised of 27 members, was tasked with submitting three recommendations to the Department – one on each of the three separate issues. Because the negotiations address three disparate issues and some Committee members did not have a stakeholder and/or expert interest with respect to certain issues, each Committee member determined for himself or herself whether they would work on one or more of the issues. Of the 27 Committee members, 19 had stakeholder and/or expert interest with respect to service animals and actively worked on service animal issues. These members represented a balanced cross-section of significantly affected stakeholder interests.<sup>31</sup>

Despite good faith efforts, the ACCESS Advisory Committee was not able to reach consensus on how the service animals regulations should be revised. Nevertheless, the Department was able to gather useful information during this process from disability rights advocates, the airline industry, an association representing flight attendants, and other interested parties. The Committee members and other interested parties spent considerable time discussing the following issues: (1) distinguishing between emotional

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<sup>30</sup> 81 Fed. Reg. 20265 (Apr. 7, 2016).

<sup>31</sup> The 19 ACCESS Advisory Committee members on the service animal subcommittee were from the following organizations: United Airlines; National Council on Independent Living (NCIL); National Disability Rights Network; National Federation of the Blind (NFB); National Air Carrier Association; Jet Blue Airlines; Association of Flight Attendants-CWA; International Air Transport Association; West Jet Airlines; Delta Air Lines; Psychiatric Service Dog Partners (PSDP); Lufthansa Airlines; Paralyzed Veterans of America (PVA); Frontier Airlines; National Alliance on Mental Illness (NAMI); Guide Dog Foundation for the Blind (GDFB); American Council of the Blind (ACB); Regional Airline Association; and U.S. Department of Transportation. These organizations were selected to represent not only the interest of that individual's own organization but rather the collective stakeholder interests of organizations in the same stakeholder category.

support animals and other service animals; (2) limiting the species of service animals that airlines are required to transport; (3) limiting the number of service animals that a single individual should be permitted to transport; and (4) requiring attestation from all service animal users that their animal has been trained to behave in a public setting. Each of these issues are discussed in turn.

#### Emotional Support Animals – Species Limitation and Containment

Airlines uniformly opposed the continued recognition of ESAs in the ACAA context, as they are not recognized under the ADA.<sup>32</sup> Carriers urged DOT to harmonize its definition of service animal under the ACAA with the DOJ definition of service animal under the ADA by eliminating ESAs and limiting service animals to dogs and where reasonable miniature horses.<sup>33</sup> Carriers also proposed eliminating access for emotional support animals as they consider these animals to cause most in-flight disruptions.

Advocates were united in supporting access for emotional support animals under the ACAA and wanted a legal classification for ESAs separate from service animals in recognition of the fact that emotional support animals are not trained to perform work or tasks to mitigate disability.<sup>34</sup> However, they disagreed about which species should be allowed access as emotional support animals and what type of access they should have.

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<sup>32</sup> Carrier Response to Revised Service Animal Proposal, August 31, 2016 (Revised September 8, 2016), at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0209>. (September 8, 2016).

<sup>33</sup> DOJ, while not recognizing miniature horses as service animals, requires that entities covered by the ADA permit individuals with disabilities to use miniature horses where reasonable if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. See 28 CFR 36.302

<sup>34</sup> Service Animal Advocates Position and Reasoning at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0208> (September 15, 2016).

Two disability organizations—International Association of Canine Professionals and Assistance Dogs International—proposed limiting ESAs to cats and dogs and requiring that they be in approved pet carriers for the duration of a passenger’s flight unless needed for disability mitigation. These two organizations stated that they do not support including rabbits as ESAs because rabbits may excrete out of the carrier.<sup>35</sup> Five disability organizations—Psychiatric Service Dog Partners, Guide Dog Foundation for the Blind, Open Doors Organization, National Multiple Sclerosis Society, Guide Dog Users, Inc.—proposed limiting ESAs to dogs, cats, and rabbits and requiring that they be contained in approved pet carriers, except when needed for disability mitigation. They stated that cats and dogs are common emotional support animals, and rabbits should also be included as they can have soothing tendencies beyond those of cats and dogs. They were opposed to extending ESA status to other animals as they believe employee training and expertise on service animals have limits and are concerned that the proliferation of nontraditional species as service animals would erode public trust toward service animal users generally.<sup>36</sup>

Six other disability organizations—Paralyzed Veterans of America, National Alliance on Mental Illness, National Federation of the Blind, Autistic Self Advocacy Network, Bazelon Center for Mental Health Law, Easterseals—wanted household birds to also be recognized as ESAs and were in favor of containment for cats, rabbits, and

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<sup>35</sup> *Id.* at 15.

