

BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

In the Matter of

Docket OST-2006-23999

**Nondiscrimination on the Basis
of Disability in Air Travel – Accommodations
for Individuals who are Deaf, Hard of
Hearing, or Deaf-Blind**

14 CFR Part 382

Comments
of
IATA
The International Air Transport Association

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June 26, 2006

IATA, the International Air Transport Association, and its Members¹ are fully committed to the safe air transport of passengers without discrimination on the basis of disability. IATA is therefore pleased to have an opportunity to respond to the Department's Notice of Proposed Rulemaking (NPRM) on Accommodations for Individuals Who are Deaf, Hard of Hearing, or Deaf-Blind, 71 *Fed. Reg.* 9285 (Feb. 23, 2006), 71 *Fed. Reg.* 19838 (Apr. 18, 2006).

The Department has chosen the same path it followed last year with its proposal on Medical Oxygen and Portable Respiration Assistive Devices, 70 *Fed. Reg.* 53108 (Sept. 7, 2005), 70 *Fed. Reg.* 61241 (Oct. 21, 2005) (hereinafter "Medical Oxygen NPRM") and has issued this NPRM while its related and more basic rulemaking on nondiscrimination on the basis of disability in air travel (Docket OST-2004-19482, 69 *Fed. Reg.* 64364) (hereinafter the "Basic Part 382 NPRM") remains pending. In this new NPRM, the Department states that it "expects to merge the final rule resulting from the instant NPRM with the final rule that results from the November 4, 2004, NPRM," 71 *Fed. Reg.* at 9286. As with its follow-on Medical Oxygen NRPM, the Department has once again chosen to complicate the process. The layering of this new NPRM on top of the Basic Part 382 NPRM in Docket 19482 *and* the Medical Oxygen NPRM in Docket 22298 is unfortunate because it introduces even more confusion to a process that even before this latest proposal was teetering on the uncontrollable. Just the renumbering of the regulations proposed in the Basic Part 382 NPRM required inclusion of a conversion chart to assist those studying and commenting on the proposal.

¹ IATA is the association of the world's international airlines. It brings together 260 airlines, including the world's largest. Flights by IATA airlines comprise 94 percent of all international scheduled air traffic.

See 69 *Fed. Reg.* at 64376. But that chart is no longer sufficient; this NPRM adds yet another conversion chart, 71 *Fed. Reg.* 9295, and anyone seeking to make sense of the Part 382 revision scheme as a whole must consider all of the proposals and both of the charts together.

As the Department notes in this NPRM, it has amended its rule on nondiscrimination on the basis of disability in air travel ten times since it was first adopted in 1990. See 70 *Fed. Reg.* at 53109. Rulemakings related to air travel by passengers with disabilities have often been lengthy and complex, and here the past is definitely prologue: to date there are almost 1,300 comments on the Basic Part 382 on file in Docket 19482 NPRM and more than 1,850 on the Medical Oxygen NPRM in Docket 22298.² By issuing yet another NPRM, the Department has chosen to exacerbate the complexity inherent in amending regulations in such a technical area and has abandoned what logic would dictate -- streamlining the process rather than commencing another overlapping proceeding.

As with the Medical Oxygen NPRM, the Department states that it is its "intention that the instant NPRM apply to foreign air carriers in *nearly* the same manner as proposed in the November 4, 2004 NPRM," 71 *Fed. Reg.* 9287 (emphasis added) and that "[t]o the extent that individuals have already submitted comments regarding the extension of part 382 to foreign carriers in response to the November 4, 2004 Foreign Air Carrier NPRM, those comments will be considered

² The Department has referred to "air carrier policies and practices concerning disabled passengers" as a long "troublesome and controversial subject." 55 *Fed. Reg.* 8008, 8009 (March 6, 1990), and the Final Rule in Docket 45657 followed years of litigation, regulatory negotiation and rulemaking initiated with an NPRM. But the process is now even more complex, with the comments filed to date in the two related Part 382 revision NPRMs far exceeding the "over 300" filed then. See 55 *Fed. Reg.* at 8010.

with regard to the final rule issued as a result of the instant NPRM.” 71 *Fed. Reg.* 9288. Notwithstanding this assurance,³ given the complex details of this proposal, its unrealistic if not impossible requirements, and the burdens the instant NPRM would impose on the industry, IATA must once again re-iterate its objections to the extraterritorial nature of the instant NPRM and indeed the entire scheme the Department is proposing.

As with its comments on the Basic Part 382 NPRM and the Medical Oxygen NPRM, IATA again suggests that the Department:

- choose international cooperation rather than unilateralism;
- acknowledge that non-U.S. air carriers are subject to the legal requirements of their own governments, which may be at odds with those proposed by the Department;
- acknowledge jurisdictional limits, as a matter of both law and comity, and adopt a policy that gives due consideration to the merits of international harmonization;
- take into account the significant differences between domestic and international air transport, and in this case, the differences in telecommunications infrastructure in the many countries where this proposal would apply;
- reconsider its economic analysis, acknowledge the excessive expenses and undue burden this NPRM would impose on the industry, withdraw this proposal and begin the process anew;

³ See footnote 24 and accompanying text *infra*.

- consider a reasonable alternative that ensures nondiscrimination and the safety, health and convenience of all passengers;
- consider a reasonable alternative that is not overly burdensome and does not ignore its mandates under AIR-21, the ACAA and the APA;⁴
- acknowledge the practical implications and technological, infrastructural and compatibility obstacles to its proposal; and
- replace its detailed and prescriptive approach with broad general principles.

