

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY**

In the Matter of

**Nondiscrimination on the Basis
of Disability in Air Travel**

Docket OST-2004-19482

14 CFR Part 382

Comments
of
IATA
The International Air Transport Association

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IATA, the International Air Transport Association, and its Members¹ are fully committed to the safe air transport of disabled passengers on the basis of nondiscrimination, with dignity and with full rights as passengers. IATA is therefore pleased to have an opportunity to respond to the Department's Notice of Proposed Rulemaking (NPRM), 69 Fed Reg. 64364 (Nov. 4, 2004), 70 Fed. Reg. 4058 (Jan. 28, 2005).

IATA suggests that the Department reconsider its approach in the NPRM and recast its proposal:

- to choose international cooperation rather than unilateralism
- to acknowledge jurisdictional limits, as a matter of both law and comity, and adopt a policy on international transport of disabled passengers that gives due consideration to the merits of international harmonization
- to take into account the significant differences between domestic and international air transport
- to give due consideration to medical differences between chronic and acute patient circumstances when defining those to whom the proposed regulation would apply and determining how it would apply
- to replace its detailed and prescriptive approach with broad general principles

IATA submits that such changes will enable DOT to better achieve the goal of transport of disabled individuals on a non-discriminatory basis, with dignity and with full rights as passengers.

The proposed rule as set forth in the NPRM presents a number of serious issues that involve both international and domestic legal standards and important international policies of comity and reciprocity. Of particular concern are the facts that the NPRM

¹ IATA is the association of the world's international airlines. It brings together approximately 270 airlines, including the world's largest. Flights by IATA airlines comprise more than 95 percent of all international scheduled air traffic.

prescribes specific arrangements for disabled passengers within foreign countries and sets standards on how non-U.S. carriers have to treat disabled passengers while their aircraft are within the jurisdiction of other sovereigns, and that these extraterritorial provisions are so extraordinarily and unnecessarily specific and detailed.

As discussed more fully below, the European Community is in the process of legislating a new binding regulation on the obligations of carriers vis-a-vis Persons with Reduced Mobility (PRMs – the European term for disabled passengers) in air travel, and indeed has just published its own proposed regulation.² The EC Proposal presents a clear contrast to the NPRM and conflicts with many of its key provisions.³ Clashing regulatory regimes will only delay progress on the very worthy underlying policy goal of nondiscriminatory international air transport of disabled passengers. IATA suggests that

² Proposal for a Regulation of the European Parliament and of the Council concerning the rights of persons with reduced mobility when traveling by air, Brussels, 16 February 2005 com (2005) 47 Final 07/2005 (COD) [hereinafter “EC Proposal.”]

³ In addition, parts of the NPRM conflict with European Civil Aviation Conference (ECAC) Doc. 30 and the U.K. Code of Practice for the carriage of disabled people as well as the specific laws of various sovereigns. Section 5 of “Doc. 30,” the *ECAC Policy Statement in the Field of Civil Aviation Facilitation* relates to Persons with Reduced Mobility (PRMs) [hereinafter “Doc. 30”]. The U.K. Code of Practice, released by the U.K. Department for Transport (DfT) in March 2003, is a voluntary code produced by the DfT and supported by a working group including representatives of the British Air Transport Association (BATA), the Airport Operators Association (AOA), the Association of British Travel Agents (ABTA) and the Disabled Persons Transport Advisory Committee (DPTAC) [hereinafter “U.K. Code.”]

The U.K. Code is designed to improve the accessibility of air travel to disabled people. It covers all aspects of air travel; from accessing information through to arriving at the final destination. It also covers the design of the airport and the aircraft.

The U.K. Code acknowledges the standards and recommendations that have been developed in this area by the European Civil Aviation Conference (ECAC) and the International Civil Aviation Organization (ICAO), and where there is harmonization between those, the U.K. Code follows the agreed international position.

It is intended that the U.K. Code should be adopted by the air travel industry in the UK. The U.K. Government intends to adopt a regulation in future legislation that would enable this Code to be placed on a statutory basis. It would be the Government’s intention only to use that regulation making power where it was demonstrated that the industry was failing to follow the voluntary Code or subsequent revisions. The full U.K. Code can be viewed at: http://www.dft.gov.uk/stellent/groups/dft_mobility/documents/page/dft_mobility_507855.pdf

These conflicts and others are detailed in Special Annex I.

the U.S. give careful consideration to the requirements of international comity in this important area and urges the U.S. to work to coordinate its regulatory objectives with other sovereigns so as to bring about the international harmony necessary to achieve true improvement in international air transport for the disabled.

Therefore, before proceeding to section-by-section comments on the specific proposals of the NPRM, IATA wishes to highlight these important issues.

I. In Failing to take into Account Relevant International Agreements and Foreign Laws, the NPRM Fails to Meet the Standards of the Governing Statute

The Department's approach in the NPRM is inconsistent with the requirements of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21) (April 5, 2000), the statute under which the proposed regulations are to be promulgated.

Section 707 of AIR-21 amended the Air Carrier Access Act, (ACAA), by extending the prohibition against discrimination on the basis of disability to foreign air carriers "*subject to section 40105(b).*" (Emphasis added).⁴ As revised, Section 41705 therefore now provides:

Discrimination against handicapped individuals:

In General – In providing air transportation, an air carrier, including (subject to section 40105(b)) any foreign air carrier, may not discriminate against an otherwise qualified individual on the following grounds:

⁴ The simple language of the relevant Section 707 is as follows:

Section 41705 is amended

1. by inserting "(a)IN GENERAL" before "In providing"
2. by striking "carrier" and inserting "including (subject to Section 40105(b)) any foreign air carrier."

- (1) the individual has a physical or mental impairment that substantially limits one or more major life activities.
- (2) the individual has a record of such an impairment.
- (3) the individual is regarded as having such an impairment.

Section 40105(b), the provision specifically referenced and therefore an inextricable part of the law extending the obligations of the ACAA to foreign carriers, requires DOT to “act consistently with obligations of the United States Government under an international agreement” and “consider applicable laws and requirements of a foreign country.”

The full text of Section 40105(b) is as follows:

Actions of the Secretary and Administrator. In carrying out this part, the Secretary of Transportation and the Administrator [of the FAA] --

- (a) shall act consistently with obligations of the U.S. Government under an international agreement;
- (b) shall consider applicable laws and requirements of a foreign country; and
- (c) may not limit compliance by an air carrier with obligations or liabilities imposed by the government of a foreign country when the Secretary takes any action related to a certificate of public convenience issued under chapter 411 of this title.

This exact and specific reference to Section 40105(b) in AIR-21 highlights the key nature of the international treaty obligations of the United States and the laws of foreign countries and how giving them due consideration is the duty of the aviation officials of the United States.⁵

Under the Chicago Convention,⁶ the most basic of the international aviation agreements to which it is a Contracting Party, the United States is obliged to take a multilateral approach and to collaborate with other States when formulating aviation

⁵ Avoiding limiting the ability of U.S. carriers to comply with the laws of other countries is another duty of the Secretary and the Department.

⁶ 61 Stat, 11180, T.I.A.S. No 1592, signed at Chicago 7 December 1944.

regulations and standards, with “the highest degree of uniformity possible” the goal of that collaboration. This general principle is enshrined in Article 37 of the Chicago Convention, and, with respect to the rights of disabled passengers, in the ICAO Standards and Recommended Practices Contained in Annex 9 to the Convention, as well as in numerous air services agreements that the United States has concluded with other countries. The specifics of these obligations of the Chicago Contracting States are discussed below in more detail.

While aspects of the NPRM indicate that the Department may have given some consideration to its obligations under Section 40105 and made proposals in an attempt to comport with them (*e.g.*, with the proposed waiver provisions of proposed § 382.7), IATA submits that the Department’s approach is fundamentally flawed and fails to comport with either the letter or the spirit of the statutory requirements.

The NPRM does not confine itself to proposing to regulate flights to and from the US; it also proposes to regulate code share flights between two foreign points and to impose standards for facilities at foreign airports, putting the onus for meeting those standards on U.S. and foreign carriers rather than on the airport operators. Proceeding in this unilateral fashion can and is likely to cause those outside the United States to take the view that the intent of the NPRM is *de facto* global regulation and an attempt by the United States to set a unilateral universal standard that undermines the fundamental international principle that accords each country the right to exercise jurisdiction over its sovereign airspace, and the corollary principles that carriers should be regulated primarily by their home governments.⁷

⁷ See, generally, Heffernan, *The US Government Prepares to Make Non-US Airlines Subject to New Rules Regarding the Transportation of Disabled Passengers* XXIX Air & Space Law 245 (November 2004).

The extension of Part 382's service obligations to foreign carriers that code share with U.S. carriers between foreign points is particularly problematic, and it is likely to discourage the commercial practice of code sharing because of the compliance costs involved.⁸ Faced with the high costs of compliance with proposed Part 382, smaller carriers may well choose to end code-share arrangements, to the detriment of U.S. passengers and without the benefit of improving the lot of disabled passengers.

DOT's proposal to unilaterally impose regulations on foreign carriers operating outside the United States clashes with international agreements and applicable laws and regulations of foreign countries. It represents a radical attempt to impose on foreign

In 1992, the FAA established the IASA International Aviation Safety Assessment Program, and began assessing whether the regulatory authorities of foreign countries licensing carriers to fly to the United States met the international ICAO standards. ICAO responded in 1998 with its USOAP, Universal Safety Oversight Audit Programme, and the FAA yielded the assessment process to the international organization.

IOSA, the IATA Operational Safety Audit Programme, has, in turn developed to standardize and professionalize international airline compliance with common approved global standards. It was launched in 2001 and the first audits undertaken in 2003. ICAO has been fully participatory in development of IOSA. The 35th Assembly accepted IOSA as a valuable tool for States to augment their own safety oversight activities, and in July 2004, the FAA recognized that the IOSA Programme was appropriate for U.S. carriers to meet their obligation to audit their code-share partners. In acknowledging the IOSA Programme, the FAA stated that it was "an important step toward achieving a single international set of audit standards that will make flying safer for passengers here and around the world." FAA Press Release 24-04 (July 2, 2004).

Thus, even in a situation where the FAA considered safety at issue and for that reason initially took unilateral action, it has nevertheless worked with ICAO and other international organizations to bring about a harmonized international situation that comports with the international obligations of the United States under the Chicago Convention. IATA suggests that the Department follow this example of international cooperation and harmonization as an effective means of achieving a single set of international standards to make flying safer, more accessible and easier for disabled passengers all around the world.

⁸ See note 13 *infra*. DOT has recognized that code sharing benefits the traveling public in several studies, highlighting how it gives U.S. carriers the ability to extend their international networks by means of code-sharing and gives foreign carriers the ability to enhance their access to the U.S. and other markets worldwide. These are among the principal benefits of the 62 Open Skies bilateral aviation agreements the United States now has with countries all around the world, and thousands upon thousands of code-shared flights are operated daily worldwide. See A Study of International Airline Code Sharing December 1994 at ES-4 ("Code sharing is also an integral part of broader airline alliances."); U.S. International Air Transportation Policy Statement April 1995 at 4 ("Code sharing and other cooperative marketing arrangements can provide a cost-efficient way for carriers to enter new markets, expand their systems and obtain additional flow traffic to support their other operations by using existing facilities and scheduled operations."); International Aviation Developments: Global Deregulation Takes Off (First Report) December 1999 at 13 ("the development of immunized alliances and other code-share arrangements have enabled airlines to offer more complete pricing structures").

carriers requirements U.S. law recognizes as so dangerous that they are specifically proscribed even with respect to U.S. carriers.⁹

In proposing a regulation that, by disregarding Section 40105, impinges on the authority of foreign governments, the Department has evidently forgotten the lesson of *British Caledonian v. Bond*, 665 F.2d 1153 (D.C. Cir. 1981), which construed the same statutory provision that is key to the AIR-21 amendment of the ACAA.¹⁰ The analysis of *British Caledonian* with respect to Article 33 of the Chicago Convention and the deference the Government of the United States owes to foreign aviation regulators applies equally to this NPRM with respect to Article 37 of the Chicago Convention and its related international standards and recommended practices, and the laws of foreign nations.

As highlighted in *British Caledonian*, the airworthiness certificates of many foreign countries incorporate the laws, regulations and requirements of those countries.¹¹ There is no doubt that those foreign governments have the proper authority to do so, a reality of international law and comity that the courts of the United States understand and have forcefully confirmed: U.S. aviation authorities have no “authority...[to] disregard valid airworthiness certificates issued by nations with whom the

⁹ See subsection (c) of Section 40105, which sets forth the rule that the Secretary of Transportation is *not* authorized to limit compliance of U.S. with the obligations or liabilities of foreign countries. The extra-territorial application of U.S. laws to carriers operating solely outside the United States also appears to violate general principles of international law governing jurisdiction, which accord States rights to regulate the conduct of entities of other States outside the jurisdiction of the regulator only in very limited circumstances. According to the Restatement (Third) of the Foreign Relations Law of the United States, § 402(1)(c), these circumstances include situations where the conduct threatens the security of the United States or has substantial effects in the territory of the United States. National security is clearly not a justification in these circumstances covered by the NPRM, and there is no basis for application of the substantial effects doctrine.

¹⁰ Section 40105 of Title 49 is the equivalent of 1102 of the former Federal Aviation Act, which was at issue in *British Caledonian*.

¹¹ See Special Annex I.

United States ha[s] entered into aviation agreements.” 665 F.2d at 1159. The judiciary has been quite clear about this and about its role in adjudicating the propriety of executive branch actions in such situations: “We reject the proposition that the determination in this case of whether the FAA Administrator has acted consistently with this nation’s treaty obligations is a question that is constitutionally committed to the executive branch of the government.” *Id.* at 1162. With the NPRM, where the DOT is proposing to establish itself as a supra-national interpreter and adjudicator of the laws of other nations,¹² the same rejection can be expected by the federal judiciary.

With the NPRM, there is, *ab initio* and by definition, no regard for the international obligations of the United States, and, as detailed in Special Annex I to these comments, there will be numerous situations where, as in *British Caledonian*, the prohibitions and requirements of the proposed regulation would conflict with the standards of the airworthiness certificates issued by the aviation regulators of many other nations. When the Department undertook its first Part 382 rulemaking after the 1986 passage of the Air Carrier Access Act, it was clearly cognizant of its Section 40105 duties and *British Caledonian* issues¹³. The explicit reference to Section 40105(b) in AIR-21 should thus have been the impetus for the Department to recall this rather than an occasion for the

¹² Notably, proposed § 382.5 offers the waiver mechanism to foreign carriers with respect to applicable foreign *laws*, but fails to take account of foreign “requirements” as Congress instructs it (See Section 40105 (b)).

¹³ “[T]he Department agrees with IATA’s comment that the regulation should not cover foreign travel agents and airport operators at locations outside the U.S. [E]nforcement action against them, even if possible legally, would be very difficult practically.” 55 Fed. Reg. 8008, 8015; “[T]here is a serious issue of whether imposing conditions on foreign carriers via airport leases would be consistent with bilateral or multilateral agreements governing international air transportation. This is particularly so if the lease arrangements purported to bind carriers’ activities, even those not carried out in the United States.” *Id.* at 8016; “It would not be economically rational for [specific foreign carriers providing limited services] to make modifications in their facilities and services . . . for a small portion of their total business. Consequently, they would probably rather drop out of providing [such services] rather than bear the expense. The result would be fewer choices, less competition and higher consumer prices.” *Id.*

Department to forget its duty to respect the legal obligations of the international agreements of the United States and the laws of other sovereigns.

The provision of AIR-21 that amended 40105 also directed the Secretary on how to go about achieving higher quality international air transportation experiences for disabled passengers:

The Secretary shall work with appropriate international organizations and the aviation authorities of other nations to bring about the establishment of higher standards for accommodations of handicapped passengers in air transportation, particularly with respect to foreign air carriers that code-share with air carriers.¹⁴

Notwithstanding the guidelines of Section 40105, the NPRM acknowledges that in making this proposal the Department has merely referred to and relied on an existing U.S. regulation that has its origins in “a lengthy rulemaking process that included a regulatory negotiation involving representatives of the airline industry and disability community.” 69 Fed. Reg. 64364. While this is accurate with respect to the stakeholders involved since 1986 and to the evolution and development of the currently effective version of Part 382, it has no application to the international stakeholders who are affected by this NPRM.¹⁵

¹⁴ Section 707(c) AIR-21, published as an annotation to Section 41705. While the Department has issued enforcement orders that deal with problems of disabled passengers on code-share flights, *see, e.g.*, Orders 2000-8-18 (Air Canada), 98-12-19 (Alitalia) and 98-9-23 (Lufthansa), there is no record that the Department followed the Congressional mandate for achieving better quality service for disabled passengers. And as noted below, there is no evidence of DOT work with international organizations or the aviation authorities of other nations.

¹⁵ DOT has exacerbated the situation by using the NPRM as a means of stealth incorporation by reference, making the following detailed and complex domestic laws of the United States and regulations adopted pursuant to them applicable to foreign carriers merely by referring to their standards in the NPRM: the Americans with Disability Act, the Rehabilitation Act of 1973, the ADAAGs – Americans with Disabilities Act Accessibility Guidelines, etc. , laws and standards designed by Congress and the Executive for domestic application and effect: to prevent discrimination against the disabled in connection with the receipt of U.S. government federal benefits, 29 U.S.C. § 794(b) and to prevent discrimination against individuals with disabilities in “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services.” 42 U.S.C. § 12101. *See also* comments on § 382.13 below.