<sup>36</sup> *Id.* at 7.

birds, except when needed for disability mitigation.<sup>37</sup> They asserted that emotional support dogs that are trained to behave in public, but not trained to provide disability mitigation,<sup>38</sup> do not require a pet carrier. The advocates all stated that when the emotional support animal is providing disability mitigation, the animal should be tethered to the handler and under control of the handler.<sup>39</sup>

Airlines and the flight attendant association urged the Department to allow airlines to require that ESAs that fit in pet carriers be kept there for the duration of the flight, if airlines are required to continue carrying ESAs. The airlines and flight attendant association stated that it would be difficult to enforce a rule that allowed ESAs to be out of the carrier when providing disability mitigation as it would necessitate a subjective assessment by flight attendants as to the reason the ESA is not in the carrier. They also expressed concern about the ability of airline personnel to distinguish between ESAs and PSAs as airline personnel have not been trained to recognize the difference between these animals.

#### Service Animals - Species Limitation

There was a consensus among ACCESS Committee members that the Department should limit the types of species recognized as service animals (including PSAs) and that

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<sup>37</sup> *Id.* at 12.

<sup>38</sup> The ACCESS Committee discussions brought to light the distinction between disability mitigation training, which is training designed to teach service animals how to assist an individual with his or her disability, and public access training, which is training designed to teach a service animal how to behave properly in a public setting. For instance, an animal that has received disability mitigation training knows how to guide a passenger with a vision impairment, retrieve an item for a passenger with a mobility impairment, or perform a task or function to assist an individual with a disability with his or her needs. Service animals that have received proper public access training would not attack or bite people or animals, urinate or defecate in the gate area or on the aircraft, growl or lunge at people or other animals, or exhibit other signs of misbehavior.

<sup>39</sup> *Id.* at 4 and 12.

this limit would provide greater predictability and added assurance of access for individuals with disabilities with legitimate service animals. The discussion about the type of animal that should be recognized as a service animal focused on dogs, miniature horses, capuchin monkeys, and cats. While there was no agreement on whether all the animals should be recognized as service animals, there was agreement that other animals should not be allowed as service animals.

### *1. Dogs*

Representatives of airlines and certain disability organizations (Psychiatric Service Dog Partners, Guide Dog Foundation for the Blind & America's VetDogs, International Association of Canine Professionals (IACP), Open Doors Organization, National Federation of the Blind, Assistance Dogs International, and Guide Dog Users, Inc.) supported limiting coverage of service animals to dogs.<sup>40</sup>

### *2. Capuchin Monkeys*

Disability groups supported recognizing capuchin monkeys as service animals,<sup>41</sup> with a requirement that they must be kept in a pet carrier due to their unpredictable aggressive behavior. Capuchin monkeys provide in-home services to individuals with paraplegia and quadriplegia and are used by individuals with disabilities primarily or exclusively in their homes. Those who support recognizing capuchin monkeys as service animals pointed out that they can perform manually dexterous work or tasks that dogs

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<sup>40</sup> Service Animal Advocates Position and Reasoning, p. 1 and 2 at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0208> (September 15, 2016).

<sup>41</sup> *Id.* at 1, 4 and 6. See Service Animal –Helping Hands Monkey Helper Presentation at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0182> (August 26, 2016). See also Carrier Response to Revised Service Animal Proposal 31 August Revised 8 September, p.2 at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0209> (September 8, 2016).

and miniature horses cannot. It was also pointed out that air travel for these monkeys as service animals could be limited to when individuals with disabilities have to leave home due to an emergency or for the initial delivery of the monkey to the individual with a disability.

### ***3. Miniature Horses***

There was also general support among disability rights advocates to provide, on a case-by-case basis, access to miniature horses trained to provide disability mitigation.<sup>42</sup> Miniature horses have specific features that make them a better choice for some persons with disabilities—longer working life, allergen avoidance, religious conformance, and soundness of structure for mobility work.

### ***4. Cats***

Some disability rights organizations (Paralyzed Veterans of America, National Alliance on Mental Illness, Autistic Self Advocacy Network, Bazelon Center for Mental Health Law, Easterseals, National Multiple Sclerosis Society) supported recognizing cats as service animals as there was a suggestion that cats provide disability mitigation related to seizure alert.

Airlines and certain other disability rights organizations (Psychiatric Service Dog Partners, Guide Dog Foundation for the Blind & America's VetDogs, International Association of Canine Professionals (IACP), Open Doors Organization, National Federation of the Blind, Assistance Dogs International, Guide Dog Users, Inc.) opposed recognizing cats as service animals as they are not recognized as service animals under the ADA and the information about cats' ability to alert individuals of seizures was

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<sup>42</sup> [Service Animal Advocates Position and Reasoning, p. 1, 3, 4, 5 and 6 at https://www.regulations.gov/document?D=DOT-OST-2015-0246-0208](https://www.regulations.gov/document?D=DOT-OST-2015-0246-0208) (September 15, 2016).

limited.<sup>43</sup> There was also concern expressed that the popularity of cats as pets would open the door for fraud if they are an allowed species.