As with the Basic Part 382 NPRM, this 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 prescribes specific arrangements for deaf, hard of hearing and deaf-blind passengers within foreign countries and sets standards on how non-U.S. carriers have to treat passengers with disabilities while their aircraft are within the jurisdiction of other sovereigns. It also proposes highly burdensome obligations on all carriers and, like the provisions of the Basic Part 382 NPRM and the Medical Oxygen NPRM, seeks to impose those requirements worldwide, with no consideration of the nationality or capability of the carrier, or the technology available or appropriate in jurisdictions other than the United States.

REGULATORY EVALUATION

As they stand, this NPRM and the Initial Regulatory Evaluation of its costs and benefits suffer from the fundamental flaw of confusing access to air travel on a

⁴ Section 707 of AIR-21 (The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (April 5, 2000) amended ACAA, the Air Carrier Access Act. The Administrative Procedure Act (APA), 5 U.S.C. § 553, sets the standards for rulemaking by federal agencies.

nondiscriminatory basis for passengers with disabilities with enhanced amenities for passengers with disabilities at airports and on airplanes.

IATA and its Member airlines fully support efforts to assure nondiscrimination and to remove barriers to access to travel for passengers with disabilities. However, much of this NPRM focuses on details related to improving the travel experience – commercial matters that are properly an issue for private sector airlines to act on based on competitive market judgments rather than public sector regulation. This NPRM conflates nondiscrimination with amenities, creating an equivalence that simply does not exist.⁵ If improving the travel experience provides an increase in traffic and profits, then airlines will seek to exploit a competitive commercial advantage by providing additional facilities. Enhancements of “flat” beds onboard aircraft and advances in gate information screens are good examples of such competition-driven passenger benefits.

IATA’s comments on the Initial Regulatory Evaluation are focused on the following key issues:

- It does not account for the practical and infrastructural difficulties of implementing the proposal, which has led to an underestimate of the costs associated with the proposal.
- It overstates the benefits of the proposal to deaf and hard of hearing passengers.

⁵ The existing U.S. legal standard, based on nondiscrimination, like the existing international standard (ICAO Standard 8.34: “*Contracting States shall take the necessary steps to ensure that persons with disabilities have adequate access to air services*”), focuses on safety and transportation, not amenities equivalence or entertainment parity.

- There is little or no consideration of where the burden of the costs and benefits lie or how they should properly be balanced. Airlines and airports bear all the costs but the majority of the benefits accrue elsewhere.
- The regulation creates a significant additional burden to the airline industry at a time when it needs to reduce and simplify its cost base.
- The financial benefits to airlines included in the Initial Regulatory Evaluation are significantly overstated.
- The costs of training are significantly understated.
- The concept of 'opportunity cost' is ignored. At a time when the global airline industry faces severe financial pressures, consideration should be given to the benefits foregone as a result of not being able to use the monies necessary to implement the proposal for other purposes.

The practical and infrastructure difficulties of implementing this NPRM are key, and these difficulties are linked inextricably to the extraterritorial reach of all the changes to Part 382 proposed to date. The inappropriate extraterritorial reach of this NPRM, like that of the Basic Part 382 NPRM and the Medical Oxygen NPRM, will impose undue financial and compliance burdens on non-U.S. carriers and on U.S. carriers in their operations overseas. Given the precarious situation of the air transport industry over the last five years, there is no justification for the capital investment requirements of the proposal. Moreover, the cost evaluation of the Initial Regulatory Evaluation assumes the use of U.S. equipment and fails to consider the costs of such equipment produced elsewhere, and, in every case, fails to take into account the costs of gaining airworthiness approval from aviation regulators in jurisdictions all around the world for use onboard aircraft of the equipment that this

NPRM mandates. Proper economic analysis would take into account the fact that such increased costs must be passed on to the passenger through higher air fares, and may, in some cases, cause certain routes to not be operated as they will no longer be economically viable.

The Initial Regulatory Evaluation gives no consideration to whether the distribution of costs and benefits is equitable. Airlines and airports – and particularly smaller operators – are hit by the burden of the costs, but have little or no ability to recover those costs; all the benefits accrue to the users.⁶ Where benefits relate to improvements in the travel experience, *commercial matters* that go beyond safety-related and nondiscriminatory access, there should be an equitable cost/benefit relationship, and airlines should be able to recover their costs.

With no consideration of where the burden lies, the Initial Regulatory Evaluation is also unable to place these costs in the wider context of the airline industry's precarious financial position.⁷ North American airlines have reported net losses over \$10 billion in 2004 and almost \$7 billion in 2005, with further losses totaling over \$5 billion forecast for 2006. The regulations proposed in this NPRM hinder the unarguably crucial industry objectives of simplifying cost bases and achieving cost efficiencies.

The Initial Regulatory Evaluation does contain an estimate of additional profitability to airlines based on an estimated number of accessibility-induced

⁶ The airlines have no practical ability to recoup fees from the users for these enhanced services in the way that governments, including the U.S. government, recoup "user fees" for services provided (such as, e.g., the DHS Immigration User Fee (see 8 C.F.R. Part 286) and the Customs User Fee (see 19 C.F.R. Part 122)).

⁷ But this oversight is not one the Department can condone: "the regulations may not impose 'undue financial or administrative burdens.' . . . In a private sector industry . . . , the ability of enterprises to make a profit is an important consideration, which it would not be reasonable to ignore." 55 *Fed. Reg.* at 8011.

enplanements. Leaving aside the broader nondiscriminatory access versus amenity issue discussed above, there is another serious issue with this estimate: the calculation of a present value of \$101.4 million of benefits is overstated. In particular, the Initial Regulatory Evaluation concludes that each additional passenger will add an average of \$41.30 to profits.⁸ Even though this figure supposedly relates to a marginal rather than average effect, it nevertheless appears to be very high in the context of the current profitability of the U.S. airline industry, which in 2004 accumulated an operating loss of \$1.4 billion while providing just under 700 million enplanements, for an average loss of \$2 per enplanement.