Neither foreign carriers nor foreign disabled groups were included in the process that led to the adoption of the current version of Part 382. Nor has DOT engaged in any systematic process of consulting with other governments or international governmental or private organizations, including, as detailed below, international health and medical organizations, such as the WHO.¹⁶ Contrary to the mandate of Congress, there has been no work with appropriate international organizations or the aviation authorities of other nations.

In fact, the Department acknowledges that when preparing the NPRM it considered, but dismissed, the precise approach of Section 40105, stating that it “could ... wait for international action (*e.g.*, through the International Air Transport Association (IATA) or via bilateral or multilateral international agreements) to establish standards for air travel throughout the world. However, IATA frequently takes a long time to devise standards, and its standards are often advisory rather than mandatory.” 69 Fed. Reg. 64376.

With this passing and offhand reference to IATA, the Department, unfortunately, underscores the extent to which it has failed to take notice of the existing international framework that relates to standards and recommended practices for international transport of disabled passengers. The NPRM contains no evidence that the Department even consulted with the international organizations that devote considerable time and effort to the exact goal AIR-21 imposed on the Department — arriving at standards for nondiscrimination in international air transport on the basis of disability consistent with both the international obligations of the United States and the laws and requirements of

¹⁶ A number of the comments below on the specific provisions of the NRRM discuss the standards, policies and concerns of the World Health Organization (WHO), *e.g.*, §§ 382.3, 382.21, 382.23, 382.25, 382.27.

foreign countries.¹⁷ There is not even any evidence that the Department consulted the publications of these organizations.

Three 'multilateral' bodies have long been active in providing for the needs of the disabled in air transport. In addition to IATA, there are 186 Member States of the International Civil Aviation Organization (ICAO)¹⁸ and the 41 Member States of the European Civil Aviation Conference (ECAC).¹⁹ ICAO and ECAC have sought to elaborate guidelines for States that are consistent with the measures, definitions and communications codes agreed by airlines and accepted worldwide. IATA submits that the same would be an effective approach for the Department and a better way to achieve the goal of international transport of disabled passengers on a non-discriminatory basis. To that end, IATA here sets forth a brief summary of the work of each of these organizations with respect to the international air transport of disabled passengers.

(i) International Civil Aviation Organization (ICAO)

The United States is one of the original contracting States to the Convention on International Civil Aviation, signed at Chicago on 7 December 1944, 61 Stat. 1180, 15

¹⁷ Since the passage of AIR-21, all three of these international organizations have continued their work in this area. The IATA Passenger Services Conference has agreed on two changes to Resolution 700. ICAO's materials are now published in an Eleventh Edition, which incorporates, *inter alia*, provisions arising from recommendations of the Third Meeting of the Facilitation Panel (FALP/3) (Montreal, February 2001), which resulted in a comprehensive expansion and amendment of Annex 9 to the Chicago Convention. The Eleventh Edition became effective on 15 July 2002 and applicable on 28 November 2002. ECAC has not changed Doc. 30, but 3 new Annexes to Doc. 30 have been added: Annex E - Guidance Leaflet for PRMs (written in full) who may be infrequent or first time flyers (adopted 14/12/2000); Annex F - Guidance Material for Security: Key Points for checks on PRMs (adopted 14/12/2000); and Annex G - Code of Good Conduct in Ground Handling for PRMs (adopted 19/5/2003). See details on the work of these organizations in the sections of the text that immediately follow this note.

¹⁸ A list of ICAO Member States can be reviewed at:
http://www.icao.int/cgi/goto_m.pl?cgi/statesDB4.pl?en.

¹⁹ The 41 Member States of ECAC are listed in Special Annex I.

U.N.T.S. 295, T.I.A.S. No 1592 (Chicago Convention or the Convention). U.S. ratification of the Chicago Convention dates from August 9, 1946. The International Civil Aviation Organization (ICAO) was established as a result of the Chicago Convention for the purpose of regulating and harmonizing commercial air transport between contracting States and establishing safety standards for the aviation industry. This core ICAO activity of adopting international standards and procedures is described, as noted above, in Article 37 of the Chicago Convention. Article 37 provides:

Each Contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with ... characteristics of airports and landing areas ... and such other matters concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate.²⁰

Acting on its Article 37 mandate, ICAO has issued two Standards and fifteen Recommended Practices (contained in Chapter 8 of Annex 9 -- Facilitation) that specifically address accessibility of air transportation by persons with disabilities.²¹ These Standards and Recommended Practices of Annex 9 are designed to achieve the

²⁰ Pursuant to Article 90 of the Convention, Annexes are effective and binding upon the Contracting States. In order to comply with this Chicago Convention provision many States adopt ICAO Annexes into their national legislation and or incorporate them by reference. See Special Annex I. In accordance with Article 38 of the Chicago Convention, which sets forth standards for deviation from ICAO SARPS (Standards and Recommended Practices) *only* Australia (with respect to 8.30 and 8.38) and China (Hong Kong) (with respect to 8.35) have submitted notices of differences with respect to Chapter 8 of Annex 9.

²¹ Chapter 1 of Annex 9 defines "Person with disabilities" as "any person whose mobility is reduced due to a physical incapacity (sensory or locomotor), an intellectual deficiency, age, illness or any other cause of disability when using transport and whose situation needs special attention and the adaptation to the person's needs of the services made available to all passengers."

“highest practicable degree of uniformity” throughout the contracting States to ensure adequate access for disabled passengers to air services and airports.

The Standards require that all airport facilities and services are adapted to the needs of persons with disabilities and that persons with disabilities have adequate access to air services.

Standard 8.27: “Contracting States shall take the necessary steps to ensure that airport facilities and services are adapted to the needs of persons with disabilities.”

Standard 8.34: “Contracting States shall take the necessary steps to ensure that persons with disabilities have adequate access to air services.”

The other ICAO provisions take the form of Recommended Practices and set forth in general terms agreed principles for facilitating the transport of passengers requiring special assistance. The most notable of these are:

Recommended Practice 8.23: “Contracting States should cooperate with a view to taking the necessary measures to make accessible to persons with disabilities all the elements of the chain of the person’s journey, from beginning to end.”

Recommended Practice 8.24: “Contracting States should take the necessary steps with airlines, airports, ground handling operators to establish minimum uniform standards of accessibility with respect to transportation services for persons with disabilities, from arrival at the airport of departure to leaving the airport of destination.”

Recommended Practice 8.25: “Contracting States should take the necessary steps with airlines, airports, ground handling operators and travel agencies to ensure that persons with disabilities are given the information they need, and should take the necessary steps to ensure that airlines, airports, ground handling operators and travel agencies are in a position to give those passengers the assistance necessary for them, depending on their needs, to help them in their travel.”

The proposals of the NPRM that seek to impose U.S. standards with respect to operations and facilities outside the U.S. present apparent and obvious conflicts with Standard 8.27 as well as the Recommended Practices noted here. By choosing the approach it has in the NPRM, the United States at least appears to disregard its obligations as a Chicago Convention Contracting State to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization of international air transportation.

The safe international transportation of disabled passengers on the basis of nondiscrimination is too important to make it the focus of needless arguments over extraterritoriality and conflicts of sovereigns and laws. A collaborative and uniform approach is the one best able to bring about the desired goal, as well as the legal obligations of the United States and all of the Contracting States to the Chicago Convention. Rather than seeking, as it does in the NPRM, to reach this goal by imposing a unilateral and overly complex scheme that holds airlines responsible, the Department and the Government of the United States should be working and cooperatively consulting with other the Contracting States to the Chicago Convention.

(ii) European Civil Aviation Conference (ECAC)

ECAC, a grouping 41 States – a quarter of ICAO’s member states -- provides an example of the cooperation envisaged by ICAO Recommended Practice 8.23. Its work on disabled passenger issues is an excellent example of cooperative efforts by ICAO Contracting States.²² An ECAC Facilitation sub-group, which has drawn on input from governments, disabled groups and airline and airport representatives, has been working

²² The European Commission has specifically noted that it “recognizes the valuable work done by the European Civil Aviation Conference over the years in facilitating the transport of persons with reduced mobility.” EC Proposal at 4.

for several years to elaborate European guidelines for Passengers with Reduced Mobility (PRMs) based on ICAO Annex 9. ECAC has published the results of this work in Section 5 of the ECAC Policy Statement in the Field of Civil Aviation Facilitation, referred to as ECAC Document No. 30 (“Doc 30”), see note 3 *supra*).

Document 30 builds on ***existing multilaterally agreed elements***:

- ❑ By accepting the ICAO definition of “persons with disabilities” as the definition for the ECAC and European term – “passenger with reduced mobility”.
- ❑ By expanding on the different recommended practices of Annex 9 with the agreement of all States.
- ❑ By incorporating the classification and codification of categories of passengers requiring special assistance set down in IATA Resolution 700 (see above) used by airlines worldwide to exchange information about passengers needs.

A copy of Document 30 is annexed as Exhibit A

(iii) IATA

Since the 1950s, IATA and its Members have developed standards and recommended practices to facilitate the exchange of passengers, including disabled persons and those with special needs, between different carriers in so-called ‘interline’ carriage. The relevant IATA provisions can be found in:

- a) Passenger Services Conference (PSC) Resolution 700 on the “Acceptance and Carriage of Incapacitated Passengers,” which sets down common definitions and procedures for facilitating travel by ‘incapacitated’ passengers on interline journeys. (Copy annexed as Exhibit B).²³
- b) IATA’s “Inflight Management Manual” (IMM), designed to assist airlines in compiling their own company service manuals. Section 4 covers a range of special needs passengers, including expectant mothers, unaccompanied minors and visually/hearing impaired and autistic passengers. (Copy annexed as Exhibit C).

²³ Recommended Practice 1700, applicable to the United States and Canada, was based on Res. 700 and adopted in 1980 but rescinded in 2004 to take account of national requirements in those countries.

- c) IATA Resolution 745b on "Acceptance of Power Driven Wheelchairs or other Battery Powered Mobility Aids as Checked Baggage." (Copy annexed as Exhibit D).
- d) PSC Recommended Practice 1716 on the "Passenger Information List" to provide crews with necessary information concerning passengers (e.g., special needs and meals) and about seats blocked for other purposes and downline seat protection. (Copy annexed as Exhibit E).
- e) IATA Live Animal Regulations. (Copy annexed as Exhibit F).

There are clearly legitimate, effective multilateral alternatives to the unilateral approach of the NPRM.

The Department, like its counterpart aviation regulatory bodies all around the world, is aware that unilateral approaches to the regulation of international air transport lead to jurisdictional disputes and result in operational and commercial difficulties for the airlines, conflict between nations, and, sadly, stalled progress on legitimate policy goals such as safe air transportation of disabled passengers on a non-discriminatory basis with dignity and with the full rights of all passengers.²⁴

IATA submits that the goal here is too important to have achieving it impeded by attempts at unilateral regulation that, by their very nature, are sure only to sow controversy. IATA therefore urges the U.S. government to withdraw those aspects of the NPRM that do not promote international harmonization of standards for air transportation of disabled passengers, and instead establish broad general principles that set forth its goal. With such principles clearly articulated, the Department should

²⁴ Officials of the Department are also well aware of the problems that would ensue were all countries to adopt this approach. In addition to the legal problems with the approach the Department has chosen, there are very serious practical issues. Confusion and retaliation would be the unhappy consequences of adoption of the regulatory regime proposed in the NPRM. See, e.g., Article I.3 of the EC Proposal. Unilateral governmental actions of this type can be the impetus for comparable application of foreign regulations. U.S. carriers operating outside the U.S. could easily find themselves in constant conflict of laws situations that would put them in the exact unfortunate situation of having to satisfy contradictory laws and regulations of more than one sovereign that Section 40105(c) directs the Department to avoid.

embark on a concerted course of action that is consistent with its international obligations, that considers applicable laws and requirements of other countries and that is focused on bringing about international regulatory harmonization that can best achieve the policy goal.²⁵

II. The Department's Regulatory Evaluation Needs Revamping

IATA has studied the regulatory evaluation the Department has placed in this docket. The IATA review shows that the Department has erred by overestimating the benefits and underestimating the costs. According to IATA's calculations, which are reported in full in the documentation included as Special Annex II, the Department's

²⁵ The Department, in another case in which it was charged by Congress to apply U.S. standards to foreign carriers while taking into consideration the international obligations of the United States and while also taking into consideration applicable laws and regulations of foreign countries, chose to withdraw a rule-making that, like this NPRM, had proposed "unilateral imposition of regulations on foreign carriers." The Department decided that its approach was "not warranted" in light of the objection of "foreign governments for foreign air carriers" and in light of multilateral progress – at ICAO – on the issue, 65 Fed. Reg. 2079, 2080 (Jan. 13, 2000). The FAA noted that what it had proposed could put foreign carriers in the situation of not being able to comply with the proposed U.S. regulation. In that case – involving drug and alcohol testing programs for employees of foreign carriers "performing safety-sensitive aviation functions" -- the FAA withdrew its rule-making, first begun in 1992 pursuant to statutory authority of 1991, and continued with an NPRM in 1994, because ICAO adopted a Recommended Practice that incorporated a relevant Manual first published in 1995, and because ICAO, in 1998, adopted a Standard that dealt with the issues. *Id.* at 2080. In the matter at issue in this NPRM (disabled passengers), as noted above, relevant ICAO Standards and Recommended Practices are *already* in effect – but have been, mysteriously, ignored by the Department.

estimate of international passengers with disabilities appears to be at least double a reasonable estimate,²⁶ which leads to serious concerns about the validity of DOT's estimates of potential additional revenues. Moreover, the implementation/compliance costs the Department estimates are significantly understated – according to IATA's analysis by possibly a factor of more than 8.5.

Imposing a regulatory burden of this magnitude on an industry in dire financial straits should, at a minimum, be based on a proper analysis. The global airline industry lost an estimated \$35 billion in the last four years. Traffic volumes rebounded strongly during 2004, but that followed the 3 years of lost growth post-9/11. Passenger traffic rose 15.3% in 2004, but still only reached a level 8.8% higher than 2000. And strong traffic volumes were not matched by strong revenues. Passenger yields fell by one-third in the past 10 years in both Europe and the U.S. During the same period, fuel bills increased from 13% to 18% of an airline's operating expenses. Recovery has developed furthest in Europe and Asia, but airline returns are still below their cost of

²⁶ Because the EC Proposal, issued after this analysis was concluded, also refers, at ¶ 31, to PRMs being approximately 1% of the passengers on scheduled flights, IATA undertook an investigation of the source of this figure. IATA consulted with AEA, the Association of European Airlines, which had provided statistics to the Commission and extracted AEA data on a number of key European airports (adding to the AEA statistics independent data with respect to AMS and BRU) to produce the following table:

Airport (2004)	Total Passenger numbers ('000)	Total Number of PRMs	PRM share of total Passengers	Weight
Helsinki	8,000	8,000	0.1%	0.03
Charles de Gaulle	96,300	110,000	0.11%	0.39
Munich	27,000	84,500	0.31%	0.11
Brussels	15,200	60,000	0.39%	0.06
Vienna	12,700	54,900	0.43%	0.05
Amsterdam	42,000	240,000	0.57%	0.17
Frankfurt (2003)	48,400	377,400	0.78%	0.19
Total	249,600	934,800		
Weighted Average			0.37%	

capital. The break-even point for airline operations is fuel priced at \$36 per barrel, but prices have reached and exceeded \$50 per barrel. See Exhibit G, a presentation on the state of the industry prepared by IATA's Chief Economist, for additional details.

In relying on a regulatory evaluation with such significant shortcomings, the Department has failed to meet the standards of Executive Order 12866 (Sept. 30, 1996), which was issued to "begin[] a program to reform and make more efficient the regulatory process," and "to restore the integrity and legitimacy of regulatory review and oversight." The specific "Principles of Regulation" articulated in E.O. 12866 include obligations on an agency "to examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of the regulation more efficiently;" to "design its regulations in the most cost-effective manner to achieve the regulatory objective," and to "assess both the costs and the benefits of the intended regulation."

As the preceding sections have outlined, and the following sections detail, in this NPRM the Department has failed to consider other laws and regulations relevant to the international air transportation of disabled passengers on the basis of nondiscrimination, has designed an overly prescriptive and prohibitively expensive complex regulatory regime and has done a poor job of assessing the costs and benefits of its approach. It would have been much simpler for the Department to follow the mandate of Section 40105.

III. The Statistical Record Reveals that a Complex, Overly Restrictive Regime is not Necessary to Address the Issue

An analysis of the Department's information on complaints filed against foreign air carriers, the group that will be most affected by this proposed regulation, indicates that an average of 48.5 complaints are filed each year, or one complaint per 1.3 million total passengers. Special Annex III includes a chart summarizing these statistics on complaints to DOT related to "Disability and Discrimination" issues involving foreign carriers, and provides additional analysis on the number of complaints that relate to disabled passengers. These statistics indicate that a wide-ranging overly complex scheme is not necessary to address "problem" the new regulation is intended to correct.

IV. Section by Section Analysis

Purpose (§ 382.1)

IATA submits that the NPRM's formulation of the purpose of the revision to Part 382 it is proposing indicates the overly prescriptive and formalistic approach that characterizes the proposal. It merely recites a particularly narrow legalistic reliance on ACAA and fails to articulate an overall policy goal. Here, and in the NPRM generally (other than in its unsupported assertions of economic benefit referred to in the Regulatory Analyses and Notices section and discussed above and in Special Annex II to these Comments), the Department fails to state a positive vision of international air transport for disabled passengers. Likewise, the NPRM fails to acknowledge that in air transportation, safety considerations are always paramount. See, e.g., 49 U.S.C.