#### Number of Service Animals Per Passenger.

During the negotiations, the advocates and airlines both appeared to agree that reasonable restrictions should be imposed on the number of service animals that one passenger should be permitted to carry. On balance, the advocates and airlines also appeared to agree that certain passengers may have a legitimate need to travel with more than one service animal. Both the airlines and advocates appear to support a requirement that a passenger seeking to travel with more than one service animal may be required to provide reasonable justification to the airline as to the passenger's need to do so.

However, there did not appear to be agreement on what would constitute reasonable justification. The airlines also supported a limit of two service animals for any single passenger.<sup>44</sup> There did not appear to be agreement from the advocates on the number of service animals that a single passenger should be allowed to carry.

#### Documentation/Attestation

Various disability rights advocates have stated that a top goal is the elimination of the current DOT requirement to provide medical documentation as a condition of access for users of PSAs and ESAs. As a possible alternative to the documentation requirements for ESAs and PSAs in the current rule, the advocates on the committee proposed the use of a "Decision Tree" model. Under this model, all individuals with a disability who wished to travel with a service animal would fill out an online questionnaire, wherein

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<sup>43</sup> *Id.* at 2. See also Carrier Response to Revised Service Animal Proposal 31 August Revised 8 September, p.2 at (<https://www.regulations.gov/document?D=DOT-OST-2015-0246-0209>), (September 8, 2016).

<sup>44</sup> *Id.* at 3.

they would provide answers to questions targeted toward assisting the airline to determine specifics about the service animal/emotional support animal in question (e.g., species of animal, whether the animal is a service animal or an emotional support animal, and number of animals). During this process, information would also be provided to the passenger regarding his or her responsibilities when traveling with a service animal (e.g., how a service animal should behave and the consequences for fraudulently representing a pet as a service animal).<sup>45</sup>

The majority of the U.S. airlines appeared to be receptive to the idea of the decision tree, but would only accept that option as an alternative to the current documentation requirements if it were made mandatory for all individuals with a disability traveling with a service animal to complete as a condition of travel, and if it included strong language designed to dissuade individuals from committing fraud by plainly stating the consequences that would follow should an individual attempt to falsely claim that their pet is a service animal.<sup>46</sup> The advocates were mostly opposed to making the decision tree mandatory because they believed that making it mandatory would increase the burden for service animal users who, under the current rule, are not required to provide documentation or advance notice when traveling with a service animal. The foreign airlines appeared not to support the decision tree model even if mandatory.

Various suggestions were made as possible compromises, including a mandatory attestation statement that all individuals traveling with a service animal would certify in

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<sup>45</sup> Service Animal Advocates Position and Reasoning, p. 16 at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0208> (September 15, 2016).

<sup>46</sup> See Carrier Response to Revised Service Animal Proposal 31 August Revised 8 September, p.1 at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0209>, (September 8, 2016).

lieu of the proposed decision tree or existing documentation requirement for PSAs and ESAs. Under this alternative, individuals with disabilities traveling with a service animal would certify that their animal is a service animal on a one-page online certification form. The attestation language would serve the dual purpose of: (1) educating individuals on what a service animal is and who is permitted to bring a service animal on board; and (2) dissuading individuals from trying to falsely claim that their pet is a service animal. It was also suggested that the attestation be saved in a traveler's profile so that a passenger would not be subject to the certification process repeatedly.

The advocates and the airlines appeared to support the attestation model as a deterrent to individuals who might seek to falsely claim that their pets are service animals.<sup>47</sup> However, the airlines also sought an additional requirement that individuals attest to having been diagnosed by a third party as having a disability. The advocates were not in favor of adding this requirement, arguing that that the term "disability" is a legal term and that all individuals with disabilities may not have necessarily received such a diagnosis, e.g. a blind person does not typically receive a diagnosis that he or she is blind. Discussions eventually reached a stalemate on this point and the ACCESS Committee members voted to discontinue discussions on the service animal issue.