IATA also believes that the additional costs of training, which the Initial Regulatory Evaluation estimates at a present value of \$105.2 million,⁹ are also likely to be understated. No consideration is given to the virtually constant training required for new staff as well as the disruption to existing operations and the costs involved in recurrent training.

Finally, given the discussion above, it must be recognized that at a time when the airline industry is facing substantial financial pressures, there will be an 'opportunity cost' involved in diverting expenditures towards implementing the regulations proposed in this NPRM rather than using the money elsewhere. Airlines operate in a competitive, low-margin environment and will have to make cost cutbacks or forego revenue-generating investments elsewhere in their operations to meet the implementation costs.

⁸ Initial Regulatory Evaluation at 79 (Exhibit 4-7) Docket OST-2006-23999-2 (February 24, 2006).

⁹ *Id.* at 66 (Exhibit 3-14).

INTERNATIONAL LAW

Like the Basic Part 382 NPRM and the Medical Oxygen NPRM, this NPRM is not limited to proposing regulation of flights to and from the United States; it also proposes regulating aircraft operations in foreign locations, and puts the onus for meeting these impossible standards on the carriers – both U.S. and foreign. As IATA predicted, and as the submissions from foreign governments and foreign government organizations in both Dockets 19482 and 22298 demonstrate, proceeding in this unilateral fashion is viewed as an attempt by the United States to set a universal standard that undermines the fundamental international principle that accords each country the right to exercise jurisdiction over its sovereign airspace, and the corollary principle that airlines should be regulated primarily by their home governments.

Of particular concern are the facts that the NPRM prescribes specific arrangements for deaf and hard of hearing passengers within foreign countries and sets standards on how non-U.S. carriers have to treat such passengers while their aircraft are within the jurisdiction of other sovereigns, and that these extraterritorial provisions are so extraordinarily and unnecessarily specific and detailed. IATA is particularly concerned as to conflicting legal regimes being applied to carriers simultaneously. A recent binding regulation from the European Community on the obligations of carriers vis-à-vis Persons with Reduced Mobility (PRMs - the European term for passengers with disabilities) in air travel presents a clear contrast to the NPRM and demonstrates the conflicts that may arise with many of its key provisions.¹⁰

¹⁰ On June 9, 2006, the Council of the European Union adopted new a regulation on the rights of disabled persons and persons with reduced mobility traveling by air. The Regulation is

Clashing regulatory regimes, such as that of the NPRM and the European regulation, will only delay progress on the underlying policy goal of nondiscriminatory international air transport of passengers with disabilities. As it did in its Comments on the Basic Part 382 NPRM and on the Medical Oxygen NPRM, IATA again urges the Department to reconsider its application of the provisions of § 707 of AIR-21, in which Congress directed the Department to act in accordance with its international agreements, and take into account the applicable laws and requirements of foreign countries.¹¹

expected to be published in the *Official Journal* during the first week of July and will enter into force on the twentieth day after its publication. The nondiscrimination aspects of the Regulation will take effect one year after the Regulation enters into force, and the airport handling provisions will take effect two years after the Regulation enters into force. See Press Release entitled *The Council adopts rules strengthening the rights of disabled persons and persons with reduced mobility travelling by air*, Brussels, 9 June 2006, 10262/06 (Presse 173) EN:

The regulation establishes rules to protect disabled persons and persons with reduced mobility against discrimination and to ensure that they receive appropriate assistance.

Under the regulation a reservation or boarding can only be refused for justified safety requirements or if, due to the size of the aircraft or its doors, the embarkation or carriage of a disabled person or person with reduced mobility is physically impossible. In the event of refusal to accept a reservation, the person concerned will be offered an acceptable alternative. In the event of embarkation being refused, the person will be offered the right to reimbursement or re-routing.

The airport managing body will be responsible for ensuring the provision of the assistance at airports without additional charge. It may provide such assistance itself, or may contract with one or more other parties for the supply thereof. The managing body may levy a specific charge on airport users for the purpose of funding the assistance.

Air carriers will remain responsible for providing assistance to disabled persons and persons with reduced mobility in aircraft, including the carriage of recognised assistance dogs and up to two pieces of medical equipment per person.

Air carriers and airport managing bodies must ensure that their personnel has appropriate knowledge of how to meet the needs of disabled persons and persons with reduced mobility, and should where necessary provide training to that end.

¹¹ The provision of AIR-21 that amended 40105 (and thus extended the nondiscrimination on the basis of disability provisions to foreign carriers) also provided guidance for the Secretary on how to go about achieving higher quality international air transportation experiences for

IATA suggests that the Department 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 passenger with disabilities. See IATA Comments on the Basic Part 382 NPRM at 4-11, Docket OST-2004-19482-1104 (March 4, 2005).

The United States has fully committed itself to this approach in its bilateral aviation negotiations with the European Union, and the November 2005 text of the draft E.U.-U.S. Air Transport Agreement provides, in Article 17, that a Joint Committee of representatives of the Contracting Parties will, operating on a consensus basis, develop cooperative approaches to a number of aviation-related issues, including consumer protection. Surely, in such a context, a broad general statement that in enforcing Part 382, the Department intends to take international standards and the laws of other sovereigns as they apply to non-U.S. carriers and to the operations of U.S. carriers outside the United States into account would be the better approach than the overly-prescriptive and often counter-productive details of the various proposals the Department has put forth in this NPRM and the two that preceded it.