§ 40101 (a)(1) (2) and (3).²⁷

This is in contrast to the EC Proposal, which reports on a “wide consensus that Community law should protect the rights of persons with reduced mobility,” EC Proposal at ¶ 5, and that states that it is designed to “achieve two essential goals: first, preventing unfair treatment, that is refusal of carriage on the basis of reduced mobility and, second, guaranteeing the provision, free of charge, of the assistance that passengers with reduced mobility need to have effective opportunities for air travel.” *Id.* at ¶ 7. Sadly, the Department also fails to make a crucial acknowledgement that is included in the EC Proposal: “The Commission recognizes the serious efforts that most airlines and airports make to accommodate the needs of people with reduced mobility. Indeed air transport is in advance of most other sectors in this respect.” *Id.* at ¶ 8.²⁸

IATA suggests that the Department would better serve the goal of non-discrimination in international air transport by acknowledging and incorporating the international standards discussed above.

Definitions (§ 382.3)

IATA notes that the definition of QIWD (qualified individual with disability) proposed in the NPRM applies to both passengers and non-passengers, and as such, goes far beyond the definition of PRM, which is key to the proposed European approach

²⁷ These provisions define the Department’s central purpose and set forth the “public interest” standard: “assigning and maintaining safety as the highest priority in air commerce” and “evaluating the safety implications” of “new air transportation services” before authorizing them, and “preventing deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce.”

²⁸ The EC Proposal goes on to “recognize[] the valuable work done by the European Civil Aviation Conference over the years in facilitating the transport of persons with reduced mobility,” and notes that one of the principal purposes for its proposal is to ensure uniformity at all Community airports and on all flights departing from those airports. EC Proposal at ¶ 8.

to the regulation of air transport with respect to disabled passengers.²⁹ The definition of QIWD also conflicts with the IATA definition of “incapacitated passengers” in Resolution 700, Section 1.1.1,³⁰ which, because it is accepted worldwide, would seem to merit at least consideration by the Department.

In addition, IATA’s Medical Advisory Group (MAG) has raised questions about the proposals of the NPRM. The MAG is a Special IATA Committee of the officials of twelve members airlines who specialize in aviation medicine and occupational health. The group advises IATA and the airline community on health issues related to travel and liaises with other related organizations such as the World Health Organization (WHO) and the International Civil Aviation Organization (ICAO) on medical and cabin health matters. The MAG has prepared agreed upon comments with respect to specific portions of the NPRM within its area of expertise. This section of the NPRM is one on which the MAG has specific comments.

In the view of the MAG, the definition of “individual with disability” presents problems because it regards permanent and temporary, acute and chronic disability as one and the same. For example, the NPRM makes no distinction between those disabled by heart disease and those who are visually impaired. From a medical standpoint, these two types of disability are very different. The air transportation issues of those with chronic disabilities are usually related to logistics, such as special

²⁹ The EC Proposal defines **person with reduced mobility** as “any person whose mobility is reduced due to physical incapacity (sensory or locomotor), intellectual impairment, age, illness, or any other cause of disability when using transport and whose situation needs special attention and the adaptation to a person’s needs of the service made available to all passengers.” This definition is the same as that adopted by ECAC (Section 5.1) and the same as that developed by ICAO in Annex 9 at Chapter 1.A. Definitions.

³⁰ “Incapacitated Passengers shall be defined as those with physical or mental disability; or with a medical condition, who require individual attention or assistance on enplaning/deplaning, during flight and during ground handling which is normally not extended to other passengers. This requirement will become apparent from special requests made by the passengers and/or their family or by a medical authority, or from obvious abnormal physical or mental conditions observed and reported by airline personnel or industry-associated persons (travel agents, etc.).”

communications devices, special announcements, special seats, etc. The air transportation issues of those with acute disabilities are usually medical in nature, *i.e.*, it is the nature of the illness that puts the passenger at risk of not completing the flight without acute care or diversion.

While a chronically disabled individual may be in the best position to make decisions concerning his or her disability, this is not necessarily the case for acutely ill individuals. In fact, very often, even physicians treating the acutely ill cannot make proper decisions about the ability of the patient to undertake air travel because they lack knowledge related to altitude physiology.³¹

Application of the Rule (§ 382.5)

As noted above, rather than following its statutory mandate, DOT has adopted a unilateral and particularly parochial approach. Because the Department essentially acknowledges this in the NPRM, this fundamental failure to take account of international agreements and the laws of foreign countries is all that much more notable. See 69 Fed. Reg at 64376 (“The Department could also wait for international action....”). Equally shocking is the cavalier approach to the scope of the regulation and the casual fashion in which the NPRM “incorporates” vast bodies of U.S. law and regulation into this proposal to regulate the actions of carriers duly licensed by other sovereigns. Moreover, the scope of the regulation with respect to foreign carriers is not clear, with § 382.5

³¹ In the view of the MAG, a good example of the problem of this unacknowledged dichotomy is presented by proposed § 382.11, which provides that carriers “must not require a qualified individual with a disability to accept special services ... that the individual does not request.” An individual with acute heart failure would not necessarily know that he or she might not be able to fly at all, and if able to fly is likely to need supplementary oxygen. Another problematic provision, in the view of the MAG, is use of the term “safety assistant”, which is inappropriate in cases of acute illness. In these situations, under the regime proposed in § 382.29, if the airline’s medical consultant determines that a medical assistant is needed for a passenger who was a recent heart or neurological patient, the passenger need only disagree with the professional judgment of the airline’s medical expert in order to bring about a situation in which the airline has to pay for the transport of the assistant.

exempting foreign carriers from the Subpart E Aircraft Accessibility, but informing them that they must “comply with the [undefined] service-related requirements” of Part 382.

Legal Problems for Foreign Carriers/Possible Waivers (§ 382.7)

While DOT’s recognition here that the proposals of the NPRM may well involve conflicts with foreign law and its recognition that “foreign air carriers operate under a variety of laws and regulations”, 69 Fed. Reg. 64366, are commendable, this does not, unfortunately, mitigate the fundamental errors of the approach of the NPRM. In fact, the mechanism the NPRM proposes to deal with conflicts of laws actually underscores the errors of its parochial, unilateral approach. By stating that it will consider granting waivers to foreign carriers, and by requiring that the U.S. standards be observed until such waivers are granted, DOT asserts again its view of the primacy of U.S. law and its right to apply it extraterritorially. The approach DOT has chosen requires carriers to violate any laws of their home countries and other foreign countries that may conflict with the requirements of DOT pending DOT grant of a waiver. This may well put the AOCs of foreign carriers at issue, and in some cases might make the carriers or their officials subject to criminal penalties. This is unacceptable to the foreign carriers and to their governments -- and for that reason should be unacceptable to the Government of the United States as well.

It was a conflict with the laws of foreign sovereigns and the rights of those sovereigns to regulate airworthiness certificates that led the *British Caledonian* court to “reject the suggestion,” like the suggestion that DOT is again, at least implicitly, making with this NRPM, “that Congress granted” the Department “the authority to override” the standards of Section 40105, or intended by legislative amendment that the Department be required to do so. 665 F.2d at 1168.

Even if the waiver provision were acceptable legally, this regime would, at the least, lead to a carrier having to incur the costs of and establish procedures or means of compliance with the U.S. regulation, which would have to be disassembled once the waiver is granted. This is not a situation that the U.S. government would want its carriers to be put in by foreign sovereigns.

This flawed approach of the NPRM to the jurisdictional issue indicates a fundamental disregard for and lack of respect for foreign sovereigns. It fails to comply with the basic principal of the Chicago Convention that regulation of flag carriers is the province of their home countries. In a strange reverse discrimination, it also fails to give U.S. carriers equal footing, by not allowing them to apply for waivers.³²

Moreover, adopting this proposal would also put DOT in the business, on an ongoing basis, of reviewing and evaluating foreign law. When the courts must engage in this process, they turn to experts rather than taking on this job themselves. See, e.g., F.R.C.P. 44.1. This would be an ongoing job as foreign laws change and develop. And an unending and extraordinarily complex task for DOT, which could prove particularly problematic when foreign laws are imposed or changed very quickly, as they often are in some extraordinary situations such as those involving quarantines or public health emergencies.

Even if the proposed waiver regime did not suffer from these fundamental flaws, it would still be problematic because it is poorly conceived. The proposed language of § 382.7 refers to “an applicable provision of the law of a foreign nation.” The Analysis section, however, states that this provision is designed to deal with the varied

³² IATA submits that U.S. carriers should be equally eligible for any such consideration because they too will face conflicts situations for their operations abroad when foreign law is at odds with the requirements of Part 382.

requirements of “laws and regulations” that affect the operations of carriers in countries all around the world. See 69 Fed. Reg. 64366. DOT should make it clear that it recognizes the mandates of foreign laws and regulations, and should extend its view of legitimate conflicting requirements to international standards and recommended practices described above, such as those of ICAO and ECAC, as well as the voluntary codes tabled or sponsored by governments, such as the U.K. Code.³³

The Department should eliminate this proposed waiver provision in favor of a broad general statement that in enforcing Part 382 it will take international standards and the particulars of conflicting foreign laws into account.

A number of IATA Members have provided information on laws and regulations of their home jurisdictions that clash with proposals of the NPRM. These are discussed in more detail below with the comments on the particular NPRM sections and are compiled and detailed in Special Annex I.

Compliance Dates § 382.9

The rules for compliance dates are, like the overall approach of the NPRM, extremely prescriptive. In addition, they reflect the periods applied to U.S. carriers in 1990, when the industry was very different: the economics of the established airline industry have changed for the worse³⁴ and technology has become far more complex. In some cases, the phase-in periods are likely to prove problematic – such as the website upgrades required by § 382.43. In addition, the different implementation dates for U.S. carriers and non-U.S. carriers are likely to create problems with code-share operations.

³³ See note 3 *supra*.

³⁴ See Section II *supra* and Exhibit G.

Subpart B – Nondiscrimination and Access to Services and Information

Nondiscrimination Requirement Generally § 382.11

With § 382.11, the problems outlined above come into clear focus. Information from IATA Members indicates that this proposed provision presents problems in a number of jurisdictions.

In addition, the significance of the medical distinction discussed above in the comments on § 382.3 is brought into sharp focus by the NPRM requirement at § 382.11 that carriers “must not require a qualified individual with a disability to accept special services ... that the individual does not request.”³⁵

Modification of policies, practices and facilities to ensure non-discrimination § 382.13

Subsection (a) incorporates section 504 of the Rehabilitation Act and the first subsection (b) [sic] states that carriers must modify their facilities consistent with the standards of the Americans with Disabilities Act Accessibility Guidelines (ADAAG).³⁶

³⁵ ECAC Doc. 30 reads: “passengers with reduced mobility (PRMs) should be boarded separately (normally prior to all other passengers) as well as disembarked separately (normally after all other passengers have left the cabin) in order to facilitate the procedure of embarkation and disembarkation etc.” Section 5.6.1.1

³⁶ The first of these prohibits discrimination on the basis of disability by recipients of federal funding, while the second is an extraordinarily detailed set of standards derived from a statute that was written “to provide a clear and comprehensive *national* mandate for elimination of discrimination against [the 43,000,000 Americans] with disabilities.” Among the multiple standards set by the Guidelines, ADAAG section 10 relates to Transportation Facilities (section 10.4 relates specifically to Airports) and section 10.1 states that “Every station, bus stop, bus stop pad, terminal, building or other transportation facility, shall comply with the applicable provisions of (ADAAG) section 4.”

Section 4 contains guidance on the following general accessibility elements:

This incorporation of U.S. standards into requirements applicable to foreign air carriers is stealth extraterritoriality, and illustrative of the improperly prescriptive and overly detailed regulatory proposals DOT has set forth in the NPRM.

In addition to improperly applying law, regulations and guidelines designed for and limited by their very nature to the territory of the United States and to U.S. entities, the proposals of this section are unlikely to reach all facilities evidently intended to be covered because airport ownership rules outside the U.S. are different from within the U.S., resulting in carriers very rarely “owning” airport facilities.

Ownership of airports and or terminals by airlines is a very rare scenario outside the U.S. This puts airlines in a dependent position when it comes to airport infrastructure and facilities. Airport authorities are usually under the administrative supervision of the local civil aviation authority, and therefore tend to focus on regulations issued by this body. Any additional requirements raised by airlines operating to these airports are subject to the willingness of the airport authority to cooperate and are usually charged to the party posting the request.

4.1 Minimum Requirements, 4.2 Space Allowance & Reach Ranges, 4.3 Accessible Route, 4.4 Protruding Objects, 4.5 Ground & Floor Surfaces, 4.6 Parking and Passenger Loading Zones, 4.7 Curb Ramps, 4.8 Ramps, 4.9 Stairs, 4.10 Elevators, 4.11 Platform Lifts (Wheelchair Lifts), 4.12 Windows, 4.13 Doors, 4.14 Entrances, 4.15 Drinking Fountains, 4.16 Water Closets, 4.17 Toilet Stalls, 4.18 Urinals, 4.19 Lavatories & Mirrors, 4.20 Bathtubs, 4.21 Shower Stalls, 4.22 Toilet Rooms, 4.23 Bathrooms, Bathing Facilities, Shower Rooms, 4.24 Sinks, 4.25 Storage, 4.26 Handrails, Grab Bars, and Tub and Shower Seats, 4.28 Alarms, 4.29 Detectable Warnings, 4.30 Signage, 4.31 Telephones, 4.32 Fixed or Built-in Seating and Tables, 4.33 Assembly Areas, 4.34 Automated Teller Machines, 4.35 Dressing & Fitting Rooms, 4.36 Saunas & Steam Rooms, 4.37 Benches .

It should also be noted that outside North America and the European Union, the providers of ground services are often monopolies, leaving airlines virtually no options if the service provider refuses to consider their requirements.³⁷

Thus, with regard to adapting leased or controlled airport facilities to the requirements of the NPRM, carriers would be dependent on airport operators responding to contract negotiations. Airport operators would most certainly approach such negotiations from an advantageous position, because they know that in most situations, the airlines have no choice and cannot turn to another contractor. In addition, they know that the Department would have difficulty taking enforcement action against them if they failed to comply with the NPRM.³⁸ Consequently, carriers could find themselves in positions where they would have to suffer undue practical and cost disadvantages just to ensure the cooperation of an airport operator.

The EC Proposal takes a fundamentally different approach, and differs significantly in the particulars of the regulatory regime it envisages. The EC Proposal

³⁷ In terms of ground services (including assistance to Disabled Passengers/PRM's), the three most frequent situations airlines face around the world are:

Ground Handling Services provided by the Airport Authority. In this case, the owner of the infrastructure provides services to the airlines operating to this airport. There are various contractual frameworks for the provision of these services, but in most cases, airlines have very little influence on infrastructure and facilities.

Ground Handling Services provided by third parties (Ground Handling Agents). At liberalized airports, ground services are also provided by specialized companies. Such companies are licensed by the Airport Authority, and the rules and regulations they have to comply with are defined in the licence agreement.

Airlines directly contract services with the ground handling agents, which in many cases show some readiness to accommodate their customer's requirements. However, these agents again depend on the goodwill of authorities to provide the necessary facilities.

Airlines self-handling. Although the general trend in the industry is to outsource ground services, certain airlines still prefer to self-handle at their home-base airport or hub. In this case airlines own facilities or rent them from the airport authority, and depending on the local situation, may influence the layout. If so, this is however linked to important investments or costs, as airports will not bear the costs themselves.

³⁸ See note 13 *supra*.

imposes on airport authorities the obligation to cater to the needs of passengers with reduced mobility while navigating EU airports, and takes a flexible approach that requires EU airport authorities to prescribe service quality standards after consultation with the industry. If the airport authorities prescribe standards that are inconsistent with carrier obligations under Part 382, it would appear that carriers would be legally responsible under Part 382 even though they lack control over decisions of the *airport authorities*. Although the NPRM proposes general rather than specific performance standards for compliance with airport accessibility requirements at foreign airports, DOT should engage in discussions with the relevant EU authorities to ensure that counterproductive conflicts of this type are avoided.

Compliance by Contractors and Travel Agents § 382.15

The greatest area of difficulty with this proposal is that at some foreign airports, responsibilities for the provision of services lies with the airport operator, other carriers or handling agents, which will give all carriers, U.S. as well as non-U.S., great difficulty in achieving compliance, or, in fact, make compliance impossible. As noted above, the EC Proposal makes *airports* responsible for the kind of guarantee this section assigns to airlines in order to “ensure that assistance is given in an extended and seamless form at all airports” and “to help the exploitation of economies of scale, for instance in the provision and operation of vehicles and of lifting equipment.” EC Proposal at ¶ 16.

In addition, as DOT has noted, the nature of airline distribution has changed radically over the last twenty years.³⁹ Given this reality, it is unrealistic as well as

³⁹ See discussion in Computer Reservations System (CRS) Regulations Final Rule, 69 Fed. Reg. 977, 985 and 1010 (Jan. 7, 2004).

fundamentally unfair to make carriers responsible for the actions of online “travel agents,” especially those outside the United States.