### ***Request for Data and Comments***

In this ANPRM, the Department solicits comment on the following issues: (1) whether psychiatric service animals should be treated similar to other service animals; (2) whether there should be a distinction between emotional support animals and other service animals; (3) whether emotional support animals should be required to travel in

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<sup>47</sup> Service Animal-Vote Tally Sheet-3<sup>rd</sup> Party Documentation, Mandatory Attestation, at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0281>.

pet carriers for the duration of the flight; (4) whether the species of service animals and emotional support animals that airlines are required to transport should be limited; (5) whether the number of service animals/emotional support animals should be limited per passenger; (6) whether an attestation should be required from all service animal and emotional support animal users that their animal has been trained to behave in a public setting; (7) whether service animals and emotional support animals should be harnessed, leashed, or otherwise tethered; (8) whether there are safety concerns with transporting large service animals and if so, how to address them; (9) whether airlines should be prohibited from requiring a veterinary health form or immunization record from service animal users without an individualized assessment that the animal would pose a direct threat to the health or safety of others or would cause a significant disruption in the aircraft cabin; and (10) whether U.S. airlines should continue to be held responsible if a passenger traveling under the U.S. carrier's code is only allowed to travel with a service dog on a flight operated by its foreign code share partner.

The Department is committed to ensuring access for service animal users on aircraft but also recognizes that airlines have a responsibility to ensure the health, safety, and welfare of passengers and employees. The Department requests data on the number of service animals that travel by air annually and the number of behavior-related service animal problems that occur annually. The Department also requests this data separately for emotional support animals if available. The Department is taking this action to ensure that the air transportation system is safe and accessible for everyone.

1. Psychiatric Service Animals

Should the DOT amend its service animal regulation so psychiatric service animals are treated the same as other service animals? DOT's current service animal regulation allows airlines to require a user of a psychiatric service animal or emotional support animal to provide airlines with medical documentation and up to 48 hours' advance notice prior to travel. This provision was adopted to address the problem of passengers attempting to pass their pets as ESAs or PSAs so they can travel for free in the aircraft cabin. We seek comments from airlines and other interested persons about their experiences with passengers attempting to pass off pets as service animals, especially as it may relate to PSAs.

Many PSA users feel that the DOT requirement stigmatizes and discriminates against people with mental health-related disabilities because individuals with physical disabilities or hidden medical disabilities who use service animals do not have to provide the same documentation as a service animal user with a mental health disability. What, if any, experience do airlines have with people attempting to bring pets on board aircraft based on claims that the animals are service animals for disabilities that are not readily apparent other than mental health-related conditions, such as seizure disorders or diabetes?

Also, PSAs are recognized as a service animal under DOJ's ADA regulation. Under the ADA regulations, the regulated entities may not require documentation as a condition for entry for service animals including PSAs. Should DOT harmonize its service animal regulation under the ACAA with DOJ's ADA service animal regulation and prohibit airlines from requiring PSA users to provide a letter from a licensed mental health professional as a condition for travel? If airlines are no longer allowed to require

medical documentation from PSA users, what effective alternative methods are there to prevent fraud? For example, if there is no medical documentation requirement for PSAs but such a requirement remains for ESAs, what would prevent individuals from asserting that their ESA is a PSA? How would airline personnel be able to distinguish between a PSA and an ESA? We invite the public, particularly service animal users, to propose methods of detecting and preventing fraud that they believe are feasible alternatives to the current medical documentation requirements for PSAs. The Department notes that the ACAA is a specialized statute that applies to an environment where many people are confined within a limited space for what may be a prolonged time. Is that sufficient reason for DOT's treatment of PSAs under its ACAA regulation to differ from that of DOJ under its ADA regulation? What are the practical implications of no longer allowing airlines to require medical documentation from PSA users?

Psychiatric Service Dog Partners, Guide Dog Foundation for the Blind and America's VetDogs (United Service Animal Users) have provided the Department a report regarding the burden on PSA users of the current system's focus on third-party documentation. According to the report submitted by the United Service Animal Users, the average cost to a service animal user to obtain medial documentation is \$156.77 and it takes an average of 31 days to obtain such a documentation. United Service Animal Users states that more than 75% of individuals surveyed have either not flown or flown less because of this requirement.<sup>48</sup> Do you agree with the data in this report? Explain the basis of your agreement or disagreement. Do the costs to users of PSAs of providing

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<sup>48</sup> See ACAA Third Party Documentation Requirements: Survey of Psychiatric-Disability-Mitigating Users at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0296>.

medical documentation outweigh the benefits to airlines of requiring such documentation?

Regarding the 48 hours' advance notice requirement for PSAs and ESAs, the Department put in place that requirement to provide airlines sufficient time to review and determine the validity of the medical documentation provided by the passenger. If the Department were no longer to allow airlines to require medical documentation from a PSA user, should the 48 hours' advance notice requirement be eliminated? We solicit comment on whether there is any reason to retain the advance notice requirement for PSAs if there is no longer a documentation requirement for PSAs. Also, what has been the impact of the 48 hours' notice requirement on individuals with psychiatric service animals?