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.* 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 2008-8-18 (Air Canada), 98-12-19 (Alitalia) and 98-9-23 (Lufthansa), there is no record that the Department has followed the Congressional mandate for achieving better quality service for disabled passengers. Nor is there any mention, in any of the three dockets the Department now has open in connection with its proposed revisions of Part 382, that it has worked with any international organizations or with the aviation authorities of other nations.

In addition to the very serious international law and comity considerations, the Initial Regulatory Evaluation and the analysis employed in this NPRM raise so many serious questions about the nature and the cost of the services mandated, that IATA believes the Department essentially needs to start over. IATA joins ATA in calling on the Department to withdraw this NPRM and start the entire Part 382 amendment process anew, or, at a minimum revise the regulatory analysis and evaluation of this NPRM and issue an SNPRM.

SECTION BY SECTION ANALYSIS

IATA includes here comments on particular proposed sections and particular aspects of those proposals as received from its Members.

SECTION 382.3:

CHANGES IN TERMINOLOGY, NEW DEFINITIONS, SCOPE OF THE PROPOSED RULE: *WHAT DO THE TERMS OF THIS PART MEAN?*

IATA and its Members support the DOT position that, because the definition of an 'individual with a disability' as provided for in the ACAA and Part 382 is quite broad, there is no benefit to creating a specific definition of deaf, hard of hearing and deaf-blind individuals. In the Part 382 context, IATA has repeatedly pointed out the pitfalls of an overly-detailed and overly-prescriptive approach.¹² In this instance, an overly-restrictive definition could potentially exclude from the benefits of the regulation those with disabilities not specifically mentioned therein.

¹² See, e.g., Footnote 5, IATA's January 30, 2006 comments on the Medical Oxygen NPRM, Docket OST-2005-22298-444.

The same is true of the proposed definition of captioning. The definition discussed in this NPRM fails to take into account current variations in captioning standards available for and compatible with relevant technology. It is commonly acknowledged, even among captioning companies, that there is no uniform standard for captioning, even at a national level. Furthermore, such a prescriptive approach could inhibit the use of new devices resulting from future technical advances. Passengers may therefore not have access to the best or most suitable service as airlines struggle to balance maintaining competitive advantages by providing high-quality technology with complying with outdated and restrictive regulations. As ATA points out, in the absence of a captioning standard in the American with Disabilities Act Guidelines (ADAAG), it is likely to be counterproductive for the Department to adopt a mandatory video captioning standard.

SECTION 382.5:

APPLICATION OF THE RULE: TO WHOM DO THE PROVISIONS OF THIS PART APPLY?

There are distinct legal and practical problems in applying this rule. As noted above, in all phases of the ongoing Part 382 rulemaking process, IATA has emphasized the legal as well as the practical problems associated with the unilateral, parochial and extraterritorial approach the Department has chosen. See pages 3-17, 20-21 and 23-25 of the IATA Comments on the Basic Part 382 and pages 3-4 of the IATA Comments on the Medical Oxygen NPRM.

SECTION 382.29:

CARRIER RESPONSIBILITY AND ASSOCIATED COSTS RELATED TO REQUIRING A PASSENGER TO TRAVEL WITH A SAFETY ASSISTANT: *MAY A CARRIER REQUIRE A PASSENGER WITH A DISABILITY TO TRAVEL WITH A SAFETY ASSISTANT?*

The rigid approach proposed in the NPRM offers no flexibility to determine the appropriate measures necessary to ensure the health, safety and convenience of passengers.¹³

In proposing the shared responsibility for communication requirement, a requirement that goes beyond what it proposed in the Basic Part 382 NPRM, the Department acknowledges that the proposal is based on the citation of “anecdotal reports” in the Petition for Rulemaking of the Deaf, Hard of Hearing and Deaf-Blind Workgroup.¹⁴ Aside from the fact it would be difficult to find a better example of an arbitrary and capricious regulation than one based on “anecdotal reports” rather than record *evidence*, IATA suggests that such an approach is an injustice to the significant efforts IATA Members make to ensure that their employees are able to communicate with deaf/hard of hearing/deaf-blind passengers, through continuous training in a variety of communication techniques.¹⁵

¹³ An inexperienced traveller, or 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. See IATA Comments in the Medical Oxygen NPRM on proposed § 382.3 (Docket OST-22298-44) and IATA Comments on the Basic Part 382 NPRM on proposed §§ 382.3 and 382.21-29, pages 21-23 and 35-41 (see especially page 39) (Docket OST-19482-1104).

¹⁴ Deaf, Hard of Hearing and Deaf-Blind Stakeholder Workgroup Petition for Rulemaking to Department of Transportation, *Proposed Regulatory Language for Part 382 Amendments Concerning Accommodations for Deaf, Hard of Hearing and Deaf-Blind Passengers* at 9, submitted by National Council on Disability, Docket OST-2006-23999-3 (July 19, 2004). The Petition includes *no detail or support* and merely employs the “anecdotal reports” phrase the Department uses in the NPRM’s Background section on proposed § 382.29, 71 *Fed. Reg.* at 9288.

¹⁵ Perhaps this is why there is no longer the reference, as there was before 1990, by advocacy groups for the disabled to the “documented complaints of many handicapped

There are also substantial practical constraints related to the Department's proposals concerning safety assistants. Firstly, asking non-revenue passengers to act as safety assistants places an unreasonable burden on such individuals, particularly if the normal journey is disrupted, (for example, if a flight is diverted with an overnight stay or a long layover involved). Secondly, on international flights, there is much greater likelihood that language problems will come into play. Finally, enlisting the assistance of volunteer safety assistants might well risk additional liabilities for carriers.