No Limit on Number of Disabled Passengers § 382.17

This provision presents problems for a number of carriers from a number of countries, as a matter of law, and as a matter of policy, based on safety concerns. The problem presented by this proposal is addressed in the introductory section of the EC Proposal, which, unlike the NPRM, makes specific reference to the primacy of safety regulations, the guarantee that carriage will not be refused on the grounds of reduced mobility “cannot be absolute” [because “[t]he transport of people with very severely limited mobility or of numerous passengers with reduced mobility on the same flight might conflict with duly established safety requirements. For instance, it could make evacuation of a plane in an emergency unacceptably slow and difficult.” EC Proposal at ¶ 10. In addition, ECAC Doc. 30 advises that aviation requirements can limit the number of PRMs on a flight. See Annex E to Doc. 30.

AOCs delivered by European CAAs now conform to the requirements of standardized European rules known as JAR-OPS (Joint Airworthiness Regulations). JAR-OPS § 1.260, outlined in full in Special Annex I, sets down the requirements to be respected regarding PRMs. The relevant Interpretative/Explanatory Material (IEM) issued by the European Joint Aviation Authorities (JAA) with regard to this provision of JAR-OPS 1.260 states that “[i]n circumstances in which the number of PRMs form a significant proportion of the total number of passengers carried on board... the number of PRMs should not exceed the number of able bodied persons capable of assisting with an emergency evacuation.” JAR-OPS is not a mandatory requirement in JAA Member States. However, most JAA States make JAR-OPS mandatory by incorporating it into

national law. And JAR-OPS will become EU law once EU-OPS-1, which incorporates the provisions of JAR-OPS, is adopted, which should come about by the end of 2005.

European carriers now apply §1.260, and have government-approved safety-based limitations in place,⁴⁰ as do carriers from other jurisdictions.⁴¹ The fact that the U.S. takes the view that there is “no relationship between the ability to impose number limits and compliance with ... [t]h[e] FAA regulation [that] requires that, as part of aircraft certification, a demonstration must be conducted showing that a fully loaded plane can be evacuated within 90 seconds. ...[and that t]his is not an operational requirement,” 55 Fed. Reg. 8008, 8028 (Mar. 6, 1990) does not, should not and cannot supersede the contrary views of other sovereigns and the operational standards and requirements they adopt pursuant to those views. IATA submits that these laws of other sovereigns are the particulars and sufficient evidence the Department sought in the original rulemaking. See *id.* and see Special Annex I for more details.

Moreover, because carriers’ insurance cover requires compliance with operational requirements, including those relating to evacuating an aircraft within a

⁴⁰ British Airways limits the number of non-self reliant passengers carried by flight (differs by aircraft type and number of floor level exits) -- on the grounds of safety.

Lufthansa too has specific rules on this issue in its Passenger Service Manual. LH takes the view that the airlines must be able to limit the number of unaccompanied PRMs in order to ensure compliance with evacuation requirements.

⁴¹ For example, in Singapore, the Civil Aviation Authority of Singapore (CAAS) has set a limit on the number of passengers with disability its airlines may carry on a flight. Chapter 7, Para. 2.2.2. of Singapore Airlines (SQ) AOC states that the number of disabled passengers to be carried should not normally exceed the total number of floor level exits. All Nippon Airways limits the number of passengers with a disability up to the double the number of emergency exits. If passengers with a disability were not accompanied by safety assistants, the number would be limited to the half of the number of exits. ANA stresses that as practicable policy, it must limit the number of passengers with a disability on a flight in order to comply with requirements for safe evacuation in emergencies and in order to meet schedules and thus meet standards and requirements in connection with slot allocations, etc. EVA Air suggests that carriers should be allowed to place a limit on the number of passengers with certain classes of disability, such as non-ambulatory passengers, due to the fact that flight attendants cannot perform their duties if they are attending to the disabled passengers. According to Eva, the limit could be based on the number of flight attendants on board (one for one), or, alternatively, could be based on the size of the aircraft.

specified period or time, prohibiting airlines from limiting the number of disabled passengers/PRMs on a flight may prevent them from satisfying this requirement. Thus, there is the possibility that coverage may be voided if the carrier is in non-compliance and the non-compliance is the cause of an accident.

Refusal to Provide Transportation § 382.19

Although the ACAA undoubtedly reflects a sincere intent to prevent unnecessary discrimination against QIWD, it appears to equate air travel with ground transportation. Unfortunately, this is not appropriate; when a QIWD encounters a difficulty during a flight, the passenger does not have the option he or she has with ground transportation, *i.e.*, to alight at the next stop. Many international flights are of long duration and involve transport across both great distances and a number of different borders and/or legal jurisdictions.

Subparagraph (b) proposes that a carrier must not refuse to provide transportation to a passenger with a disability because the person's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers. A number of IATA Members have noted that this provision presents operational problems and conflicts with their current, government-approved policies. *E.g.*, Section 7.1 of the New Zealand Civil Aviation Act of 1990. See Special Annex I. In addition, carriers would prefer an exception that would permit refusal to carry a passenger when the passenger's appearance or behavior would be likely to offend or annoy other passengers, where that condition is the result of a temporary medical condition likely to improve with medical treatment.

The MAG states that this provision fails to recognize acute medical problems and their implications for flight safety. Theoretically, this provision would allow an

uncontrolled psychotic onboard the aircraft. In the view of the MAG, besides being totally impractical, it is clearly dangerous.

IATA also asks the Department to note and explicitly recognize the ultimate responsibility and obligation of the captain for all operations to decide whether to accept an individual passenger, based on the captain's comprehensive legal authority for onboard safety. See 14 CFR § 91.3 ("The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.").

Comparable regulations of numerous foreign jurisdictions state the same standard.⁴² Subparagraph (c) of this proposed section does make reference to Section 44902 and § 121.533 of the regulations (which does provide in subsection (e) that "[e]ach pilot in command has full control and authority in the operation of the aircraft, without limitation" with respect to "*domestic, flag, and supplemental operations of each person who holds or is required to hold an Air Carrier Certificate or Operating Certificate*"(as per § 121.1)), but *not* to § 91.3 which applies to "operation of aircraft ... *within the United States.*" Regrettably, this again underscores the focus on domestic law and regulation, a focus inappropriate for an Executive Branch agency charged by the Congress with adopting new standards in a manner consistent with the international obligations of the U.S. and with consideration given to the "applicable laws and requirements of a foreign country."

In addition, carriers request that the Department consider making the requirement of (d) for a written statement contingent on the request of the refused passenger, and not an automatic requirement in every case.

Finally, IATA asks the Department to take note of the fact that this is yet another provision that conflicts with the EC Proposal, which states that "an air carrier . . . may

⁴² See, e.g., RHBA 91.3 (Brazil) ("O piloto em commando de uma aeronave é diretamente responsável pela operação de aeronave e tem a autoridade final para tanto."); and JAR-OPS §§ 1.085(f) and 1.090.

refuse to accept a reservation from or to embark a person with reduced mobility or request that a person with reduced mobility who travels must be accompanied by another person in order to meet applicable safety requirements duly established by law or if the size of the aircraft or the justified absence of cabin crew.” EC Proposal, Art. 4.

Special Rules for Passengers with Communicable Disease or Other Medical Conditions § 382.21

The WHO flatly states that “[t]o avoid any risk of infecting others or transmitting disease from one country to another, as well as for personal health reasons, people with contagious diseases should not travel by air.”⁴³

Based on these serious international health concerns, and the lessons learned from the SARS episode of 2003, IATA suggests that DOT consider enhancing this proposed provision by adding an affirmative obligation for disabled individuals not to travel when they have a communicable disease or infection that poses a significant risk to the health or safety of others and that cannot be eliminated as specified in the definition at § 382.3.

According to the MAG, this proposal is an overreaction to a previous problem associated with passengers suffering from AIDS. While it is unacceptable to refuse transport to a stable AIDS patient, it is also just as unacceptable to carry someone with SARS. It is the view of the MAG that the emphasis here must be on public health, which is the common good, and not the other way around. In other words, the rule must be focused on protection of the public, keeping in mind that there are exceptions that must

⁴³ WHO’s materials on ‘Transmission of infectious diseases’, (http://www.who.int/ith/chapter02_03.html#10, viewed 04 January 4, 2005). See also the comprehensive health laws and regulations at 42 U.S.C. §§ 264 *et seq.*, 42 CFR Part 71, 69 Fed. Reg. 17588 (Apr. 10, 2003) and Executive Order 13295 (April 4, 2003) (United States); and at R.S., c.33 (1st Supp.) and C.R.C., c. 1368 (Canada).

be dealt with appropriately. The WHO and the U.S. CDC work very hard and allocate considerable resources to protection of public health; unfortunately, this rule trivializes the risk of communicable infectious diseases in international air transportation.

Medical Certificates § 382.23

As noted above in the comments on § 382.3, it is the view of the MAG that this provision suffers from a serious flaw in its assumption that a passenger's physician has the knowledge to correctly advise the airline on the implications of air travel for the passenger's medical condition. In fact, few physicians have training in aviation medicine and lack the specialist skills required to determine whether an individual should, in fact, be flying. They are also likely to lack the expertise to state the conditions or precautions that would have to be observed to prevent the transmission of disease or infection during flight.

At a minimum, IATA suggests that the regulations allow for input from the airline's own medical advisers, who do have specialist knowledge in aviation medicine. For example, the "extraordinary medical assistance" referred to in subsection (b)(2) might lead to a situation where personal physician, lacking specialized knowledge, errs, leaving a passenger in a situation on a long-haul international flight where indeed medical assistance is needed but there is no assistant and the flight crew is not able to provide the assistance needed.

According to the MAG, this provision is another reflection of the inappropriate definition of "individuals with disability." While it may be inappropriate to require a medical certificate from a chronically disabled person such as a paraplegic, accepting a passenger with a severe acute illness without proper medical clearance is ethically unacceptable and may jeopardize flight safety if a diversion is required.

For this reason and all the others mentioned above, IATA suggests that the Department consider a two-pronged approach, separating chronic disability, where logistic issues are the main concern, and acute disability, where the medical issue is the main concern both for the passenger him or herself and the other passengers and the safety of operations. Such an approach would recognize the well-founded rationale for proper medical clearance for acutely ill passengers for the protection of the ill passenger and his or her fellow travelers.⁴⁴

Advance Notice §§ 382.25 and 382.27

According to the IATA MAG, if the above recommendation with respect to § 382.21 is accepted, it goes without saying that a proper medical clearance would require some reasonable advance notice.

It is commonly agreed that for long haul international flights, disabled individuals should be encouraged to provide advance notice (without creating an obligation to do so) so as to ensure a safe and smooth travel experience for themselves, just as passengers desiring special diabetic or vegetarian meals must request them in advance. See Special Annex I, and the details on the Civil Aviation Act of New Zealand. This is also the approach of the European Commission:

Knowing the particular needs of passengers with reduced mobility in advance of travel would help airports and airlines to organize assistance, provide prompt service and make the best use of their resources. ... If passengers with reduced mobility gave prior notice of their needs, airports would be obliged to assist them in such a way that they caught their flights. In the absence of prior notification, they would only have to make best efforts to ensure that they caught their flights. This would encourage

⁴⁴ Note that Annex E of Doc. 30 advises PRMS that if they have a serious medical condition they must contact the airline in advance of travel, may have to provide a "fitness to fly certificate," and may be required to confirm their fitness to fly at the airport.

notification, without creating an obligation that would be considered a step backward from present practice.

EC Proposal at ¶ 23.

The WHO advises advance notice.⁴⁵ The U.K. Code states that: “[a]irlines should be able to insist on advance notice where the passenger requires assistance or lifting. Ideally the advance notice should be given at the time of booking ... Section 4.13. ECAC Doc. 30 states: “[i]t should be recommended that PRMs requesting special assistance or their travel agency inform the competent body (airport authority or airline) of their needs, as soon as practicable, preferably at the time of booking their flight.” Section 5.2.3.3. See also Annex E, Doc. 30.

Advance notice is preferred in order to assure high quality service. Without advance notice, a carrier or its handling agent cannot plan operationally for services needed, e.g, wheelchair service. Lack of planning can result in delays to the provision of services to passengers, both the disabled and those who are not disabled. Internal carrier communication relies on service information being provided and stored in the passenger booking record (PNR). Effective communication to cabin crew members operating flights can fail if the service information for QIWDs is not stored in the PNR but entered into the check-in system at the time of check-in.

The proposal that advance notice by passengers requesting medical oxygen cannot exceed 48 hours is neither practical nor realistic. Certain airports may not have medical oxygen readily available; provision of oxygen may require up to 5 days. For airlines with limited operations to the U.S., as well as for U.S. carriers with operations from foreign airports so limited, this provision, with its implicit requirement that carriers

⁴⁵ “Airlines have regulations on conditions of travel for passengers with disabilities. Disabled passengers should contact the airline in advance for guidance.” (http://www.who.int/ith/chapter02_03.html#10, viewed 04 January 4, 2005)

be required to be prepared for the arrival of such passengers at all times, would impose an undue and unnecessary burden.⁴⁶ In addition, if a carrier has a policy that services such as stretchers, onboard oxygen, etc are cleared with headquarters, given flight schedules and international time differences, 48 hours notice may not be sufficient. In addition, some carriers provide assistive devices of various types, including oxygen, and advance notice of more than 48 hours better assures proper planning for allocation of such services to outlying and overseas stations.

Safety Assistants § 382.29

From an operational point of view, and in order to avoid conflicts with the laws and regulations of other jurisdictions, the reasons for requiring an assistant must extend beyond those given in § 382.29(b) and include any person who is not self reliant in terms of toilet functions, eating, lifting, communicating or administering medication.⁴⁷ Again, an inexperienced traveler, or a passenger with no experience of long haul flights, may not be able to correctly judge for him or herself the consequences of such flights in terms of physical needs that arise while onboard.

These crucial functions and the importance of being able to engage in them independently gather greater and greater significance with the longer onboard times of international flights. Lack of assistants is more likely to lead to problems for disabled

⁴⁶ In addition, some jurisdictions require doctors to approve the supply of oxygen to such passengers, which takes at least 2 working days.

⁴⁷ The WHO website takes this view in its section on 'Travellers with disabilities': "A physical disability is not usually a contraindication for travel. Passengers who are unable to look after their own needs during the flight (including use of the toilet and transfer from wheelchair to seat and vice versa) will need to be accompanied by a competent escort. Travellers confined to wheelchairs should be advised not to dehydrate themselves deliberately before travel (as a means of avoiding use of toilets during flights). (http://www.who.int/ith/chapter02_03.html#10, viewed 04 January 4, 2005). The U.K. Code also supports this approach: "airlines should only require an escort or companion when it is clear that a disabled person is not self-reliant. In establishing whether someone is self reliant airlines should establish that the passenger is independent in the following areas: breathing, feeding, lifting, communicating, toileting and medicating." Section 4.16. See also Special Annex I details on Doc. 30 and the EC Proposal.

passengers, for non-disabled passengers and for crew. As proposed § 382.113 states explicitly, the carrier is not required to provide extensive special assistance to a disabled passenger with actual eating, assistance with the restroom or with elimination functions at a passenger's seat or with provision of medical equipment or services. On long haul flights such lack of assistance, if this leads to the passenger not being able to eat, perform elimination functions or ingest needed medicines, puts the carrier and other passengers in an untenable situation, the carrier has a passenger onboard for an extended period of time for whom it is not required to provide assistance with basic human needs that should not be ignored for such long periods of time. And choosing to provide those services on a volunteer basis could well raise complicated possible liability issues.

It would be preferable for carriers to be able to make their own assessment of the need for a safety assistant on the basis of advance information provided by the passenger, or at check-in if no advance notice has been given. With the standard set in proposed subsection (c), there is a danger that a carrier will accept a disabled individual's self assessment that they can travel alone, but then be charged with caring for that passenger if it is later transpires that the passenger's assessment was either absolutely untrue, or incorrect due to underestimation of the effects that a long flight may have on the passenger's condition. For these reasons, a carrier should be able to determine whether an assistant is required or not, and if required the carrier should be allowed to charge for carriage of the assistant.⁴⁸ Unfortunately, subsection (c) as written is an invitation to abuse because it creates a loophole for free transportation for traveling

⁴⁸ The U.K .Code supports this: "where an escort or companion is required by the airline they should consider offering a discount on the full fare for that flight for that person." Section 4.18. Doc. 30 similarly reads: "airlines should be encouraged to offer discounts for the carriage of an accompanying person for PRMs in particular when the airline considers the presence of such a person necessary."

companions of disabled individuals who are willing to assert that, although by objective assessment they meet the standards set out in subsection (b), they are capable of traveling independently.⁴⁹

According to MAG, “Safety Assistant” may be the appropriate term for logistical purposes. However, if any medical attention is required, such as administering medication or checking vital signs, a medical assistant is required. These services carry professional and legal responsibilities that cabin crew cannot assume.

In addition, the regulation should specify that the safety assistant must travel in the same class of travel as the QIWD and that the safety assistant also meets all applicable immigration, customs and quarantine requirements.

Limitation on Charges § 382.31

DOT should clarify that under this provision carriers are able to make an additional seat charge if required for an assistance dog.

Waiver of Liability for damage § 382.35

Due to the primacy of treaty obligations,⁵⁰ the liability limits of the Montreal Convention, or other applicable liability treaties, apply. There should be no special liability regime for disabled passengers or the goods they bring onboard or check.

Carriers from countries with strict animal quarantine laws are, however, interested in being able to ask passengers to sign waivers with respect to assistance

⁴⁹ Although DOT addressed this issue in the 1990 rulemaking and concluded that abuse would be avoided because carriers would invariably chose to assign off-duty employees or volunteer passengers to serve as Safety Assistants, international operations do not have the same high number of off-duty of deadheading crew as domestic flights, and carriers may be restrained by their domestic laws or the requirements of their insurance from adopting the second of these “options.”

