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REPORT REGARDING THE FEASIBILITY OF A NEGOTIATED RULEMAKING ON SIX ISSUES INVOLVING AIR CARRIER ACCOMMODATIONS FOR AIR TRAVELERS WITH DISABILITIES.

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I. Introduction

This Convening Report commissioned by the Department of Transportation assesses prospects for a negotiated rulemaking to address six issues arising under the Air Carrier Access Act and involving air carrier accommodations for air travelers with disabilities. The key provisions of the Air Carrier Access Act that are relevant to this rulemaking are set forth in Annex A hereto.

On December 7, 2015, the Department announced its intention to explore a negotiated rulemaking ("reg-neg") to:

1. Determine the appropriate definition of a service animal and establish safeguards to reduce the likelihood that passengers wishing to travel with their pets will be able to falsely claim that their pets are service animals.
2. Ensure that the same in-flight entertainment (IFE) available to all passengers is accessible to passengers with disabilities.
3. Address the feasibility of accessible lavatories on new single aisle aircraft, in light of the industry trend toward use of single-aisle aircraft on medium and long-haul flights.
4. Provide individuals dependent on in-flight medical oxygen greater access to air travel consistent with Federal safety and security requirements.
5. Address whether premium economy is a different class of service from standard economy, as airlines are required to provide seating accommodations within the same class of service to passengers with disabilities that require extra legroom.
6. Require airlines to report annually to the Department the number of requests for disability assistance they receive and the time period within which wheelchair assistance is provided to passengers with disabilities.

Over the past two months, at the request of the Department, I have reviewed the docket and briefing materials furnished to me by the Department, and I have interviewed over 45 stakeholders (listed in Annex B) representing a wide range of interests and perspectives on these issues: trade associations representing international, national and regional air carriers; individual air carriers; flight attendant unions; aircraft manufacturers; IFE providers and developers of closed captioning technologies; service animal trainers; providers of medical oxygen; consumer representatives; a wide array of advocates for passengers with disabilities; and representatives of the US Department of Transportation and the European Commission. In many calls, the interviewees fielded teams of experts to contribute to the call. The purpose of these interviews was to acquaint stakeholders with the negotiating rulemaking process and to establish a foundation for findings on: (A) the level of interest in participating in a negotiated rulemaking to seek consensus on the terms of proposed rule addressing aircraft accessibility standards, (B) the stakeholders' initial views and positions on the

central issues relevant to this rulemaking; and (C) the prospects for success of a negotiated rulemaking on this matter.

This Convening Report will present those findings and offer my recommendations based on them. Please note that the views expressed in this report are my own findings and recommendations. They report the results of my literature review and interviews with stakeholders. They do not necessarily reflect the views or positions of the Department of Transportation.

II. Key Findings

A. Support for negotiated rulemaking

In each interview I introduced the stakeholder to the negotiated rulemaking process. The vast majority of stakeholders interviewed on these calls indicated at the end of our call that if negotiated rulemaking on any or all of these issues goes forward they would want to participate. Many offered to bring teams of experts to the various working groups to supply subject matter expertise. As will be explained in more detail below, expectations at this point for consensus at the end of the day varied across a wide range, depending on the issue. Reform of the service animal definition is widely regarded as offering the brightest prospects for consensus: advocates and industry alike agree that the present status quo is unsustainable and favor change, though the exact contours of that change remain to be worked out. As will be seen, certain stakeholders have suggested a modification to the scope and/or framing of the issues in the case of IFE accessibility, medical oxygen, and reporting requirements. At the other end of the range, the accessible lavatory and the legroom issues are viewed as the most contentious, with advocates expressing eagerness for change while most (though not all) airline representatives voice strong skepticism that any significant change from the status quo can be justified on cost-benefit grounds.

As is true with most reg-negs, prospects for consensus on particular issues may evolve over the course of the discussions, depending on what the group finds when it looks collectively at the issues, the options, the data, and the analysis. Whether or not consensus on all issues is reached on particular issues, there seems little reason to doubt that a group of representatives and experts of the kind and caliber of those I interviewed will provide useful insights into the options available to the Department, and the costs and benefits of those options. The Department will then be in a better position to decide in each case how, or whether, to modify the existing rule with respect to that issue.