IATA believes that the NPRM could be interpreted as obliging the air carrier to provide a safety assistant who can communicate with the passenger in any suitable language. This places an unreasonable and impractical burden on carriers and requires a permanently available pool of safety assistants capable of covering the entire spectrum of communication skills. Even for those carriers operating solely in English, there are obstacles, including the diverging versions of sign language.¹⁶ For those operating in a language other than English - even more so for those operating in multiple languages - and operating flights into and out of the United States, the problems multiply accordingly.

passengers," 69 Fed. Reg. 8088 (March 6, 1990). See also Special Annex III to IATA's Comments in the Basic Part 382 NPRM at 84, Docket OST-2004-19482-1104 (March 4, 2005), which demonstrated that the complaint ratio for flights conducted by foreign carriers to and from the United States is less than one hundredth of one percent.

¹⁶ Even the dominant forms of sign language are only "partially standardised" and vary from country to country. The myth of them being mutually intelligible is partially based on a relatively small number of iconic signs, which are comparable to onomatopoeic words in spoken languages (like "hiss" or "buzz" in English) www.terralingua.org/DeafHR.html (accessed June 22, 2006). Sign languages are "no more mutually intelligible or 'universal' than would be comparable spoken languages." (Timothy Reagan 134) www.terralingua.org/DeafHR.html (accessed June 22, 2006).

It is because of these numerous obstacles that carriers have, in general in the past, reserved the right to charge for the cost of provision of a safety assistant or insisted that the passenger provide his or her own safety assistant in the event of a difference in the assessment of the passenger's needs. Taking into consideration the additional costs of meeting all administrative requirements, as well as supplementary costs, IATA is at a loss to understand why air carriers should be required to provide a safety assistant without charge. IATA would be extremely surprised if any other service provider would be required to provide such free services to deaf/hard of hearing/deaf-blind persons when such persons were undertaking any other form of commercially driven pastime.¹⁷

IATA disagrees that the costs of implementing these provisions would be minimal, as assumed by the Department. The use of "volunteer" non-revenue passengers may raise labor issues,¹⁸ and this proposal does not consider the supplementary costs likely to be incurred by the air carrier in providing a safety assistant (all of which costs are more likely, and more likely to be greater), on international flights, such as accommodation costs, meals and drinks, rest periods

¹⁷ See IATA Comments on the Regulatory Evaluation included with the Medical Oxygen NPRM: "Airlines are facing all the costs of free provision..., which is certainly not expected of Amtrak or the Washington Metro when [those needing a special service] travel by train or subway, or even Wal-Mart when [they] patronize its stores." Docket OST-2005-22298-444 (January 30, 2006).

¹⁸ Applicable laws and regulations may require carriers to compensate non-revenue employee passengers for such "volunteer" activities. Even in the U.S. labor legislation differs from state to state, with employees granted different entitlements, and, of course, there are variations from one country to another. Furthermore, the U.S. federal minimum wage (\$5.15 per hour for covered non-exempt workers, Fair Labor Standards Act, www.dol.gov/dol/topic/wages/minimumwage.htm, accessed May 26, 2006) differs vastly from that of other countries, whose laws could govern the safety assistant activities by non-revenue airline employees (e.g., the U.K. minimum wage is 5.05 GBP for persons aged 22 years or over – www.hmrc.gov.uk/nmw/ (accessed May 26, 2006). There are also differences in financial and non-financial entitlements. The differences in labor laws mean that certain foreign carriers, whose home countries have strong labor laws, may well incur significantly higher costs than U.S. or other carriers in implementing this proposal.

and holiday pay.¹⁹ In addition, the complexities of international travel, where visas are often required, and where interlining, and multiple flight segments are much more common, are sure to both complicate and raise the costs to carriers for the “volunteer” safety assistant scheme the Department envisions, notwithstanding the Department's belief that “the cost of complying with this section of the instant NPRM will be the same for U.S. and foreign carriers.” 71 *Fed. Reg.* at 9289.

The above-mentioned issues are merely an exemplary and non-exhaustive list to demonstrate some of the costs air carriers would face and the varying effects this safety assistant proposal would have on all carriers. These costs would also increase with connecting flights, which, as already noted, are more likely to occur on long haul or international flights. As there are a significantly higher proportion of non-U.S. carriers in the international arena than U.S. carriers, this proposal would impose greater burdens on the non-U.S. carriers.

Finally, IATA is also concerned that this proposal invites abuse by creating a loophole for free transportation for travelling companions of individuals who are willing to assert that they are capable of travelling independently. There is no safeguard against a person declaring that they do not need an attendant in order to

¹⁹ See, e.g., Article 7 - Annual leave (European Working Time Directive): “Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.” In the U.S., an employee's right to either a paid day-off or holiday premium pay for a holiday worked, depends on whether an employee is regularly scheduled. An employee who is not regularly scheduled has no entitlement to a paid day-off and no entitlement to holiday premium pay. A regularly scheduled employee must be allowed one or the other. Employees who perform work on a holiday designated by Federal statute or Executive Order are entitled to pay at their rate of basic pay, plus premium pay at a rate equal to their rate of basic pay, for holiday work, which is not in excess of 8 hours, or overtime work. Department of Commerce: Office of Human Resources Management website http://ohrm.os.doc.gov/Premium_Pay/PROD01_000905 (accessed June 2, 2006).

have a companion travel free of charge.²⁰ In addition, any regulation adopted should specify that the safety assistant must travel in the same class of travel as the passenger with a disability and require that the safety assistant meet all applicable immigration, quarantine and customs requirements.