⁵⁰ U.S. Constitution, Art. VI,2; Vienna Convention on the Law of Treaties, Arts. 17, 18, 26 and 27. See also 49 U.S.C. § 40105(b)(1).

dogs. To reduce the chances of assistance dogs failing clearance checks upon arrival in such countries, carriers wish to be able to obtain signed confirmations that animals are correctly documented for entry and indemnifications against costs should the animal need to be quarantined, fails entry requirements of the destination country or be destroyed by quarantine authorities.

Subpart C – Information for Passengers

Required Information for Disabled Passengers § 382.41

The requirement of proposed subsection (c) that certain information must be required even if the passenger does not request it appears to contradict, at least in part, the introductory portion of this proposed provision.

Accessibility of Information and Reservation Services § 382.43

While non-U.S. carriers have not provided IATA with details on anticipated costs associated with this requirement, the comments of ATA clearly indicate that the Department's estimates are far too low.

The inappropriate worldwide, extraterritorial aspects of the NPRM are highlighted again by the use of very narrow and very provincial standards in this provision. Part 1194 of Title 36 of the Code of Federal Regulations is a *domestic* standard that requires that federal employees with disabilities have access to electronic and information technology in the same way as federal employees who do not have disabilities, that requires that members of the public with disabilities seeking information or services from a federal agency have access to and use of information and data comparable to that

provided to individuals who do not have disabilities, and that sets out technical specifications for such technology.⁵¹

And again, the onerous results of this approach will adversely affect U.S. as well as non-U.S. carriers, because all carriers are faced with E-commerce and data protection laws and regulations in other countries as well as local anti-discrimination laws. They have to comply with these local laws in each of the jurisdictions in which they maintain and operate websites.

These accessibility requirements should apply only to websites that airlines maintain within the United States, and should only relate to website content that is essential to the booking function. In addition to the legal and jurisdictional problems raised by the universalistic approach of the NPRM, it would, in fact, yield little or no benefit for disabled passengers in the United States, who rarely visit the non-U.S. websites of carriers.

Given that technology constantly changes and evolves, the goals of the NPRM might be better served by stating those goals rather than taking such a detailed prescriptive approach, which is sure to require regular reconsideration and updating.

Carriers should be able to accommodate requests for medical services onboard only via personal contact. Such detailed and complex arrangements are not susceptible to website booking engines. As noted above, in cases such as requests for oxygen,

⁵¹ In addition, this attempt to inappropriately stretch a domestic standard to fit a complex international scenario might well have its own pitfalls for the Department. Indeed, 36 CFR Part 1194.3 General Exceptions states that “the products a contractor develops, procures, maintains, or uses which are not specified as part of a contract with a Federal agency are not required to comply with this part.” This would suggest that a contractor like Expedia would only be required to amend the parts of its web site that relate to carriers affected by the NPRM. Such an operation would incur a prohibitive cost and could well prove to be technologically impossible. Ultimately, this attempt to regulate providers of electronic data services by means of regulating air carriers is likely to prove as difficult – or as impossible – as regulating foreign airports by means of regulating air carriers. And, as the Department is well aware, it has recently determined that it could regulate non-airline websites only via application of Section 41712 to them as “ticket agents.” Section 41507 does not apply to ticket agents. See 69 Fed. Reg. 976, 995-98 (Jan 7, 2004).

advance notice, planning, and, in many cases, consultation with the passenger's personal physician is necessary.

With respect to TTY services, a number of carriers have advised IATA that TTY services are not available in their home countries.

Subpart D – Accessibility of Airport Facilities

Airport Accessibility Generally § 382.51

Although carriers accept the principle that passengers with disabilities should be able to move through airports readily and have easy access to all airport facilities, this provision is virtually certain to present carriers, both U.S. and non-U.S., with insurmountable problems. In many, if not most cases, while carriers may be charged with responsibilities under this provision as written, they do not actually own or control airport facilities. Airport operators, which, in some cases are foreign governments or entities of foreign governments, are in control of the conditions and facilities of airports.⁵²

In some terminals the airlines do exercise some control over ticketing locations, including check-in kiosks. However, complications would arise in the event of an electronic ticketing kiosk being used by passengers traveling on different airlines both subject to and not subject to the NPRM. The cost of adapting the large number of electronic ticketing kiosks already in service to comply with the requirements would again be prohibitive. In addition, further complications would arise with relation to who would incur the costs of adapting the kiosks used by passengers traveling on different airlines when not all of the airlines would have to comply with Part 382.

Again, considering the complexities of check-in, the fact that check-in for passengers with requests for or requiring special onboard services are not the norm and

⁵² See discussion of §382.13 and note 37 *supra*.

easily dealt with by automated systems, the Department should consider stating the goal, and leave the details to be developed to suit the circumstances of each different airport situation.⁵³

And again, the Department's use of domestic standards underscores the fact that the overly detailed and provincial approach it has chosen is inappropriate for regulation of a complex international matter and that in issuing the NPRM the Department has failed to meet the standards set by the statute it is seeking to enforce. The ADAAG guidelines (section 4.3.3-4.3.10 referenced in subsection (a)(2)) set *domestic* standards for "location, width, passing space, headroom, surface textures, slope levels, changes in levels, doors and egress " of "Accessible Routes" through airports.⁵⁴

The Department's ADA rules at 49 CFR Parts 37 and 38 referenced in subsection (a)(3) add yet another level of complexity and incorporate these complex domestic rules into a regulation the Department intends to apply internationally. Part 37 is most notable for its Annex A, which refers back to the ADAAG's, and Part 38 outlines the "Specifications for Transportation Vehicles," which are divided into the following groups: 1. buses and vans; 2. rapid rail vehicles; 3. light rail vehicles; 4. commuter rail cars; 5. inter-city rail cars; 6. over-the-road buses; and 7. other vehicles (which is where the *only* reference to airports can be found).

⁵³ 36 CFR § 1194.25, which the NPRM references as a possible source of kiosk accessibility requirements, contains guidelines in the following ten areas: 1. ensuring access without needing to attach assistive devices; 2. alerting and facilitating timed responses; 3. utilizing touch screens and contact - sensitive controls; 4. alternatives to biometric forms of identification; 5. facility for private listening when machines provide auditory output; 6. volume levels for machines using voice output in a public area; 7. conveying information through means other than color-coding; 8. the provision of a variety of contrast settings when providing information visually; 9. controlling image flicker levels; and 10. physical attributes (size/location) of non-portable machines.

⁵⁴ See note 36 *supra*.

Airport Requirements for the Vision Impaired and Deaf/Hard-of-Hearing § 382.53

In addition to the difficulties in making the sort of detailed information required here available for the short-haul foreign-to-foreign flights that would be covered under the proposal, this provision is impractical because airlines do not provide all information at airports. In many instances, information on general delays and other relevant information is provided by the airport operator.

Subpart E – Accessibility of Aircraft

Movable Aisle Armrests § 382.61

As noted above, and as set forth in *British Caledonian*, regulations of this type should be left to the discretion of the sovereign regulating the airline.

A large number of carriers have noted that the detailed specifics of the 50% rule set forth in this provision are unnecessary due to the differences between domestic and international service and because the seats for the passengers in the premium service (business, first) sections of the aircraft do not need moveable armrests in order to be accessible for disabled passengers. For this reason, the moveable armrest requirements should apply only to economy portions of aircraft cabins.⁵⁵ Such accessibility of premium seats is clearly the developing norm.⁵⁶ Again, it would be overly

⁵⁵ This would conform the DOT proposal to other regulators. For example, the U.K. Code calls for “at least 50% of all aisle seats in economy cabins, or those with restricted legroom, should have moveable armrests. There may be less need to provide lifting armrests in cabins where the seat spacing allows for ease of movement in front of the seats.” Section 7.5.

⁵⁶ Both major aircraft manufacturers have filed comments that support this. Philippe de Gouttes, Manager Aviation Regulations, Product Integrity Division, Airbus, has stated:

While movable armrests can easily be provided on economy class seats, significant design and certification difficulties may be met on business and first class seats. New seat

prescriptive, and, ultimately, counter-productive for the Department to adopt the detailed provision proposed here.

concepts in these classes, that introduce cocoons, canted installation, etc... make the movable armrest provision irrelevant in some instances.

The intent of the requirement is to facilitate transfer of disabled passengers between onboard wheelchair and seat. Therefore, movable armrests should be considered as a means of showing compliance with the regulation, but not as the requirement itself. Alternative solutions should be allowed to meet the objective of this requirement, such as but not limited to: space provision in front or around the seat, movable seat pan, or additional transfer device...

§ 382.61(e) requires that "if you replace an aircraft's seats with newly manufactured seats, you must provide movable aisle armrests as required by this section." This requirement is not new compared to the current Part 382, but its consequences may have been underestimated. In case of replacement of one seat with a newly manufactured seat, a new designed seat with foldable aisle armrest must be installed. The modification development cost, which is the same as for a complete retrofit, is not justified for a single unit. This paragraph should read, "newly developed type of seats" instead of "newly manufactured seats".

Submission No. 59 in this Docket, dated January 25, 2005.

Elizabeth A. Pasztor, Director Certification Regulatory Affairs, Boeing, has stated:

Boeing Commercial Airplanes has reviewed the subject NPRM and has identified a concern relative to the requirements of proposed Sec. 382.61 (What are the requirements for movable aisle armrests?).

Typical business- and first-class seat designs do not fit with the traditional "removable" armrest designs, such as those addressed in the proposed rule. Our research has shown that, for seats that have substantial room between rows (as is customary in first and business classes), there is sufficient room for most wheel chairs used on airplanes to enter the row between the seats, and for the passenger to translate from the wheelchair into the seat with a 90-degree rotation. There is some evidence that this type of translation might actually be easier for the passenger and crew to accomplish in many situations. The NPRM, however, only addresses the traditional movable aisle armrest and sideways translation of the occupant. In light of this, we request that the proposed rule be revised to allow the use of methods other than just "moveable armrests" when complying with this section.

Submission No. 93 in this Docket, dated February 4, 2005.

Accessible Lavatories § 382.63

The costs of this proposal, which would require, in many cases, removal of passenger seats – to an industry that in the best of times operates on very thin margins – is simply excessive. See details in Section 3.2.2 of Special Annex II. In addition, the layout changes that would be required would have to be set forth in an aircraft Service Bulletin. Manufacturers have not issued necessary technical details. For such detailed technical changes, which are inextricably related to operational safety are at issue, any unilateral arbitrary compliance date that is not related to a Service Bulletin, is unworkable.⁵⁷

⁵⁷ Again, Mr. De Gouttes of Airbus has already provided comments:

§ 382.63(c) requires that, if you replace a lavatory on an aircraft with more than one aisle, you must replace it with an accessible lavatory. If you replace a component of an inaccessible lavatory (e.g., the sink) on an aircraft with more than one aisle, you must replace it with an accessible component.

In most cases, and not only in single-aisle aircraft, replacement of an existing non-accessible lavatory by an accessible lavatory may not be feasible without cabin reconfiguration and thus seating capacity reduction.

The explanation on section 382.63, page 64371 1st column, states that, for installation of accessible lavatories in single-aisle aircraft, “this potential burden relates not only to the cost of the lavatory units themselves but also, and more importantly, to the continuing revenue losses that airlines would encounter because they would probably have to reduce the seating capacity of the aircraft to accommodate the larger lavatory unit.”

This statement is also valid for replacement of lavatories on aircraft with more than one aisle.

On-board Wheelchairs § 382.65

The specific, very detailed requirements of the wheelchairs mandated here would require many carriers that already provide onboard wheelchairs to purchase entirely new wheelchairs to replace all of those currently in use. The cost of each of the new wheelchairs is estimated at \$2,500US. This would impose an undue economic hardship on carriers. At a minimum, carriers ask that this requirement be linked to normal replacement cycles of equipment rather than to a particular date for across-the-board compliance.

Priority Storage of Passenger Wheelchairs § 382.67

This proposal again raises conflicts of law issues.⁵⁸ Moreover, in practice, much of the priority space would be located in the rear of the typical cabin, which means that the disabled passenger would be kept waiting no less than the time necessary to retrieve the wheelchair from the cargo hold. Thus, it is unlikely that the proposal would improve convenience or provide a user-friendlier situation for the disabled passenger. In addition, some carriers have noted that their staff have no expertise in the required disassembly of wheelchairs.

Subpart F – Seating Accommodations

Seating Accommodations for Passengers § 382.81

The specific seating requirements in this provision underscore the importance of advance notice. As more fully outlined below, without advance notice, carriers may well

⁵⁸ See, e.g., U.K. Code: “although space may be available on board to store a personal folding wheelchair, the Code recognizes that there could be demand for that space. To avoid conflicts arising, all wheelchairs should be stored in the hold.” Section 6.35.

have pre-allocated these seats to other passengers, which then puts the carriers in the position of having to discriminate against those other passengers.

Moreover, applicable standards of at least some other jurisdictions prohibit seating of disabled passengers in the upper deck of 747 aircraft.⁵⁹ As with many of the other provisions of the NPRM that affect operational matters, this proposal could be improved with a statement that its provisions are subject to safety considerations.

Methods for Making Seating Accommodations § 382.83

The requirements of this provision are both unrealistic and onerous. If a disabled passenger fails to notify the carrier of his or her disability and requirements at the time of booking and another passenger is allocated a designated seat, it will prove difficult to re-accommodate the passenger at times up to one hour before the flight. This is particularly the case on long haul flights operated with large aircraft, where intensified screening procedures and more detailed requirements for provision of advance information to governments have necessitated longer and longer mandatory advance check-in times.

For carriers that do not operate standardized fleets, it would be preferable to be able to designate a number of rows and leave the engineering/maintenance staff to make arrangements to comply with a general standard rather than the overly-elaborate hierarchy of requirements detailed here. It would be far superior to state the desired outcome and require carriers to achieve it by whatever safe and legal means they devise. This is particularly important on long-haul international flights, where the comfort of all passengers must be the pre-eminent standard.

⁵⁹ See, e.g., Canadian Transportation Agency Decisions No. 323-A-1997 (May 27, 1997); Decision No. 309-AT-A-1998 (June 17, 1998); and No. 664-AT-1999 (Nov. 25, 1999).

Other Seating Accommodation Provisions §§ 382.85 and 382.87

This proposal, with its use of the phrase “a seat, not already assigned to another passenger,” appears to mandate upgrades. Upgrade determinations are commercial decisions best left to the airline’s discretion. Such a regulatory requirement would impose an additional cost burden that the industry can ill afford.

Subpart G – Boarding, Deplaning and Connecting Assistance

Within the Terminal § 382.91

As with the requirements of proposed Subpart D, these are areas most typically under the control of entities other than airlines, and the EC Proposal acknowledges this.⁶⁰

The requirements of subsection (a) are at odds with accepted practice, and, as a practical matter, when an arrival carrier seeks to carry out the responsibilities allocated to it by subsection (a), it will not be able to provide assistance after a certain point.

Without prior notice from the disabled passenger, it will be impossible for carriers to provide the assistance mandated by subsection (b). Moreover, this requirement, in effect, imposes on carriers a valet or personal service obligation with respect to disabled passengers. Carriers simply have neither the resources nor the expertise to provide such functions. A more reasonable approach would be to impose responsibilities on the carriers to commence with check-in.⁶¹

⁶⁰ As the EC Proposal notes, “it would be unreasonable to expect one airline to provide assistance throughout an airport, for its own passengers and for those transferred between carriers, in the terminal that it uses and in others. There is a strong case for making the airport manager responsible for organizing and financing the assistance that PRM need to use air transport.” ¶ 17.

⁶¹ See also, e.g., the analyses adopted in *Day v. Trans World Airlines*, 528 F.2d 31 (2nd Cir. 1975); *Evangelinos v. Trans World Airlines Inc.*, 550 F.2d (3rd Cir. 1977) , *Hernandez v. Air France*, 545 F.2d 279

Boarding, Deplaning and Connecting Assistance § 382.95

A specific time limit for providing assistance is impracticable in certain situations, for example, in the case of irregular operations. Additionally, facilities vary significantly from airport to airport, making specific time limits difficult or impossible to standardize. Compliance with a “promptly” requirement must, of necessity, be judged only in light of the circumstances of each individual case.

Lifts for Boarding and Deplaning § 382.97

The Department needs to clarify that the provisions of this section apply only to situations covered by § 382.95(b).

Carrier Agreements with Airports § 382.99

The Department needs to clarify that all of the portions of this section (and not only subsection (a)) apply only to situations covered by § 382.95(b), *i.e.*, the requirement for lifts at U.S. commercial service airports with 10,000 or more annual enplanements.

As noted above, an advance check-in time of one hour is an absurdity in the present environment.

Other Boarding and Deplaning Assistance § 382.101

Although carriers agree with the intent that motivated this provision, an absolute prohibition against hand-carrying in all circumstances may, in some instances, have the effect of preventing a disabled individual from traveling. An exemption for emergency situations is suggested.

(1st Cir. 1976), *Baker v. Lansdell Protective Agency*, 590 F. Supp. 497 (S.D.N.Y. 1984) and *Muller v. Port Authority of New York and New Jersey*, 722 N.Y.S.2d 40 (App. Div. 2001).

Leaving Wheelchairs Unattended § 382.103

Again, while carriers agree with the intent of this provision, it may present difficulties when there are numerous disabled passengers on a particular flight, and the waiver provision of the last sentence should not require an explicit waiver when the disabled passenger is accompanied.