## 2. Emotional Support Animals

The Department is seeking comment on whether it should continue to include ESAs in its definition of a service animal under the ACAA. ESAs are not recognized as service animals in regulations implementing the ADA. Unlike other service animals, ESAs are not trained to perform a specific active function, such as pathfinding, picking up objects, or responding to sounds. This has led some service animal advocacy groups to question their status as service animals and has led to concerns by carriers that permitting ESAs to travel in the cabin has opened the door to abuse by passengers wanting to travel with their pets. Airlines also assert that DOT should exclude emotional support animals from its definition of a service animal under the ACAA to be consistent with the definition of service animal under the ADA.

Others favored keeping emotional support animals as a separate and distinct category from service animals that are still entitled to protections under the ACAA. For example, the U.S. Department of Housing and Urban Development (HUD), which enforces the Fair Housing Act regulations, considers animals that provide emotional support to persons with disabilities to be assistance animals.<sup>49</sup> HUD allows housing providers to require a letter from a medical doctor or therapist to demonstrate that the animal is a legitimate assistance animal. The Department seeks comment on whether the amended definition of a service animal should include emotional support animals. Alternatively, the Department seeks comment on whether emotional support animals should be regulated separately and distinctly from service animals? If yes, should DOT allow airlines to require ESA users to provide a letter from a licensed mental health professional stating that the passenger is under his or her care for the condition requiring the ESA and specifying that the passenger needs the animal for an accommodation in air travel or at the passenger's destination? Would such a documentation requirement be stringent enough to prevent individuals who do not have disabilities from skirting the rules by falsely claiming that their pets are ESAs? Suggestions are welcome on approaches to minimize the use of letters from licensed mental health professionals that enable passengers without disabilities to evade airline policies on pets. Are there other types of documents or proof that could be required for carriage of ESAs in the passenger cabin that would be just as effective? Is advance notice of a passenger's intent to travel with an ESA needed to provide the airline time to review documents or other proof? If

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<sup>49</sup> See Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, FHEO Notice: FHEO-2013-01 at [https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals\\_ntcfheo2013-01.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf), (April 25, 2012).

the documentation needed to fly with an ESA is rigid, would ESA users be less likely to fly and choose other modes of transportation? The Department seeks comment on the practical implications of these options.

### 3. Containment of Emotional Support Animals

If DOT adopts a rule that continues to require that ESAs be accepted for transport in the aircraft cabin, should DOT allow airlines to require that ESAs be in carriers for the duration of a flight? There appears to be a belief among airlines, a flight attendant association, and others that the increase in misbehavior by service animals on aircraft is largely attributed to the increase in use of emotional support animals. DOT requests any available information to confirm or dispel this belief. Further, because the ADA does not require airports to recognize or allow ESAs as service animals, some airports are requiring that emotional support animals be contained in a pet carrier when traversing through areas of the airport not owned, leased, or controlled by airlines. Considering these concerns, the Department seeks comment on when, if at all, should emotional support animals be contained in a pet carrier. What should be done if the emotional support animal is too large to fit in a pet carrier? Commenters should also consider that recent changes to aircraft configuration and seating, e.g. economy seating vs. seating with extra leg room, means that there may be limitations with respect to containment requirements given the availability of passenger foot space.

### 4. Species Limitations

The Department seeks comment on what, if any, limitations on species should be imposed for service animals/emotional support animals. All major stakeholders—disability rights advocates, airlines, flight attendant associations—appear to agree that

limiting the types of species recognized as service animals would provide greater predictability and prevent the erosion of the public's trust which could reduce access for individuals with disabilities. Some prefer that the Department limit coverage of service animals to dogs, which are the most common service animals used by individuals with disabilities. This is consistent with the DOJ definition of service animals under the ADA and the existing ACAA requirement for the type of service animal that foreign air carriers are required to transport. It is also our understanding that service dogs are by far the dominant type of animals used to assist individuals with disabilities. Although accounts of unusual service animals receive wide publicity, cases of unusual service animals, such as turkeys and pigs, being transported on aircraft are not common. As such, would limiting the species of recognized service animals to dogs cause harm to individuals with disabilities? We request data, if available, about the type of service animals that airlines transport year-over-year. The Department also seeks comment on whether any safety-related reasons specific to foreign carriers may preclude the carriage of service animals other than dogs on their flights.