The crucial function of a suitably trained safety assistant and the importance of such a person with knowledge of the passenger's needs gathers greater significance with the longer onboard times of international flights. Inappropriate safety assistants or lack of a safety assistant (on the passenger's insistence/assessment) could lead to, at least, discomfort for the passenger with a disability and potentially endanger all passengers. This puts the carrier in an untenable situation, in particular if the carrier has a passenger onboard for an extended period of time for whom it is not required, or able, to provide assistance with basic human needs that should not be ignored. For the reasons elaborated above, a carrier should be able to determine whether an assistant is required or not, and if required, whether to charge for the carriage of the assistant.²¹

²⁰ In its comments, ATA notes that this is already the case, and that "a few passengers, unfortunately, have made repeated abuses of this provision to obtain free transportation for a travelling companion." IATA is confident that this assertion of ATA's is one that can be supported by actual evidence rather than one that should be relegated to the "anecdotal report" category.

²¹ The U.K. Code of Practice for the carriage of disabled people, released by the U.K. Department for Transport (DfT) in March 2003, states that "where an escort or companion is required by the airline they should consider offering a discount on the full fare for that person." Section 5 of the European Civil Aviation Conference (ECAC) "Doc. 30" (the *ECAC Policy Statement in the Field of Civil Aviation Facilitation*) relates to Persons with Reduced Mobility (PRMs). Specifically, Section 5.2.4.2. of Doc. 30 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."

SECTION 382.43

ACCESSIBILITY OF CARRIERS' TELEPHONE INFORMATION AND RESERVATION SERVICES: *MUST INFORMATION AND RESERVATION SERVICES OF CARRIERS BE ACCESSIBLE TO INDIVIDUALS WHO ARE DEAF, HARD OF HEARING, OR DEAF-BLIND?*

The inappropriate worldwide extraterritorial aspects of the instant NPRM are highlighted again in this section. U.S. and non-U.S. carriers alike must comply with local e-commerce, data protection and other associated laws in each country in which they operate. The forced installation of TTYs (text telephones) could well conflict with such local requirements and result in additional, unnecessary burdens on air carriers. In addition, there are associated practical, infrastructural, linguistic and cost issues.

The proposal of the NPRM would impose the requirement for equivalent TTY services at a time when there is still an ongoing national debate in the United States as to the meaning of "functionally equivalent" services and the extent to which the Federal Communications Committee encourages the use of new technologies.²² IATA submits that it is unreasonable to impose such obligations on one particular industry when the issue as a whole is still the subject of debate.

The Department attempts to resolve the difficulties faced by the disability community associated with dialling TTY services directly and response time lags. It has failed to take into account, however, that current technology makes it impossible to have equivalent response times on both services, even when a TTY service is

²² See, e.g., <http://www.nad.org/site/pp/asp?c=foINKQMBF&b=274046>, the website of the National Association for the Deaf. The Department also fails to take into consideration other potential limitations of TTY-type services. See <http://www.deafhope.org/do&dont.htm>, and <http://gri.gallaudet.edu/literacy/#reading> (both accessed June 22, 2006).

available. Many traditional and newer captioned telephones²³ operate through a Relay Service, by which an Operator voices what has been typed and types what has been voiced. For this reason, such services cannot offer response times equivalent to normal information and reservation services.

Numerous forms of TTY services exist and more are in the process of development. However, few, if any, provide the capability to make international calls. It is not possible to make an international call to a Relay Service in the United States because traditional TTY, Internet Protocol Relay and Video Relay Service are all incompatible for calls made outside the United States.

Furthermore, severe infrastructural barriers exist with respect to TTY services due to the fact that TTY services are not available in some countries. IATA has already put the Department on notice,²⁴ evidently to no avail. TTY devices for languages using alphabets other than the Roman alphabet, such as Japanese, Chinese and Arabic, simply do not exist. TTY has never been and will not be, for the foreseeable future, available to deaf, deaf-blind and hard of hearing persons in countries such as Japan, because Japanese language typewriters do not exist. The rulemaking therefore proposes to impose not just a discriminatory, but also an impossible, obligation on air carriers using these languages, or operating from countries using these languages; compliance will simply not be possible.

Thus, once again, the Department's overly-detailed, overly-prescriptive approach is likely to lead to a regulation that is impractical, for which compliance

²³ For example the CapTel phone (<http://www.captionedtelephone.com/how-it-works.phtml>) (accessed June 22, 2006)

²⁴ "With respect to TTY services, a number of carriers have advised IATA that TTY services are not available in their home countries." Comments of IATA at 44, Docket OST-2004-19482-444 (March 4, 2005).

may well be impossible and that is likely to preclude carriers from adopting better current or future technologies to address legitimate needs of passengers with disabilities.

Even where language and infrastructure constraints are not an issue, the costs associated with installing TTY systems are too prohibitive and unjustified by the frequency of use to be a regulated requirement. In a recent survey of IATA's Member airlines, all respondents that do have TTY systems in place reported usage as extremely minimal.²⁵

SECTION 382.45

AVAILABILITY OF ACCESSIBLE COPIES OF PART 382: *MUST CARRIERS MAKE COPIES OF THE PART AVIALABLE TO PASSENGERS?*

While IATA agrees that copies of 14 CFR Part 382 should be made available for review by passengers, requiring air carriers to do so at every airport supporting a flight to and from the United States entails an unreasonable and impractical burden. First, Part 382 is a public document, available through the official National Archives website and via innumerable other websites.²⁶ More importantly, airlines invariably do already provide such information to passengers, either electronically, or from their Head Offices via various media. Thus, passengers can be made aware of the regulation at the time of making a booking or before arriving at the airport and informed of how to obtain, or be provided with a copy of the regulation. They therefore have an appropriate opportunity to read, understand and ask questions

²⁵ As low as one call per month in the case of one of the largest non-U.S. Member carriers.