One unique feature of this rulemaking is the extraordinary heterogeneity of the issues on the table: service animals, IFE, legroom, lavatories, oxygen, reporting. Such heterogeneity can be readily managed at the Working Group level – by simply setting up a Working Group for each issue. But issue diversity this extreme will pose unique challenges in deciding the composition of the plenary

committee and in crafting its work agenda, so as to use stakeholders' time judiciously while ensuring that voting rights for each plenary committee member are properly assigned. I am happy to offer recommendations on how to address this challenge if and when the Department elects to move forward with a negotiated rulemaking. Ultimately, it is up to the Department to decide who is on the Committee (based on nominations from the public) and up to the Committee to decide its ground rules.

B. Perspectives on Key Issues

At the outset of this convening, DOT staff supplied me a set of background materials on each of the key issues to be explored in the convening. These materials were extensive and extraordinarily useful and I examined them carefully. I also was able to schedule and hold 46 interviews with non-agency stakeholders, and multiple interviews with agency staff. While the brevity of the convening process precluded me from interviewing every stakeholder that I might like to have consulted – and limited me to one interview with most stakeholders – I believe these interviews combined with my examination of the extensive written materials yield a clear picture of the present situation, the issues, and the views of stakeholder community on these issues. They lay a solid foundation for the report that follows.

1. Service Animals

Although precise data are lacking, it seems clear that a small but significant number of passengers travel on commercial airlines with "service animals" for which they request free passage in the cabin with the passengers. Such animals may, but need not, be specially trained to provide such services. Passengers with visual impairments use service animals as guides. Hearing-impaired passengers use service animals to notify the handler of public announcements and/or possible hazards. Epileptics and diabetics use such animals to warn of possible crises so that the passenger can take timely and effective preventive measures. Combat veterans with PTSD use service animals to warn them of subtle symptoms of an onset of emotional crisis, thus allowing them to take timely and effective self-calming measures. Wheelchair-bound passengers use dogs to carry certain items or, in some cases, small monkeys to retrieve items that have been dropped. These are examples of situations where service animals (almost always specially trained) offer valuable services to help their human handlers cope with traditional physical or mental disabilities before, during and/or after flight.

In addition, current DOT regulations promulgated pursuant to the Air Carrier Access Act recognize the category of "emotional support animals", which provide comfort and have a calming effect on passengers who may be traveling far from home and/or may suffer from a fear of flying.

Current law establishes at least two sets of rules governing the definition of service animals that are entitled to special accommodation in public places. The first rule has been promulgated by the Department of Justice under the Americans with Disabilities Act (ADA) and governs the definition and accommodation of service animals in most public accommodations, including hotels, restaurants, trains and buses. This will be referred to hereinafter as the "ADA Rule." The second rule has been promulgated by the Department of Transportation under the Air Carrier Access Act (ACAA) for use in defining service animals and establishing the requirements for their accommodation onboard commercial aircraft. This will be referred to hereafter as the "ACAA rule."

The ADA rule and the ACAA rule, as currently crafted, take rather different approaches. As of March 15, 2011, the ADA rule recognizes only dogs (and in some cases miniature horses) as protected service animals, and no longer recognizes "emotional support animals" as service animals. However, it treats "Psychiatric Support Animals" on a par with those serving passengers suffering from physical disabilities. In both cases, the rule specifies that service providers may request, but not require, advance notice that a person with a disability will be entering their premise or using their service. Likewise, providers may request, but not require, documentation of that person's disability. In all cases the service provider may ask whether the owner whether the dog is a service dog, and may ask the dog's handler to describe the tasks performed by the dog that help with a disability. Providers may not require documentation of the dog's training unless the applicant's answer to such questions is "not credible." However, providers are entitled to deny accommodation to any person whose dog is not well-behaved, suggesting a lack of proper training.