Others would like for capuchin monkeys and miniature horses to also be recognized as service animals or, in the alternative, provided access on a case-by-case basis. Some individuals with disabilities prefer miniature horses to dogs because of allergies to dogs, religious reasons, or because miniature horses live longer, have excellent vision, and are better at assisting their owners with balance while walking. While DOJ does not recognize miniature horses as service animals, entities covered by the ADA are required to modify their policies to permit miniature horses where

reasonable.<sup>50</sup> Those who advocate for recognizing a capuchin monkey as a service animal emphasize how essential the capuchin monkeys are in caring for individuals who are paralyzed or otherwise limited in mobility. DOJ, in deciding not to recognize capuchin monkeys in its definition of service animals for purposes of its regulation implementing the ADA noted “their potential for disease transmission and unpredictable aggressive behavior.” 75 FR 56164, 56194 (September 5, 2010). Subject to existing applicable health and safety regulations,<sup>51</sup> should the DOT designate capuchin monkeys or miniature horses as service animals under the ACAA? Can the health and safety concerns related to capuchin monkeys be adequately addressed if there was a requirement that these animal travel in pet carriers? The Department also seeks comment on whether any amended service animal rule should designate cats or any other animal as eligible species to be a service animal.

If the Department were to adopt a rule that continues to require airlines to accept ESAs for transport, what species of animals should be accepted as ESAs? During the Department’s ACCESS Committee meetings, the four species that were mentioned as possibilities are dogs, cats, rabbits, and household birds. Should the Department limit the transport of ESAs to dogs particularly if a service animal is defined to be a dog? What is the impact on passengers with disabilities if an ESA is limited to dogs? Are cats, rabbits, and birds common emotional support animals? Are there any other emotional support animals that are widely used by individuals with disabilities?

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<sup>50</sup> See 28 CFR 36.302.

<sup>51</sup> The Centers for Disease Control and Prevention’s (CDC) regulation on the importation of nonhuman primates prohibits the importation of a nonhuman primate, which includes capuchin monkeys, into the United States unless the person is a registered importer with the CDC. See 42 C.F.R. §71.53.

## 5. Number of Service Animals Per Passenger

The Department's service animal rule does not limit the number of service animals that one passenger may bring on an aircraft. A single passenger legitimately may have more than one service animal. For example, a person who is deaf and has panic attacks may use one service animal to alert him or her to sounds and another to calm him or her. A person may also need more than one animal for the same task, such as assisting with stability when walking. However, the Department's Office of Aviation Enforcement and Proceedings, as a matter of prosecutorial discretion, has chosen not to pursue action against carriers that refuse to accept more than three service animals per person. The Department seeks comment on whether to limit the number service animals/emotional support animals that a single passenger may carry onboard a flight. If so, what should the number limit be? The Department also seeks comment on whether justification should be required for a single passenger to be allowed to carry more than one service animal/emotional support animal. If so, what would the parameters of that justification be?

## 6. Social Behavior Training

A4A and others have urged the Department to revise its service animal regulation to address an increase in passengers bringing animals onboard that have not been appropriately trained as service animals.<sup>52</sup> The guidance document referenced in the Department's service animal regulation states that an animal that engages in disruptive behavior, such as running around freely in the aircraft or airport, barking, or growling

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<sup>52</sup> Comments of Airlines for America Part II - Proposals for Repeal or Amendment of Specific DOT Economic Regulations, DOT, DOT-OST-2017-0069-2751 at <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2751>, (January 31, 2018).

repeatedly at people, biting, and jumping on people, or urinating or defecating in the cabin or gate area, shows that it has not been successfully trained to function as a service animal in a public setting. Airlines are not required to accept for transport animals that do not behave properly in public; on the other hand, the regulation does not specify how an airline can be assured that a service animal has been trained to behave appropriately in a public setting. Airlines also explained of the difficulties their employees experience in observing animal behavior prior to a flight given the lack of staffing and the hectic and time-sensitive nature of air travel. The Department seeks comment on whether it should amend its service animal regulation to allow airlines to require that all service animal users attest that their animal can behave properly in a public setting. The Department also solicits comments on alternatives to a documentation requirement to assess the service animal's behavior.

The ADA prohibits covered entities from requiring documentation, such as proof that the service animal has been trained to behave appropriately as a condition for entry. Is the need for assurance that the service animal can behave properly greater in air travel, as air travel involves people being in a limited space for a prolonged period without the ability to freely leave once onboard the aircraft? Would a provision allowing airlines to require service animal users attest that their animal has been successfully trained to function as a service animal in a public setting reduce the safety risk that passengers, airline staff, and other service animals face from untrained service animals? What is the impact on individuals with disabilities of allowing airlines to require attestation as a condition for permitting an individual to travel with his or her service animal? If such a provision is allowed, should airlines be able to require the attestation in advance of

travel? How long in advance of travel? What options exist for preventing any advance documentation requirement from being a barrier to travel for people with disabilities? What is the proper balance between ensuring passengers with disabilities do not encounter barriers to air travel and protecting the health and safety of passengers and airline crew? If DOT allows airlines to require attestation that an animal has received public access training, should the attestation be limited to certain types of service animals? Why or why not?