²⁶ Other industries are not required to provide consumers with copies of applicable regulations similarly available as public documents. For example, the FCC does not require manufacturers of telecommunications equipment to make copies of applicable regulations available to consumers at the points of sale of such equipment.

about the regulation before boarding the flight, or even in some cases, making the booking. Providing such information at the airport leaves much less time for this to happen.

SECTION 382.51

ACCESSIBILITY OF AIRPORT FACILITIES: WHAT REQUIREMENTS MUST CARRIERS MEET CONCERNING THE ACCESSIBILITY OF AIRPORT FACILITIES?

The Department rightly takes account of the fact that non-U.S. carriers do not own, lease or control parts of airports in the United States and thus IATA has no points to make on this section other than to refer to the comments provided by our colleagues at the Air Transport Association.

SECTION 382.53

ACCOMMODATIONS REQUIRED AT AIRPORTS: WHAT ACCOMMODATIONS ARE REQUIRED AT AIRPORTS FOR INDIVIDUALS WITH A VISION AND/OR HEARING IMPAIRMENT?

IATA notes that this provision is covered in detail in the comments of ATA, but can report that it has heard from only one carrier that uses a pager system to communicate with some passengers. However, IATA would point out that the carrier took a commercial decision to implement such a system as a means to gaining a competitive commercial advantage. As such, IATA agrees with the Department's assessment that requiring carriers to implement such a system would be costly, with little or no increased benefit to passengers.

SECTION 382.69

ACCESSIBILITY OF VIDEOS, DVDS AND OTHER AUDIO-VISUAL PRESENTATIONS SHOWN ON BOARD: *WHAT REQUIREMENTS MUST CARRIERS MEET CONCERNING THE ACCESSIBILITY OF VIDEOS, DVDS AND OTHER AUDIO-VISUAL PRESENTATIONS SHOWN ONBOARD AIRCRAFT TO INDIVIDUALS WHO ARE DEAF AND HARD OF HEARING?*

Increasing the accommodations on aircraft in relation to captioning all safety and informational videos on aircraft raises several issues concerning practical application, striking a suitable balance between critical information and entertainment services, and implementation - with some requirements being technically or operationally unfeasible.

The Department stated its “intent that carriers find a way to caption all audio-visual safety, as well as informational materials such as they are useable by passengers with and without disabilities.” However, captioning services are provided by third parties and dependent on the system, rather than the aircraft. Carriers are at the mercy of third party captioning companies or other suppliers and the technology developed by them when trying to provide captioned material to passengers.

Carriers recognise the need for safety information to be provided to all passengers and currently provide this information through printed safety cards and cabin crew assistance. However, it is not technically feasible to caption all videos, DVDs and audio-visual presentations. There are constraints relating to hardware compatibility and the airworthiness of the audio-visual equipment within the aircraft itself. Certain older safety and informational videos cannot be captioned, due to the limitations of the technology being used. It is not feasible, economically or technically, to install video equipment into aircraft with audio-only systems solely for

captioning purposes. Further constraints may arise in relation to obtaining necessary approvals (involving, *e.g.*, authors and/or censors).

The NPRM does not distinguish between English and non-English language products. Certain carriers have also reported that they face language problems in providing captioning that goes beyond their existing mandatory bilingual services. Non-U.S. carriers are particularly disadvantaged in this respect. Mandatory provision of English captioning limits the languages an air carrier can make available for passengers, as well as the range of products available.

This provision also raises concerns over differing captioning standards. There is no common international, or even national, captioning standard,²⁷ with variances depending on: the country of broadcast; the captioning company inputting the captions; the type of system (with variances between PAL, SECAM and NTSC systems); and the type of program – live or pre-recorded.

Often captions are provided on an *ad hoc* and variable basis, with each country imposing its own captioning regulations and standards. Carriers could, therefore, potentially be in breach of national legislation in complying with the Department's requirements. There is also the possibility of carriers being exposed to criminal as well as civil penalties in the event of a discrepancy between a visual display and the captioning related to that display *e.g.*, where a government has censored a film, but the captioning has not been similarly censored.

Furthermore, IATA notes that the NPRM proposes standards for air carriers that differ from the standards within the Telecommunications Act 1996 and which are therefore applied by the Federal Communications Commission to broadcasters.

²⁷ *E.g.*, Line 21 format (pop-on or pop-up or block; roll-up or scroll-up or scrolling; paint-on), DVD bitmap format; DTVCC; CEA-608-B; CEA-708-B.

Despite the fact that audio-visual entertainment provided by broadcasters has an undoubtedly wider audience than that provided by air carriers, the standards proposed in this NPRM are substantially more stringent than those set out in the Telecommunications Act.²⁸ Given the smaller audience and more limited resources of air carriers, it is both unreasonable and unfair to place a higher burden on carriers rather than on video programming providers or owners, who would be supplying the material for the displays in question. This provision would also certainly lead to higher costs for non-U.S. carriers than for U.S. Carriers. Almost all non-U.S. carriers operate in different, and sometimes multiple, languages,²⁹ which require specific captioning more often than U.S. carriers, for whom a large proportion of programmes are already available in English.