Subpart H – Services on Aircraft

Required Onboard Services and Onboard Services Not Required §§ 382.111 and 382.115

The experience of carriers teaches that use of the lavatory is an issue onboard, and that disabled passengers at times require more than what is required in these provisions. This underscores the point made previously that airline crew and medical professionals are often better able to make assessments about the ability of disabled passengers to travel without assistance.

The onboard communication requirements of subsection (f) of §382.111 make it mandatory to provide deaf and hard-of-hearing passengers with information that not all passengers currently receive, especially on flights where some, but not all, announcements are made in more than one language.

Moreover, the requirements of § 382.115 appear to be contradictory because subsection (a) requires the carriers to provide an individual briefing while § 382.11(a)(2) prohibits carriers from requiring a disabled passenger to accept special services that the individual does not request.

The provisions of subsection (e) of § 382.115 are, again, overly prescriptive and not necessary to achieving the goal of this section – provision of essential information to all passengers onboard.

Service Animals § 382.117

This proposal, and the details of Annex A, raise numerous conflict of laws issues. Laws of some jurisdictions and the government-approved operating manuals of a number of carriers allow only dogs as service animals. The NPRM places very few limitations on suitability of service animals, but that is at odds with the standards in many other jurisdictions. Annex II of the EC Proposal, for example, states only that “[c]arriers should offer carriage of age of certified service dogs in the cabin, subject to national regulations and for flights whose scheduled duration is less than five hours.” In addition, ECAC Doc. 30. Section 5.6.7 states that “Member States should recommend that air carriers allow blind passengers to be escorted by their guide-dogs inside the aircraft cabin during the whole flight, provided airline regulations allow it, and under their conditions.” See *also* Special Annex I, with information on the laws of particular jurisdictions, including Switzerland and Brazil. It is also suggested that the Department consider clarifying whether carriers can require that emotional support animals be restricted to cages when carried in the cabin.

The NPRM contains no evidence the Department considered the special circumstances of ultra long haul transpolar flights – where there is no ability to stop -- or does it indicate that the Department consulted with any animal rights organizations international service animal associations. Nor does the NPRM acknowledge that other passengers may have medical contradictions or religious objections to being in the presence of animals for extended periods of time.

Subpart I

Mobility Aids and Assistive Devices in the Cabin and Priority Cabin Stowage Space for Wheelchairs §§ 382.121 and 382.123

As noted above in the comment to § 382.67, this provision is at odds with the applicable standards of other jurisdictions. In addition, some assistive devices such as nebulizers and signal omitting heart monitors may also present safety issues and therefore justify some restrictions not allowed by this proposed provision.

Cargo Hold Stowage for Wheelchairs, Etc. § 382.125

With references to only domestic standards of the FAA and TSA, the Department again makes it clear that it is not providing appropriate analysis for a regulation that is required to take international agreements and laws of foreign countries into consideration. Again, the standard should require reasonable accommodation rather than the excessive detail here.

Stowage of Battery-powered Wheelchairs § 382.127

The details of this section are unnecessary as they relate to international air transport, because the carriage of battery-powered mobility aids is subject to the requirements set out in an ICAO document entitled "The Technical Instructions for the Safe Transport of Dangerous Goods by Air" (the "TIs)". The ICAO Technical Instructions came into effect in 1983 as advisory material and into legal force in 1984.

The TIs have legal effect by virtue of Annex 18 to the Chicago Convention. Annex 18 and its associated TIs apply as mandatory requirements for international operations of civil aircraft. In addition, the Annex recommends that States comply with the Annex and the TIs for domestic civil aircraft operations.

The ICAO TIs, as the legal requirements applicable to the international transport of dangerous goods by air, are reflected in the IATA Dangerous Goods Regulations (DGR). The U.K. Air Navigation (Dangerous Goods) Regulations 2002 reference the ICAO Technical Instructions. In India, it is the Aircraft Rules (Carriage of Dangerous Goods 2003), in Australia, Civil Aviation Safety Regulations Part 92 - Consignment and carriage of dangerous goods by air and in New Zealand, Civil Aviation Rules Part 92 - Carriage of Dangerous Goods, etc., etc.⁶²

In accordance with ICAO procedures, States and operators may submit 'variations' to the TIs. These variations may impose a restriction, or a higher standard, than applies in the TIs. Variations cannot impose a lesser standard than that of the TIs. The provisions of the ICAO TIs with regard to the carriage of battery-powered wheelchairs are an international legal standard and the Department cannot impose a lesser requirement *other than for domestic operations*.

With regard to battery-powered wheelchairs and other mobility aids carried by passengers, the provisions of 49 CFR 175.10(a)(19) & (20) are effectively identical to the requirements set out in DGR 2.3.2.3 & 2.3.2.4, but there is one significant difference. The ICAO TIs and the DGR state that battery-powered wheelchairs may be carried "subject to the approval of the operator(s)". Therefore an operator is not obligated to accept these items.

It is worth noting that 49 CFR 175.10(a)(19) & (20) and the DGR restrict the carriage of battery-powered wheelchairs to passenger checked baggage. These items are not permitted in the aircraft cabin. In this respect, the NPRM, at proposed

⁶² An exception to this is in the U.S., where Title 49 of the Code of Federal Regulations contains dangerous goods regulations for all modes of transport, road rail, sea and air. Amendments to the U.N. Model Regulations, the International Maritime Organization IMDG Code and ICAO Technical Instructions are generally added directly to the content of 49 CFR, by means of the U.S. rulemaking process, which does not always adopt all of the requirements of the ICAO TIs into domestic legislation, or may modify the requirements of the Technical Instructions.

§§ 382.121(1), 382.123(a) and 382.127(f), which state that the operator **must** allow these in the cabin, is inconsistent with the requirements of 49 CFR.

Liability Limits § 382.131

The liability limits accepted by countries (the limits of the Warsaw system or the new Montreal Convention) apply.⁶³ These treaties are agreed to by the signatory countries and the DOT should not attempt to increase the liability limits set forth therein. See Vienna Convention on the Law of Treaties, Arts. 19-27.

Subpart J

Carrier Training Requirements § 382.141

Training requirements for non-U.S. carriers are appropriately determined by the regulators of their home countries. See discussion above in Section I.

Deadline for Training § 382.143

If training requirements could appropriately be imposed, the “deadline” for training should not be unilateral, but should rather be acknowledged to be best coordinated with the regular training schedule of carriers. Again, there is no evidence that the Department consulted with carriers, international training organizations or disability groups. Moreover, it is not possible for airlines whose countries do not have such domestic organizations to comply.

⁶³ Indeed, the Department acknowledged this basic principle in the 1990 rulemaking. See 55 Fed. Reg. at 8038.

Carrier Manuals § 382.145

The requirements of this provision present no problems for carriers, but it is suggested that DOT state that it is sufficient for carriers to provide information to DOT on updates to their manuals by means of the IOSA safety audit procedures.

Subpart K – Complaints and Enforcement Procedures

Complaints Resolution Officials and Actions of CROs §§ 382.151 and 382.153

These additional requirements are not supported by empirical evidence demonstrating their necessity. In the absence of this evidence, it is not appropriate for the Department to subject carriers to administrative penalties for failure to comply with requirements that are not shown to benefit disabled passengers.

Response to Written Complaints § 382.155

The time limits may pose problems in situations when the carrier needs to conduct a full investigation before declarations are made in respect of admitting or denying a violation.

CONCLUSION

For all of the reasons detailed above, IATA asks the Department to reconsider its approach to this rulemaking

- (1) by giving due consideration to applicable domestic law, which requires actions consistent with the international agreements to which the United States is a party and proper consideration to the laws and

requirements of foreign countries, and upon such reconsideration -- and upon reflection on the requirements and realities of international comity and reciprocity -- choose to retreat from the expansive extraterritorial approach it has chosen in the NPRM.

- (2) by examining its economic analysis, and upon such examination, choose to retreat from the overly prescriptive and unnecessary details of the NPRM in favor of adopting broad general principles.

IATA urges that the Department set broad general principles for provision of services to disabled passengers on a non-discriminatory basis that comport with the existing international standards such as those of the Chicago Convention and ICAO, and are in accord with the approach of the EC Proposal, and, with those principles in place, embark on serious coordinated efforts to reach a harmonized approach via international cooperation.

Respectfully submitted,

/s/
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SPECIAL ANNEX I

Conflicts of Laws

Chicago Convention: General

The extra-territorial nature of the NPRM clearly conflicts with one of the basic principals of the Chicago Convention, namely that regulation of flag carriers is the province of their home countries.

Moreover, many countries have gone one step further and incorporated the Convention into national law. For example:

Czech Republic: Annex 9 as well as the other ICAO annexes 1-18 are incorporated into the national law of Czech Republic pursuant to the provision § 102 (2) Act. No. 49/1997 Coll. on Civil Aviation and the Amendment and Supplement of the Act No. 455/1991 Coll., on Engaging in a Trade (The Trade Licensing Act) as last amended. Incorporating the ICAO annexes into Czech Airlines internal documentation and manuals is a fundamental precondition of obtaining an Air Operator Certificate.

Mexico: Article 133 of the Mexican Constitution provides that the International Treaties signed and ratified by the United Mexican States are national law. In this regard, the applicability of the Standards of ICAO and its Annexes are incorporated in Article 4 of the Mexican Airports Law and Article 4 of the Mexican Civil Aviation Law.

New Zealand: The New Zealand Civil Aviation Act 1990 confirms New Zealand's obligations international aviation agreements to which it is a party. Section 14 (2) (a) includes a commitment to the Chicago Convention and Section 33 confirms that the standards of ICAO relating to aviation safety and security must be taken into account in making rules.

Switzerland: The standards of ICAO Annex 9 and 17 that are of a self-executing nature are directly applicable in Switzerland pursuant to Article 6a paragraph 1 of the Federal Air Navigation Act (LFG; SR 748.0) in connection with Articles 122d and f of the Federal Air Navigation Regulation (LFV; SR 748.1).

Chicago Convention: Transportation of Dangerous Goods

The carriage of battery-powered mobility aids is subject to the requirements set out in an ICAO document entitled "the Technical Instructions for the Safe Transport of Dangerous Goods by Air". The ICAO Technical Instructions came into effect in 1983 as advisory material and into legal force in 1984.

The document has force by virtue of Annex 18 to the Chicago Convention. All States that are signatories to the Chicago Convention are legally obliged to adopt and enforce the provisions of Annex 18 and the Technical Instructions. Annex 18 and its associated Technical Instructions apply as a mandatory requirement for international operations of civil aircraft. In addition, the Annex recommends that States comply with the Annex and the Technical Instructions for domestic civil aircraft operations.

The ICAO Technical Instructions are the legal requirements applicable to the international transport of dangerous goods by air. The contents of the Instructions have been incorporated into the national regulations of many countries. For example:

- Australia: Civil Aviation Safety Regulations Part 92 - Consignment and carriage of dangerous goods by air
- India: Aircraft Rules (Carriage of Dangerous Goods) 2003
- New Zealand: Civil Aviation Rules Part 92 - Carriage of Dangerous Goods
- United Kingdom: Air Navigation (Dangerous Goods) Regulations 2002

The ICAO Technical Instructions, and thus the national regulations of many countries, state that battery-powered wheelchairs may be carried "subject to the approval of the operator(s)". Moreover, the Instructions restrict the carriage of battery-powered wheelchairs to passenger-checked baggage. This results in a clear conflict of law with NPRM sections 382.121(1), 382.123(a) and 382.127(f), which state that the operator must allow these in the cabin.

European Commission

On 16 February 2005, the European Commission issued a proposed regulation "Concerning the rights of persons with reduced mobility when traveling by air."

The draft Regulation takes a practical approach to guaranteeing the rights of persons with reduced mobility and affords a balanced amount of discretion to the airlines. Such an approach conflicts starkly with the overly prescriptive and politically correct approach of the NPRM.

Specific conflicts between the EC draft regulation and the NPRM are as follows:

NPRM Section	Conflict
382.15	<p>NPRM requires that all parties with which airlines contract (including airports) to comply with the requirements of the NPRM. Moreover, it places the onus for ensuring compliance squarely on the airlines themselves. As such, it is the airlines that are held accountable if an airport does not comply.</p> <p>The EC draft proposal holds the airports responsible for their own compliance.</p>

382.19	<p>NPRM states that carriers may only refuse transportation to a PRM on the basis of safety. The EC draft proposal provides the carrier with the discretion to decide whether the PRM may be refused transportation if the size of the aircraft or the justified absence of cabin crew prevents the carriage of persons with reduced mobility, including their embarking and disembarking.</p>
382.27	<p>NPRM prohibits a carrier from requesting advance notice from a PRM requiring special assistance except under specific limited circumstances.</p> <p>The EC draft states, "it would be going too far to make advance warning a condition of assistance, as many airports and airlines now provide a satisfactory service without it. Rather, Community legislation should encourage passengers to give advance notice, without creating what would be in effect an obligation to do so."</p> <p>As such, the EC's proposal is that "if passengers with reduced mobility gave prior notice of their needs, airports would be obliged to assist them in such a way that they caught their flights. In the absence of prior notification, they would only have to make best efforts to ensure that they caught their flights. This would encourage notification, without creating an obligation that would be considered a step backward from present practice."</p>
382.29	<p>NPRM states that carriers must not require a PRM to travel with a safety assistant unless under certain specific circumstances. In addition, the carrier must pay for the transportation of a safety assistant if it determines that one is needed contrary to the PRMs self-assessment.</p> <p>The EC draft proposal provides the carrier with the discretion to decide whether the PRM requires a safety assistant.</p>
382.91	<p>NPRM requires that, with regard to connecting flights, the arriving carrier be responsible for assisting PRMs between gates, even if separate tickets are involved. The EC's proposed draft states, "it would be unreasonable to expect one airline to provide assistance throughout an airport, for its own passengers and for those transferred between carriers, in the terminal that it uses and in others".</p> <p>NPRM makes the carrier responsible for assisting PRMs between the terminal entrance and gate and between the gate and the aircraft. The EC's proposed draft makes the airport operator responsible for these.</p>
382.117	<p>NPRM places very few limitations on admissibility of service animals. The EC's draft proposal states only that carriers should offer "carriage of certified service dogs in the cabin, subject to national regulations and for flights whose scheduled duration is less than five hours".</p>

European Civil Aviation Conference (ECAC)

European Civil Aviation Conference (ECAC) was founded in 1955 as an intergovernmental organisation and currently groups together the following 41 States:

Albania	Denmark	Latvia	Republic of Moldova
Armenia	Estonia	Lithuania	Romania
Austria	Finland	Luxembourg	Serbia & Montenegro
Azerbaijan	France	Malta	Slovak Rep
Belgium	Germany	Monaco	Slovenia
Bosnia & Herzegovina	Greece	Netherlands	Spain
Bulgaria	Hungary	Norway	Sweden
Croatia	Iceland	Poland	Switzerland
Cyprus	Ireland	Portugal	Turkey
Czech Rep	Italy	Republic of Macedonia	UK
			Ukraine

An ECAC Facilitation sub-group on *persons with reduced mobility* (PRMs) has been ongoing for several years to elaborate European guidelines for Passengers with Reduced Mobility (PRMs) based on ICAO Annex 9. This is contained in Section 5 of the *ECAC Policy Statement in the Field of Civil Aviation Facilitation*, referred to as ECAC Doc. 30.

The merit of Doc. 30 is that it builds on existing multilaterally agreed elements:

- By accepting the ICAO definition of “persons with disabilities” as the definition for the ECAC and European term – “passenger with reduced mobility”.
- By expanding on the different recommended practices of Annex 9 with the agreement of all States.
- By incorporating the classification and codification of categories of passengers requiring special assistance set down in IATA Resolution 700 (see above) used to by airlines worldwide to exchange information about passengers needs.

The specific areas where the NPRM conflicts with ECAC Doc. 30 are as follows:

NPRM Section	Conflict
382.3	ECAC definition of PRMs is in line with the ICAO definition. The NPRM refers to all airport infrastructure which carriers control, but does not define “control”. In addition, the NPRM extends the QIWD definition to include persons accompanying or meeting a traveller.
382.11	NPRM states that carriers must not require PRMs to accept special services, including pre-boarding if not requested. Whereas ECAC Doc. 30 states that PRMs should be boarded and disembarked separately (normally prior to all other passengers and after all other passengers respectively).
382.17	NPRM states that carriers must not limit the number of PRMs on any flight. ECAC Doc. 30 advises that aviation requirements can limit the number of PRMs on a flight.
382.23	NPRM prohibits a carrier from requesting a medical certificate except under certain very limited circumstances. Annex E of ECAC Doc. 30 states that ‘if you also have a serious medical condition, you must contact the airline and it may be necessary to provide a ‘Fitness to fly’ certificate. You may be asked at the airport to confirm your fitness to fly.’
382.27	NPRM prohibits a carrier from requesting advance notice from a PRM requiring special assistance except under specific limited circumstances. ECAC Doc. 30 suggests that “PRMs requesting special assistance inform the competent body (airport or airline) of their needs, as soon as practicable, preferably at the time of booking their flight”.
382.29	NPRM states that carriers must pay for the transportation of a safety assistant if it determines that one is needed contrary to the PRMs self-assessment. ECAC Doc. 30 simply states that “airlines should be encouraged to offer discounts for the carriage of an accompanying person for PRMs in particular when the airline considers the presence of such a person necessary”.
382.117	NPRM places very few limitations on admissibility of service animals. ECAC Doc. 30 only allows for certified guide dogs to travel within the cabin and only if “airline regulations allow it and under their conditions”.