#### 7. Control of the Service Animal

DOT expects that a service animal will be under the control of its user, but DOT's service animal regulation does not contain any leash, tether, or harness requirement. We seek comment on whether tethering or other similar restrictions should be a condition for permitting travel with a service animal. The DOJ's service animal regulation requires that dogs and miniature horses be harnessed, leashed or tethered unless the device interferes with the animal's work or the individual with a disability is unable to hold a tether because of his or her disability. In such cases, the individual with a disability may control his service animal by some other means, such as voice control. Should DOT adopt a similar requirement? Would such a requirement further minimize the likelihood of unwelcome or injurious behavior by a service animal to other passengers or airline staff? What are the advantages or disadvantages in adopting this type of requirement?

#### 8. Large Service Animals

Airlines have also expressed safety concerns about large service animals in the cabin, particularly large emotional support animals that have not received disability-mitigation training. Some airlines have urged the Department to consider instituting size

and weight restrictions for emotional support animals. The current rule contemplates that a service animal would not be permitted to accompany its user at his or her seat if the animal blocks a space that, per FAA or applicable foreign government safety regulations, must remain unobstructed (e.g., an aisle, access to an emergency exit) *and* the passenger and animal cannot be moved to another location where such a blockage does not occur. The Department provides guidance in the current rule that if the passenger and animal cannot be moved, carriers should first talk with other passengers to find a seat location where the service animal and its user can be agreeably accommodated (e.g., by finding a passenger who is willing to share foot space with the animal).<sup>53</sup>

While the Department previously concluded that a service animal's reasonable use of a portion of an adjacent seat's foot space does not deny another passenger effective use of the space for his or her feet and is not an adequate reason for the carrier to refuse to permit the animal to accompany its user at his or her seat, some airlines have indicated that passengers feel pressured to agree to such an arrangement and have later expressed to airline personnel their dissatisfaction at having to share their foot space. The Department seeks comment on whether it should allow airlines to limit the size of emotional support animals or other service animals that travel in the cabin and the implications of such a decision. The Department also seeks comment on whether passengers would find it burdensome to share foot space with service animals and what concerns passengers might have with such an arrangement.

## 9. Veterinary Forms

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<sup>53</sup> See Guidance Concerning Service Animals, 73 FR 27614, 27660 (May 13, 2008).

Recently, a few airlines have begun requiring service animal users to provide information about their animal's health and behavior as a condition for travel. These airlines state that there has been a significant increase in the number of service animal/emotional support animal transportation requests they receive as well as an increase in reported animal incidents of misbehavior, including urination, defecation, and biting. The airlines assert that the health and behavior records of the animals are necessary to protect their customers, employees and other service animals on board aircraft should they be bitten.<sup>54</sup> They also contend that producing animal health records would not be burdensome for service animal users as most, if not all, States require animals to be vaccinated. We ask airlines for available data on how many incidents of misbehavior, particularly incidents of biting, airlines have experienced, as well as any data demonstrating an increase in these incidents. What amount of increase in animal misbehavior, if any, is sufficient to warrant a general requirement for a veterinary form regarding the health and behavior of a service animal without an individualized assessment that a service animal or emotional support animal would pose a direct threat to the health or safety of others or would cause a significant disruption in the aircraft cabin? We ask passengers with disabilities to provide information regarding what, if any, burdens may exist should they be required to submit veterinary forms related to the health or behavior of their service animal.

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<sup>54</sup> An airline may refuse transportation of a service animal if the animal would pose a direct threat to the health or safety of others. However, the Department's regulation does not clearly specify whether airlines must make this direct threat assessment on an individualized case-by-case basis. The DOT guidance document referenced in the regulation does suggest that the direct threat should be individualized as it states that the analysis should be based on observable actions

The American Veterinary Medical Association (AVMA) has raised concerns with the Department about airlines' service animal forms, which require veterinarians to attest to the animal's behavior as well as the animal's health. The AVMA explained to the Department that veterinarians cannot guarantee the behavior of an animal particularly in a new environment like an aircraft but can provide information based on their observations of the animal during a physical examination and discussions with the animal's owner regarding whether the animal has been aggressive in the past. AVMA emphasized to the Department that expanding the scope of the veterinary form beyond health information of the animal and behavioral information of the animal based on the veterinarian's observations could lead to refusals by veterinarians to fill out these forms, which would result in more service animals being denied air transportation.