Again, it is important to draw the distinction between captioning that facilitates the communication of critical information and captioning aimed at enhancing the passenger's enjoyment of the travel experience. While the provision of safety information is essential to any passenger's journey, providing audio-visual

²⁸ In the Memorandum Opinion and Order in the matter of ABS-CBN International, *Video Programming Accessibility*: Petition for Waiver of Closed Captioning Requirements CSR5827, it was recognised that Congress, enacting section 713 of the Communications Act 1934 (Implementation of Section 305 Telecommunications Act of 1996 – Video Programming Accessibility 13 FCC Rcd 3272), acknowledged that in certain situations the costs of captioning might impose an undue burden on video programming providers or owners, and authorized the Commission to adopt appropriate exemptions. For example, programs not in English or Spanish are exempt from captioning. Under Part 382, there is no such exemption, although the provisions would affect air carriers operating in numerous other languages and jurisdictions, including those with official bilingual requirements.

²⁹ Even with the multiple language captioning available on many international flights, it is easy to imagine situations where language abilities of the passenger make all but the most basic pictorial/visual safety information inaccessible – *for example*, the passenger who speaks and understands only Russian who is traveling on a Miami-Buenos Aires flight where audio-visual materials are available in Spanish, English, Portuguese and French only; the passenger who speaks and understands only Chinese who is traveling on a New York-Montreal flight where audio-visual materials are available only in English and French; or the passenger who speaks and understands only English who is traveling on a Tokyo-Seoul flight where audio-visual materials are available only in Japanese, Korean and Chinese.

entertainment is a commercial issue for private sector airlines, not for public sector regulation. As IATA has stated above, if improving the travel experience provides an increase in traffic and profits, then, in a competitive market, airlines will seek to exploit this as a competitive commercial advantage and provide additional facilities. IATA submits that market forces determining this issue would provide a greater benefit for passengers than government regulation.

In terms of implementing this part of the proposed rulemaking, IATA has concerns regarding the proposal that air carriers have only 180-240 days from the effective date of any rule to make any and all alterations to airplanes to comply with the relevant requirements. Carriers have informed IATA that making the necessary modifications (if indeed they prove possible) to both the material and the aircraft equipment would require a minimum of 18 – 24 months. Implementation would also require a high capital investment to upgrade equipment, placing an unreasonable cost burden on the carrier while aircraft are out of service for renewal of safety equipment. IATA also notes the impact of lost revenue associated with aircraft being out of service in order to comply with the NPRM. Every substantial or structural modification to an aircraft requires a large capital investment.

SECTION 382.119

ACCOMMODATIONS REQUIRED ON AIRCRAFT FOR INDIVIDUALS WHO ARE DEAF OR HARD OF HEARING: *WHAT ACCOMMODATIONS ARE CARRIERS REQUIRED TO PROVIDE ON AIRCRAFT FOR INDIVIDUALS WITH A VISION AND/OR HEARING IMPAIRMENT?*

IATA submits that the instant NPRM duplicates existing practices and creates confusion. Carriers already train staff in methods of communication with deaf, hard of hearing and deaf-blind passengers, with the intention of providing the same

information to all passengers. IATA can report that the following points give a good indication of the sort of areas covered by air carriers' training manuals:

- i) Individual safety briefings of passengers beyond the general briefings prescribed by the safety manual;
- ii) Individual assessment of disabilities, directions and distance to the emergency exit, the best way to assist the passenger;
- iii) Safety and emergency procedure information: detailed instructions for passengers on equipment to use, distance and number of passengers between the passenger's seat and the closest emergency exit (passengers with visual disabilities are allowed to touch the emergency exit).

IATA submits that carriers currently ensure that they provide passengers with visual or hearing disabilities with the same information as other passengers. This information is provided on an individual basis, ensuring that the passenger is provided with the most suitable accommodation and the best possible service. The overly-prescriptive approach proposed by the Department in the instant NPRM would not allow the carriers sufficient flexibility to continue to make individual assessments and would thus inhibit those carriers from providing appropriate accommodations and the best service possible to the passenger. Complying with the provisions of the NPRM would require re-training of all staff, re-drafting of training manuals and dramatic changes in procedures, at a high cost, and with little benefit to passengers.

SECTION 382.141

TRAINING FOR CARRIER PERSONNEL TO BETTER COMMUNICATE WITH INDIVIDUALS WHO HAVE VISUAL OR AUDITORY IMPAIRMENTS: *WHAT TRAINING ARE CARRIERS REQUIRED TO PROVIDE FOR THEIR PERSONNEL?*

Carriers do currently train staff in communication methods for deaf, hard of hearing and deaf-blind persons. In addition to training staff through standard procedures, courses and manuals, carriers also liaise with local organisations representing passengers with visual or auditory disabilities. This NPRM would again limit the ability of carriers to fashion tailor-made training solutions.

IATA again notes that the additional costs of training, estimated at a present value of \$105.2 million, are likely to be understated. No consideration is given to the disruption to existing operations – and the costs this would involve – of placing a substantial number of staff on additional training courses.

Finally, IATA asks that the Department consider the impact of the following additional costs in its assessment: use of facilities (room hire for training, training supplies); cost of trainers; and training pay.

CONCLUSION

IATA once again urges the Department to reconsider its approach to the entire Part 382 revision process, and to avoid imposing unnecessary financial burdens on an already beleaguered industry. IATA encourages the Department to allow market forces and industry standards to motivate carriers to continue to provide a personalised service to passengers, rather seeking to impose overly-prescriptive standards that overburden the industry.

And again IATA urges the Department to adopt broad general principles for the provision of services to passengers with disabilities on a nondiscriminatory basis

that comport with the existing international standards, and are in accord with the EC regulation, and with those principles in place, embark on serious coordinated efforts to reach a harmonized approach via international cooperation.

Respectfully submitted,

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June 26, 2006