JAR OPS-1 (Joint Airworthiness Regulations)

The Joint Aviation Authorities (JAA) is a body that groups together the Civil Aviation Authorities of 38 European States (listed below). The JAA has produced a set of standardised European rules known as JAR-OPS (Joint Airworthiness Regulations).

JAR-OPS 1.260 sets out the requirements to be respected regarding the Carriage of Persons with Reduced Mobility and states:

b) An operator shall ensure that PRMs are not allocated, neither occupy, seats where their presence could:

- impede crews in their duties
- obstruct access to emergency equipment
- impede the emergency evacuation of the aeroplane

c) the Commander must be notified when PRMs are to be carried on-board.

The relevant Interpretative/Explanatory Material (IEM) issued by the JAA with regard to the provision of JAR-OPS 1.260 states the following:

2. In normal circumstances PRMs should not be seated adjacent to an emergency exit

3. In circumstances in which the number of PRMs form a significant proportion of the total number of passengers carried on board:

a] the number of PRMs should not exceed the number of able-bodied persons capable of assisting with an emergency evacuation.

In order to comply with the above JAR-OPS and IEM requirements, the carrier would need advance notice that the passenger is a PRM. This clearly conflicts with the NPRM's statement that no PRM is required to provide advance notice that they will be taking a flight. In addition, the IEM provides for a limit on the number of PRMs being carried on board, which conflicts with the NPRM's requirement that there can be no limit.

JAR-OPS is not a mandatory requirement in JAA Member States. However, most JAA States make JAR-OPS mandatory by incorporating it into national law. For example:

Czech Republic: JAR-OPS is incorporated into the national law of Czech Republic pursuant to the provision § 102 (2) Act. No. 49/1997 Coll. on Civil Aviation and the Amendment and Supplement of the Act No. 455/1991 Coll., on Engaging in a Trade (The Trade Licensing Act) as last amended.

Hungary: Transport of passengers with a disability is regulated by Order no. 20/2002 (III.30.) Chapter D. paragraph 1.260 of the Ministry of Transport and Water Management, which corresponds to JAR-OPS 1 Subpart D. paragraph 1.260.

Switzerland: The provisions of JAR-OPS 1 are made directly applicable to commercial air transport companies in Switzerland pursuant Article 6a paragraph 2 of the Federal Air Navigation Act (LFG; SR 748.0) in connection with Articles 2

and 3 of the Federal Regulation on the Operation of Aircraft in Commercial Air Transport (VJAR-OPS 1; SR 748.127.8).

Switzerland is also a good example of the specific conflict of laws relating to limiting the number of PRMs on board. Like most other European carriers which have to apply JAR-OPS 1.260, Swiss international Air Lines has government-approved safety-based limitations in place which implement this restriction with regard to the carriage of disabled passengers. Therefore, under the Operations Manual of SWISS, for long haul aircraft like an Airbus A-340.300 or A-330-200 a maximum of 26 disabled passenger (including escorts) travelling in a group and a maximum of 8 disabled passengers travelling individually (4 in economy class, 2 each in Business and first class) are admitted on a given flight.

The JAA has also adopted the following Acceptable Means of Compliance (AMC) with regard to JAR-OPS 1.270 concerning the stowage of baggage and cargo in a passenger cabin:

"In establishing procedures for the carriage of cargo in the passenger cabin of an aeroplane, an operator should observe the following:

[...] b. That a mix of the passengers and live animals should not be permitted except for pets (weighing not more than 8 kg) and guide dogs [...]."

This clearly contradicts the proposed rule in § 382.117 and the guidance material in Annex A of Part 382.

Most importantly, JAR-OPS will become EU law once EU-OPS-1, which incorporates the provisions of JAR-OPS, is adopted. Adoption should take effect by the end of 2005.

JAA States:

Albania	Finland	Luxembourg	Slovak Rep
Armenia	France	Malta	Slovenia
Austria	Germany	Monaco	Spain
Belgium	Greece	Netherlands	Sweden
Bulgaria	Hungary	Norway	Switzerland
Croatia	Iceland	Poland	Turkey
Cyprus	Ireland	Portugal	UK
Czech Rep	Italy	Republic of Macedonia	Ukraine
Denmark	Latvia	Republic of Moldova	
Estonia	Lithuania	Romania	

Brazil

DAC NOSER 2508 (21 Dec 1995) Section IV.4.3 states that carriers should transport trained dogs for free and that such dogs should be located with their masters in the cabin. Health certificates for dog must be presented.

DAC Portaria No. 676 (19 Dec 2000), Section V (Art 46) states that only dogs and cats may be transported in the cabin and Article 47 states that only dogs may act as service animals.

Chile: Direccion General de Aeronautica Civil, Regulation 2.3 Prohibition Against Transportation of Certain Items or Persons (30July 2002)

This Regulation provides that mentally disabled passengers can only travel with medical certificates issued by their treating physicians – which medical certificates state the medication the passenger is using, necessity of the passenger to travel with an attendant, measures necessary to control the passenger and what steps are necessary in case of an emergency.” (*“Los enfermos mentales sólo podrán viajar con certificado del médico tratante, donde conste medicación, necesidad de personal de salud de acompañante, medidas de control del individuo y actuación en caso de crisis”*)

Mexico: Norma Oficial Mexicana NOM-008-SCT3-2002

This Mexican Regulation is incorporated into the Operating Manuals of Mexicana. The Regulation does not expressly state that airlines may limit the number of PRMs on a flight. However, it does establish certain dispositions regarding evacuation procedures, which may not be fulfilled in case of emergency if the airlines are not able to implement a limit.

New Zealand: Civil Aviation Act 1990

Makes specific reference to the Warsaw Convention as amended by the Hague Protocols of 1955 and the Montreal Additional Protocols Nos 1 and 2 and Protocol No 4 of 1975 requiring the issue of a ticket including the conditions of carriage. Section 7.1 covers “the right to refuse carriage” and 7.2 “special assistance”. These are detailed as follows:

7.1 RIGHT TO REFUSE CARRIAGE

We may refuse to carry you or your Baggage if, in the exercise of our reasonable discretion, we decide or establish any of the following:

7.1.3 your conduct, age or mental or physical state is such as to require special assistance, cause discomfort or make yourself objectionable to other passengers or involve any hazard or risk to yourself or to other persons or to property;

7.2 SPECIAL ASSISTANCE

Acceptance for carriage of unaccompanied children, incapacitated persons, pregnant women, persons with illness, or other people requiring special assistance, is subject to **prior arrangement** with us. Passengers with disabilities who have advised us of their disability and any special requirements they may have at the time of ticketing, and been accepted by us, shall not subsequently be refused carriage because of such disability or special requirements.

Section 7.1 clearly conflicts with the NPRM's conditions on which transportation may be refused and Section 7.2 conflicts with the NPRM's statement that no PRM is required to provide advance notice that they will be taking a flight.

Additional conflicts between the NPRM and the laws of New Zealand are as follows:

New Zealand	Draft NPRM
Reference is to "incapacitated passengers"- these are listed in the Company's exposition. The list is prescriptive and accompanied by a note that these passengers require "individual assistance or attention"	Reference is to "Disabled Passengers" – the definition is illustrative and not definitive. There is no indication of whether the disability is permanent or temporary
Complaints from "incapacitated passengers" are dealt with in the same way as any other passenger. Except in respect of flights originating and or terminating in the US in which case the US complaints procedure is applied	Extensive passenger complaints reporting requirements
Medical clearance required for certain incapacitations except where the incapacity is permanent and stable	Requirement for medical clearance restricted to very limited number of cases.
Customers are required to disclose prior to check in if medical fitness in question	Only very limited disclosure required prior to check
Specific regime for carrier declining to carry – these include where an individual poses a risk to other customers, where the customer is obviously unwell and there is no medical certificate, where arrangements have not been made to safe guard the individuals travel	Specific regime but uses very different terminology and is heavily in favour of carriage of disabled person even if they may be a risk to other passengers.
Seating for disabled – specific seating for customers requiring leg elevations, oxygen, stretchers, incubators and lower limb plaster casts; restrictions on seating in emergency rows; limitations on numbers of disabled that can be carried on any one flight. Seating is restricted to class for which ticket is purchased. No seating on upper deck of B747-400 aircraft. Additional charges apply for oxygen, stretcher cases	Proposed regime is more permissive and requires preferential allocation to disabled persons

Escort is restricted to persons over the age of 15 and are required for infants traveling in an incubator; customers requiring additional care; stretcher patients; customers with severe hearing and visual impairment; those with severe mental disabilities; severe mobility impairment; when the limits on the number of disabled persons traveling unescorted is about to be exceeded	No age restriction on persons who could be escorts; determination of whether an escort is required will as a rule be left to customer except in certain prescribed circumstances
Passengers classified according to incapacity for purposes of boarding aircraft where air bridge or lift not available	General presumption that air bridge or lift will always be available
Wheelchairs generally stowed in hull. One wheel chair provided on aircraft	Proposed rule is unclear. Priority appears to be given to the stowage of wheel chairs in cabin.
Only animal permitted in cabin is guide dog. Guide dogs restricted to NZL/UK route over USA. Limited to maximum of 6	Very limited restrictions on animal types that cannot be taken into cabin. Unrestricted numbers
Advanced notification required and the carrier has the discretion to determine whether to refuse transportation	Maximum of 48 hours advance notice and 3 hours prior to check in
No requirement for moveable arm rests	Ratio of moveable arm rests required
Torso harness carried on aircraft	No requirement for specific restraints
Crew not permitted to lift passenger (employment agreements not Civil Aviation rule)	Requirement for crew to assist.

Spain: Civil Aviation Authority Operative circular 04/01

This Spanish regulation establishes that a carrier may limit the number of PRMs on any flight so that they shall not exceed the number of people that can help them. This clearly conflicts with the NPRM's requirement that no carrier may limit the number of PRMs on board (§ 382.17),

Singapore: Civil Aviation Authority

The Singapore CAA has set a limit on the number of disabled persons that a Singaporean air carrier may carry. Chapter 7, Para 2.2.2. of SIA's AOC (issued by CAAS) provides that the total number of handicapped passengers to be carried should not normally exceed the total number of floor level exits.

United Kingdom: Department of Transport Code of Practice

In March 2003 the United Kingdom Department of Transport released a Code of Practice entitled "Access to Air Travel for Disabled People". The purpose of this Code of Practice is to improve the accessibility of air travel to disabled people. It covers all

aspects of air travel, from accessing information through to arriving at the final destination. It also covers the design of the airport and the aircraft.

The specific areas where the NPRM conflicts with ECAC Doc. 30 are as follows:

NPRM Section	Conflict
382.25	NPRM prohibits carriers from requiring advance notice from PRMs of their intention to travel. The UK Code states that travel agents, tour operators and airlines should enquire of all bookings whether assistance might be required.
382.27	NPRM prohibits carriers from requiring advance notice from PRMs of their need for special assistance except under certain limited circumstances. The UK Code states that airlines should be able to insist on advance notice when the passenger requires assistance or lifting.
382.29	NPRM states that carriers must pay for the transportation of a safety assistant if it determines that one is needed contrary to the PRMs self-assessment. UK Code suggests that if an assistant is required by the airline, it should consider offering a discount on the full fare on that flight.
382.61	NPRM states that in aircraft with more than 30 seats, at least 50% of the aisle seats (in which PRMs may sit pursuant to FAA safety rules) must have movable aisle armrests. Such armrests must be provided proportionately in all classes. The UK Code states that at least 50% of aisle seats in economy cabins, or those with restricted legroom, should have moveable armrests, but that there may be less need to provide moveable armrests in cabins where the seat spacing allows for ease of movement in front of the seats.
382.67	NPRM states that aircraft with 100 or more seats must have a priority space of sufficient size to stow at least one folding wheelchair. UK Code states that to avoid conflicts relating to on-board storage areas, all wheelchairs should be stored in the hold.
382.83	NPRM puts the onus on the carrier to guarantee (with the exception of certain circumstances) PRMs their choice of seats. The UK Code states that in all cases it should be communicated to PRMs that no seats can be guaranteed and that seat allocation is at the discretion of the carrier.
382.117	NPRM places very few limitations on admissibility of service animals. UK Code states that assistance dogs (e.g. guide and hearing dogs) should, subject to regulations, be permitted to travel in the passenger cabin at no extra charge. However, the airline can ask the owner for proof that their dog has been trained by a recognised body and is also permitted to limit the number of assistance dogs on a flight.

SPECIAL ANNEX II

Critical Appraisal of the Preliminary Evaluation of the U.S. Department of Transportation

1. SUMMARY

IATA questions the accuracy of the Department's estimates of additional revenues of \$326-615 million from disabled passengers, apparently able and willing to fly following the enactment of this legislation:

- A key assumption, the proportion of international passengers with disabilities, appears to be at least double reasonable estimates:
 - First, the estimate of 1.1% used by the DOT as the proportion 'in the presence of barriers' (*sic*) to disabled travel appears to bear no relation to the 0.6% used in Table 4.1 from the study of Canadian passengers – which rises to a little over 0.7% in the 'high' case and not 1.3% as in the DOT analysis.
 - Second, figures available from major European airports show disabled passengers account for 0.37-0.5% of total passengers;
- If we rework the DOT analysis with a starting proportion of 0.5% rather than 1.1%, the estimated additional revenues are more than halved to \$148-280 million;
- Apparent mistakes have also been made in the baseline estimates of the number of passengers carried by international airlines which we have detected using the same database;
- Both the discrepancy on the assumed proportion of disabled passengers and that on the baseline estimates cause us serious concern about the validity of the DOT's estimates of potential additional revenues.

IATA also questions the DOT's estimates of the costs of this proposed legislation for foreign airlines of \$159-204 million:

- In reworking the DOT's estimates of costs we have detected a number of apparent errors leading to an underestimate of the implementation costs;
- More importantly, it appears that the DOT have underestimated the number of employees in foreign airlines by over 52%;
- There is also a substantial discrepancy in the \$57 million total training costs shown in Table E-1 and the figure of \$189 million that appears in summary Table ES-1. In our recalculations we have used the lower figure. Clearly though our recalculations of the implementation costs would be considerably higher were we to add the \$132 million difference. It is another example that casts doubt on the DOT analysis;
- Recalculating the cost of training using the DOT's classroom based approach correcting for errors and employee underestimates implies a cost of \$212 million, compared to the DOT's estimate of \$57 million;
- Using an alternative approach of e-learning, with typical industry costs, leads to an estimated cost of \$214 million, again considerably higher than the DOT's estimate of \$57 million;

- This suggests an underestimate in compliance costs of some \$150 million, which taken with revised estimates for potential new revenues show that this proposed legislation would be a clear and significant financial cost to foreign airlines.
- Finally, the DOT's estimate of \$35 as the unit cost of the movable aisle armrest installation, \$12,500 as the capital cost of accessible lavatory per aircraft and \$120,000 as the revenue loss from the seat removal per aircraft are considerably underestimated. Using the unit cost from British Airways of £1,019, £61,983 and £826,446 respectively, we calculated the compliance cost for all the foreign carriers that are considerably higher.

Spreadsheets containing details of IATA's recalculations of the DOT's cost-benefit analysis are available on request.

2. BENEFIT ANALYSIS

2.1 Disabled Passenger share of International Passengers

A key DOT assumption is that disabled passengers account for 1.1% of total international travelers flying to/from the United States.

Figures available from European airports (Aéroport de Paris, IHD Airport Services B.V. for Amsterdam and Brussels) show that disabled persons accounted for 0.37%- 0.5% of total passengers and it is only at some Mediterranean summer resort destinations that one finds ratios of about 1%.

The Canadian ratio of 1.1%, used in the DOT analysis, is not typical for foreign travel to/from the US because of the high proportion of "snowbirds" or senior Canadians visiting or living in the southern US. This cannot be characterized as typical of other US travel markets.

Using the lower proportion of 0.5% clearly produces a much lower *Present Value* (PV) than using the DOT estimate based on Canadian figures.

	DOT	IATA
	1.1%	0.5%
PV Low Case:	\$325,701,323	\$148,046,056
PV High Case:	\$615,268,120	\$279,667,327

In fact, in Table 4-1, DOT gives an adjustment rate for disabled travelers from the base rate of 2% of the whole population. This rate is 37.2%, which means the adjusted disabled passenger share should be 0.7% after barriers have been removed. With barriers the share is just over 0.6%, which is comparable to European data. It would have been more logical for the DOT to have used 0.6% based on its own findings.

It is not clear why the DOT do not start their analysis with 0.6% rather than 1.1%. It is also not clear where the 1.1% comes from but this is critical for the size of any additional passenger revenues for the airlines.

2.2 Baseline Total Foreign Carrier International Passengers To/From U.S (2002)

The DOT's data also overestimates the baseline number of foreign carrier international passengers, which exaggerates the PV for incremental revenue compared to figures based on data from the DOT's Bureau of Transportation Statistics (BTS).

Yet, the DOT also used the BTS T-100 (f) International Passenger Database to make its baseline estimation. This discrepancy is not explained.

	DOT	BTS
Passengers	65,069,782	58,219,274
PV Low Case:	\$325,701,323	\$291,411,681
PV High Case:	\$615,268,120	\$550,493,057

On the other hand, using the BTS number for 2003/2004 International Passengers, the DOT baseline figure underestimates the starting level for its 20-year analysis, given that the 2004 number already exceeds 80 million (compared to 71,739,435 predicated by the DOT projection) as shown below.