Through discussions with representatives of many disability rights organizations and a joint letter from ten disability rights organizations, the Department is aware of some of the concerns of service animal users. Psychiatric Service Dog Partners stated that any requirement for health or other forms that applies to PSAs without applying to other service animals is discriminatory. The American Council of the Blind (ACB), the National Federation of the Blind (NFB), and other disability rights organizations pointed out that blind people have used guide dogs safely for decades and should not now have barriers placed on travel. Other disability organizations, such as Paralyzed Veterans of America, emphasized that the airlines should not be requiring such forms unless the airline determines that the animal would pose a direct threat to the health or safety of others or would cause a significant disruption of cabin service based on an individualized assessment.

Disability rights advocates also pointed out that the way airlines implement their policies for veterinarian forms may be problematic and negatively impact passengers with disabilities. For example, airline policies that all or certain service animal users provide a veterinarian form related to the health or behavior of their animal 48 hours in advance of scheduled travel means persons with disabilities are unable to fly should there be an emergency. Policies that animals be visually verified at airport check-in would prevent the ability of passengers with disabilities to check-in online like other passengers. Airlines establishing their own policies for travel with a service animal could also mean a patchwork of service animal access requirements, making it difficult for persons with disabilities to know what to expect and how to prepare for travel. The Department seeks comment on whether its service animal regulation should explicitly prohibit airlines from requiring veterinarian forms as a condition for permitting travel with a service animal beyond those specifically allowed by the Department in its regulation unless there is individualized assessment that such a documentation is necessary. If veterinarian forms are not allowed to be required as a condition for travel, what about other types of documentation to ensure that the animal is not a public health risk to humans? Specifically, the Department seeks comment on whether airlines should be allowed to require that service animal users provide evidence that the animal is current on the rabies vaccine as that vaccine is required by all 50 states for dogs and by most states for cats. Finally, should airlines be permitted to require passengers to obtain signed statements from veterinarians regarding the animal's behavior. And if so, what recourse should be available for service animal users if the veterinarian refuses to fill out the behavior form.

10. Code-Share Flights

Currently, foreign airlines are only required to transport service dogs, including emotional support and psychiatric service dogs, barring a conflict with a foreign nation's legal requirements. However, a U.S. carrier that code-shares with a foreign carrier could legally be held liable for its foreign codes-share partner's failure to transport other service animal species on code-share flights. While the Department's Office of Aviation Enforcement and Proceedings has not taken action against U.S. carriers under these circumstances, the Department seeks comment on whether the rule should explicitly state that U.S. carriers would not be held responsible for its foreign code-share partner's refusal to transport transportation service animals other than dogs.

### **Regulatory Notices**

#### A. Executive Order 13771, 12866 and 13563 and DOT's Regulatory Policies and Procedures

This action has been determined to be significant under Executive Order 12866, as amended by Executive Order 13563, and the Department of Transportation's Regulatory Policies and Procedures. It has been reviewed by the Office of Management and Budget under that Order. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) require agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." Additionally, Executive Orders 12866 and 13563 require agencies to provide a meaningful opportunity for public participation. Accordingly, we have asked commenters to answer a variety of questions to elicit practical information

about alternative approaches and relevant technical data. These comments will help the Department evaluate whether a proposed rulemaking is needed and appropriate. This action is not subject to the requirements of EO 13771 (82 FR 9339, February 3, 2017) because it is an advance notice of proposed rulemaking.

B. Executive Order 13132 (Federalism)

This ANPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (Federalism). This notice does not propose any regulation that (1) has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government, (2) imposes substantial direct compliance costs on State and local governments, or (3) preempts State law. States are already preempted from regulating in this area by the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

C. Executive Order 13084

This ANPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments). Because none of the topics on which we are seeking comment would significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires an agency to review regulations to assess their impact on small entities unless the agency determines

that a rule is not expected to have a significant economic impact on a substantial number of small entities. A direct air carrier or foreign air carrier is a small business if it provides air transportation only with small aircraft (i.e., aircraft with up to 60 seats/18,000-pound payload capacity). See 14 CFR 399.73. If the Department proposes to adopt the regulatory initiative discussed in this ANPRM, it is possible that it may have some impact on some small entities but we do not believe that it would have a significant economic impact on a substantial number of small entities. We invite comment to facilitate our assessment of the potential impact of these initiatives on small entities.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), no person is required to respond to a collection of information unless it displays a valid OMB control number. This ANPRM does not propose any new information collection burdens.

F. Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this notice.

G. National Environmental Policy Act

The Department has analyzed the environmental impacts of this ANPRM pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental

impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.6.i of DOT Order 5610.1C categorically excludes “[a]ctions relating to consumer protection, including regulations.” The purpose of this rulemaking is to seek public comment on the Department’s service animal regulations. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

**ISSUED THIS 16th DAY OF MAY, 2018, IN WASHINGTON, D.C. under authority delegated in 49 C.F.R. Part 1.27(n).**

- Original Signed -

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James C. Owens,  
Deputy General Counsel.