BTS T-100 Database

Year	Pax carried by foreign carriers to/from US
1990	37,993,051
1991	37,070,694
1992	37,397,078
1993	39,696,630
1994	42,354,416
1995	46,880,985
1996	49,821,003
1997	52,148,322
1998	53,816,080
1999	58,771,521
2000	62,412,043
2001	56,914,778
2002	58,219,018
2003	57,469,018
2004	80,025,123

If the predicated data in 2003 and 2004 is replaced by the actual number and keeping the 5% growth rate for the next 18 years, the result would be:

	DOT			IATA		
	2002	2003	2004	2002	2003	2004
PAX Number	65,069,782	68,323,271	71,739,435	58,219,274	57,469,018	80,025,123
PV Low Case :	\$325,701,323			\$361,850,349		
PV High Case :	\$615,268,120			\$684,054,379		

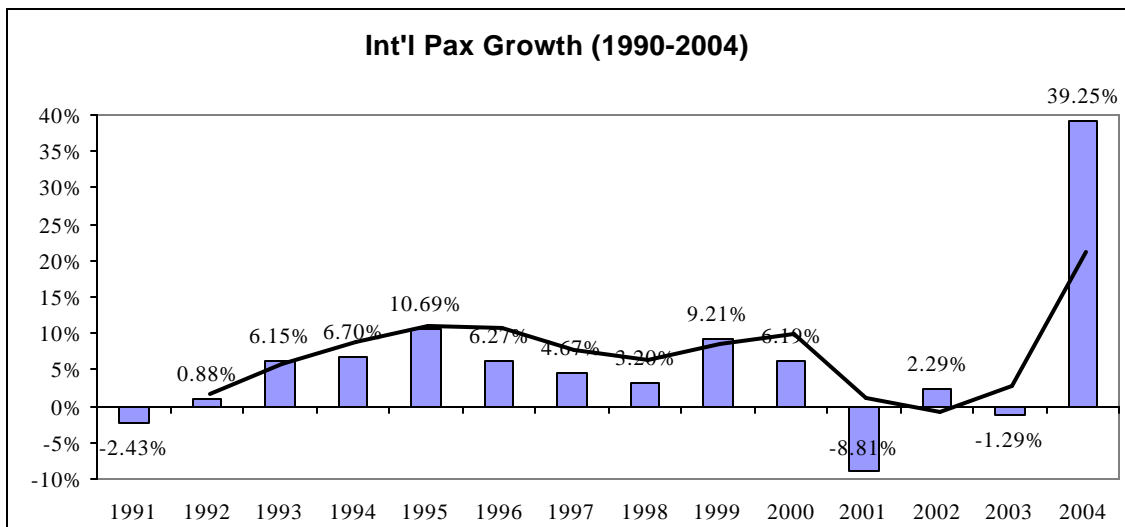
Although our estimates of the passengers carried by foreign carriers to/from US increases the PV of incremental revenue in 20 years, IATA observes that it casts serious doubts on the validity of DOT's data source .

2.3 International Passenger Growth per year (=Disabled Passenger Growth per year)

DOT (02-22)	BTS (91-04)	BTS (91-00)	IATA Total Int' l (04-08)
5%	5.96%	5.15%	6.0%

The BTS T-100 (f) International Passenger Database shows that from 1990-2004, the international traffic carried by foreign carriers to/from U.S. experienced significant deviations from the median growth 5.96% a year.

The growth rate prior to September 11, 2001 was 5.15%, which is a more realistic figure. IATA's forecast for 2004-2008 is slightly higher at 6% but that is distorted by the one-off rebound from SARS. Moreover, as markets in Europe and North America continue to mature the longer-term growth rate will slow. We believe the DOT's 5% rate is an appropriate estimate.



Source: BTS

2.4 Other key inputs

DOT makes several assumptions for remaining key inputs based on different data sources:

Low Case Regulatory Impact	9%
High Case Regulatory Impact	17%
Average International Fare	\$448
International Fare Growth/year	0%

Both the low and high case regulatory impact rates are based on Canadian statistics covering the period 1995 to 2001 following the introduction of legal requirements to remove physical barriers for disabled passengers in Canada. Note that these impact rates are additional to the international passenger growth rate.

The first issue here is whether Canadian historical data can be used to forecast future performance without adjustment, especially over a much longer period. Since 2001, the structure and development of the global aviation industry have fundamentally changed. Passenger travel demand is now influenced by additional external factors whose effects have not been incorporated in the Canadian model.

Secondly there is an issue regarding the validity of applying Canadian data to other countries. A key factor is relative purchasing power and ability to pay for air travel. Canada is one of the richest countries in the world. Canadian citizens have 11% more purchasing power than EU citizens and 363% more than the world average, as the table below shows.

Economy	Gross National Income at PPP US\$
United States	37,500
Canada	29,740
EU	26,260
World	8,180
Middle income	6,000

Source: World Bank

It cannot be argued that the impact of this regulation on the proportion of disabled passengers flying will be the same outside of Canada since purchasing power is much lower and travel patterns much different.

Furthermore, the statistical analysis shows that the DOT's estimates of the potential incremental revenues are highly sensitive to the following factors:

Name	Regression Sensitivity (low case)	Name	Regression Sensitivity (high case)
Low Case Regulatory Impact	0.543	Average Int.l Fare	0.550
Average Int. Fare	0.421	Discount rate	-0.464
Discount rate	-0.417	Int'l Passenger Growth/yr	0.433
Int. Passenger Growth/yr	0.377	High Case Reg Impact	0.331

2.5 Benefit Summary

Input		DOT	IATA
Discount rate		7%	7%
Years Included		19	19
Int'l PAX Growth per year		5%	5%
Disabled Passenger Growth per year		5%	5%
Disabled Passenger share of Int. PAX		1.10%	0.5%
Low Case Regulatory Impact		9%	9%
High Case Regulatory Impact		17%	17%
Average International Fare		\$448	\$448
International Fare Growth per year		0%	0%
Baseline Total Foreign Carrier International Passengers To/From U.S.	2001	65,069,782	58,219,274
	2003	68,323,271	57,469,018
	2004	71,739,435	80,025,123

Output	DOT	IATA
PV of Incremental Revenues Low	\$325,701,323	\$164,477,432
PV of Incremental Revenues High	\$615,268,120	\$310,933,808

3. COST ANALYSIS

3.1 Training Cost

3.1.1 Calculation Mistakes

Table E-1: Initial Training Cost

		DOT	IATA*
1.	Initial Course Presentation - Carrier Personnel Costs	\$ 8,580,703	\$8,577,891
2.	Year 1 Total Cost (M)	\$8.227	\$12.251
3.	20 Years Total Cost (M)	\$57.320	\$62.079
4.	NPV	\$31.537	\$35.848
5.	Nominal Annual Cost	\$2.883	\$3.104

*Before adjustment by our baseline employee figure.

While Item 1 contains rounding errors, DOT miscalculated Item 2 by \$4 million, which consequently underestimates Items 3, 4, 5.

Table E-2: Recurrent Training Cost

		DOT	IATA*
1.	Foreign Carrier Personnel	765,962.9	765,947.5
2.	Year 13 Instructor Cost (millions)	\$104	\$0.145
3.	20 Years Total Cost (millions)	\$194.3	\$100.185

* Before adjustment by our baseline employee figure.

Item 1 is a rounding error. Item 2 is a miscalculation mistake which exaggerates the recurrent training cost by about 100 million. Accordingly, our calculation of the total cost in 20 years is around \$100 million less than the DOT's number.

Table H-3 New Hire Training Cost

		DOT	IATA*
1.	20 Years Total Cost (M)	N/A	\$27.79

* Before adjustment by our baseline employee figure.

Because of a technical problem, DOT failed to provide the new hire training cost for year 2 to year 20.

3.1.2 Total number of employees for all foreign carriers in US operation:

DOT	IATA 2002	Difference
31,085	47,379	+52.4%

DOT Formula:

Foreign Carriers Employee number for US operation	==	US Departure Pax
Total Foreign Carriers Employee number		Worldwide Departure Pax

IATA has used the 2002 passenger figure both for departures and arrivals to reflect a more complete picture. Also, instead of using samples (43 samples were used in DOT analysis), IATA has calculated the actual numbers.

Total Employees - Foreign Carriers *	634,361
US Passengers **	120,637,746
Worldwide Passengers***	1,615,214,000
Thus using the DOT formula:	
Foreign Carriers Employee number for US operation	47,379

Sources:

* Osiris Database (Only includes public companies, so the employee number is already underestimated)

** DOT/BTS

*** IATA World Air Transport Statistics

IATA's Foreign Carrier Employee number for services to/from the United States is 52.4% higher than DOT's figure. The total training cost figure has been adjusted accordingly.

3.1.3 Total Training Cost

Total training costs comprise:

- Initial Training Cost (Instructor + Personnel Cost)
- Recurrent Training Cost
- New Hire Training Cost

Year 1:

DOT's model suggests that the cost of developing training courses and manuals accounts for 28% of the total initial training cost as a fixed cost. IATA accepts this figure. For the remaining 72% of personnel costs IATA has increased the value by (1+52.4%) for a total of **\$13,429,506**.

Therefore, in year 1, the total initial training cost is **\$16,869,506**.

Years 2-20

From year 2 to year 20, the initial training cost is equal to the new hire training cost incurred in that year. While DOT fails to provide the new hire training cost for year 3-20 due to technical problems in Table H-3 (no data shown), it does provide the new hires data for years 2-20 based on which IATA has calculated the new hire training costs for year 2-20.

The initial training costs in those years should equal the numbers so calculated. However, DOT uses different numbers as initial training cost for years 2-20 which are not derived from any data they provided and are considerably lower than the numbers determined by IATA.

Using the IATA baseline employee numbers, the total initial training cost for 20 years is **\$59,266,000** while DOT's number is only **\$20,326,000**

With reference to Recurring Costs for years 2-20, besides the mistake mentioned in 1.1, DOT has not used the breakdown in Table E-2 to calculate the total training cost in Table E-1, but have used other data whose source cannot be identified in their analysis. We applied our estimates in Table E-2, and adjusted it by our baseline employee numbers, the total Recurring Cost for 20 years is **\$152,699,000** compared with the DOT figure of **\$36,994,000**.

Hence, the total training cost for 20 years is \$211,925,000 and DOT's figure is \$57,320,000.

3.1.4 British Airways Data

British Airways (BA) has provided estimates of the cost of training courses and the development of manuals based on e-learning modules, which will become increasingly widespread during the next 20 years. IATA has used the BA data to estimate total training costs in this scenario.

The e-learning module development cost is approximately **\$45,000**, which can be used to estimate the cost for the 125 foreign carriers regardless of their size as it is a fixed cost. Therefore totally this cost will be **\$5,625,000**.

If other factors remain unchanged, we obtain a total training cost of **\$214,110,000** that is slightly higher than traditional training method.

3.2 Equipment Costs

3.2.1 Capacity Issue

If the 125 foreign carriers were to order the equipment required by DOT within the same period of time, existing manufacturing capacity would become an issue. New orders may drive the price up significantly in a short time given that suppliers need a certain lead-time to develop additional capacities.

3.2.2 British Airways Cost Data

Industry sources show that DOT's estimate does not include the installation costs of seats and underestimates the unit cost of accessible lavatories and the revenue loss from seat removal. One example is taken from British Airways.

BA's data show that the airline industry estimate of the compliance costs for the movable aisle armrest installation is considerably higher than the DOT's unit cost of \$35. We have reached the compliance costs using a unit cost from BA of £ 1,019.

Also DOT's estimates about the capital cost of accessible lavatory per aircraft of \$12,500 and the revenue loss from the seat removal per aircraft of \$120,000 appear to be similarly underestimated. We calculated the compliance costs for those items using BA's unit cost of £ 61,983 and £826,446 respectively.

As shown below, DOT's analysis significantly underestimates the total compliance cost in 20 years.

Exchange Rate		GBP: USD = 1.8: 1					
Cost Item (20 years)	BA Total (£ M)	BA Unit Cost (£)	DOT Unit Cost (\$)	DOT Total		IATA Total Low (\$ M)	IATA Total High (\$ M)
				Low (\$ M)	DOT Total High (\$ M)		
Install Movable Aisle Armrests	28	1,019	35	18.998	18.998	995.456	995.456
Capital Cost of accessible lavatory	15	61,983	12,500	26.860	26.860	239.742	239.742
Revenue loss from removal of 3 seats	200	826,446	120,000	67.140	134.270	832.314	1,664.504

Source: BA estimates

4. CONCLUSION

Using the same methodology as the DOT, IATA's analysis highlights the following major discrepancies in the benefit analysis:

1. Disabled Passenger share of International Passengers
2. Baseline Total Foreign Carrier International Passengers to/from US

Benefit Side		DOT	IATA	Difference
1. Disabled Passenger share of International Passengers		1.10%	0.50%	- 0.60%
2. Baseline Total Foreign Carrier International Passengers to/from US	2001	65,069,782	58,219,274	(6,850,508)
	2002	68,323,271	57,469,018	(10,854,253)
	2003	71,739,435	80,025,123	8,285,688
PV of Incremental Revenues Low (Million)		\$325.7	\$164.5	(\$161.2)
PV of Incremental Revenues High (Million)		\$615.3	\$310.9	(\$304.3)

Similarly in our cost analysis, IATA found the following major discrepancies:

1. Foreign Carriers Employee Number for US operation
2. Initial Training Cost
3. Recurring Cost
4. Total Training Cost

Cost Side	DOT	IATA	Difference
1. Foreign Carriers Employee Number for US operation	31,085	47,379	16,294
2. Initial Training Cost (20 years Million)	\$20.3	\$59.3	\$38.9
3. Recurring Cost (20 years Million)	\$37	\$152.7	\$115.7
4. Total Training Cost (20 years Million)	\$57.3	\$211.9	\$154.6

IATA is unable to compare the present value of the total cost because of the discrepancy in DOT's total personnel training cost of \$ 57.3 million (See table E-1) and \$ \$189.1 million (See table ES-1). The \$154.6million above therefore is a better estimate of the difference between DOT's total costs and ours.

Using BA's estimates about the unit costs of movable aisle armrest installation, capital cost of accessible lavatory and the revenue loss from the seat removal, the discrepancy in the total cost and present value cost is considerably higher.

Costs Factors		DOT	IATA	Difference
Installation of Movable Aisle Armrests (20 years Million)		\$18.998	\$995.456	\$976.46
Capital Cost of accessible lavatory (20 years Million)		\$26.86	\$239.742	\$212.88
Revenue loss from removal of 3 seats (20 years Million)	Low	\$67.14	\$832.314	\$765.17
	High	\$134.27	\$1,664.504	\$1,530.23
Total Cost (20 years Million)	Low	\$324.92	\$2,399.827	\$2,074.907
	High	\$415.74	\$3,434.775	\$3,019.035
Present Value Cost (Million)	Low	\$159.18	\$1,199.914	\$1,040.734
	High	\$203.63	\$1,715.887	\$1,512.257

Source: BA estimates

Additionally, in repeating DOT's analysis IATA found a series of apparent mistakes in the DOT's cost estimates. They are listed below. They serve to cast doubt on the validity of the DOT's cost estimates:

Items	Location	DOT	Correct Value
Initial Training Cost			
Year 1 Total Cost (Million)	Tale E-1	\$8.2	\$12.3
20 Years Total Cost (Million)	Tale E-1	\$57.3	\$62.1
NPV (Million)	Tale E-1	\$31.5	\$35.9
Nominal Annual Cost (Million)	Tale E-1	\$2.9	\$3.1
Recurrent Training Cost			
Foreign Carrier Personal Number	Tale E-2	765,962	765,947
Year 13 Instructor Cost (M)	Tale E-2	\$104	\$0.145
20 Years Total Cost (M)	Tale E-2	\$194.3	\$100.2
New Hiring Training Cost			
20 Years Total Cost (M)	Tale H-3	N/A	\$27.8
Total Personnel Training Cost			
20 Years Total Cost (M)	Tale ES-1 & Tale ES-2	189.1	\$57.3

SPECIAL ANNEX III

Disabled Passenger Complaints

Level of complaints filed with the US Department of Transportation

IATA has reviewed the number of 'Disability and Discrimination' complaints filed against foreign air carriers with the Department's Office of Aviation Enforcement and Proceedings and reported in the *Air Travel Consumer Report*.

The Department received 291 complaints in this category between 1999 (the first year when such complaints were recorded) and 2004 for an average of 48.5 complaints a year.

Even accepting that many complaints are not reported, this remains an extremely low level of complaints when compared to the total number of passengers flown by foreign carriers between the United States and foreign points and when compared to estimates of the number of disabled travellers (variously estimated at between 1.1% by the DOT and 0.5% by IATA on the basis of European airports figures). These comparisons give complaint ratios of less than one hundredth of one percent.

These figures support the contention of airlines providing international air transportation to and from the United States that they provide a high level of service to disabled persons and that it will prove difficult to reduce the complaint ratio.

Year	Pax carried by foreign carriers to/from US	Number of complaints to US DoT	Number of complaints per million Paxs	Disabled as 0.5% of Pax	% Complaints	Disabled as 1.1% of Pax	% Complaints
1999	58,771,521	37	1.58	293,385	0.013	646,490	0.006
2000	62,412,043	49	1.27	312,060	0.016	684,650	0.007
2001	56,914,778	47	1.21	284,574	0.017	626,063	0.008
2002	58,219,018	54	1.08	291,095	0.019	640,409	0.008
2003	57,469,018	47	1.22	287,345	0.016	632,159	0.007
2004	80,025,123	57	1.40	400,126	0.014	968,303	0.006