The ACAA rule, as mentioned, adopts a rather different approach. The ACAA rule (set forth in Annex B hereto) does not allow U.S. airlines to limit accommodation to a service animal that is a dog, though it allows foreign carriers to limit their accommodation to dogs. The ACAA rule also requires U.S. and foreign air carriers to accept "Emotional Support Animals" as described above. However, the ACAA rule treats Psychiatric Service Animals (PSA) and Emotional Support Animals (ESA) similarly to each other, but differently from service animals assisting passengers with other medical impairments. The ACAA rule provides that US or foreign airlines may require users of PSA and ESA to provide the airline with 48 hours advance notice and then furnish the airline written medical documentation signed by a licensed mental health professional stating that the passenger has a mental or emotional disability recognized in the DSM-IV manual and that the passenger needs the animal for air travel or activity at the passenger's destination. Like the ADA rule, the ACAA rule empowers airlines to deny boarding to any person whose service or comfort animal is not well-behaved, suggesting a lack of proper training.

My interviews uncovered widespread dissatisfaction with the current ACAA rule on service animals on the part of airlines and disability advocates alike. Airlines

object that the ESA category in particular is emboldening a growing number of passengers to present semi-trained or untrained animals that are essentially just pets, and demand the right to bring them aboard as service animals. These animals may create disruptions in the airport waiting areas. Even worse, they may be well-behaved in the waiting area but then cause problems in flight, by which time it is too late to deny them boarding. Airlines also noted the proliferation of websites offering a certificate of psychological need for essentially any applicant who pays a small fee.

Advocates for the sight- and hearing-impaired share this concern and worry that a proliferation of disruptions and abuses by untrained pets proffered as service animals will create resentment and suspicion by flight attendants, pilots and other passengers that may adversely affect their ability to bring their legitimate service animals aboard, or their treatment while aboard.

Advocates for veterans with PTSD along with persons suffering from epilepsy and other "non-visible" impairments also object to the ACAA rule because they say it discriminates against passengers with psychiatric and psychological issues by requiring them to give notice that others are not required to give, obtain documentation required of no one else, and answer intrusive and humiliating questions about their condition that are not posed to other passengers.

Stakeholders I talked with expressed considerable interest in the idea of reforming the ACAA rule to be more like the ADA rule. However, there was not unanimous support for the idea of a complete assimilation of the two rules. Some stakeholders noted that airplane flights are somewhat different from bus and train rides in that the former often transport passengers larger distances for longer periods of time, while possibly triggering a fear of flying not experienced on buses or trains.

Other stakeholders offered different reservations about the prospect of an ADA-ACAA rule merger. One stakeholder objected to the ADA's seemingly arbitrary restriction of eligibility to dogs only. This stakeholder noted the valuable service that small, trained capuchin monkeys provide for their wheelchair bound users in retrieving objects. These animals are very small and remain completely confined during flight. They provide their service at home or at the destination, not at the airport or during flight. This stakeholder made the case for a recognition of their status as legitimate service animals.

Other stakeholders noted that the current ADA rule only requires accommodation of service animals accompanying the human and providing service to that human. But service animals must sometimes be transported by handlers who are not impaired for delivery to customers who are disabled. These stakeholders asked for consideration of an expansion of the ACAA rule to accommodate such situations.

3. In-Flight Entertainment

Advocates for hearing- and sight-impaired passengers remain, as they have been for years, strongly interested in advancing the industry-wide adoption of closed-captioning and (if feasible) video-description of In-Flight Entertainment (IFE). These advocates uniformly expressed the view that carriers who supply IFE to their paying passengers are presumably including that service as part of the flying experience they offer passengers in exchange for the price of their ticket. Sight- and hearing-impaired passengers pay the same price as sighted and hearing passengers and they are entitled, they feel, to the same access to In-Flight Entertainment as other passengers.

Current law contains no provision requiring airlines to offer IFE in accessible format, though it does require them to ensure that passengers who self-identify as hearing or sight-impaired are given assistance receiving cabin safety and informational announcements (see Annex D).

Airline industry representatives I spoke with said that airlines (and their IFE suppliers) are making significant efforts to improve the accessibility of IFE for the benefit of sight-and hearing impaired passengers. These passengers are valued customers, as are all other passengers. However, several airline industry representatives I spoke with expressed their view that the DOT lacks authority under the ACAA to *require* airlines to install accessible IFE. DOT legal staff I spoke with asserted confidence that this issue falls squarely within the Department's ACAA jurisdiction. This basic question of jurisdiction will thus stand at the threshold any reg-neg committee work in this area and will need to be resolved. The discussion that follows assumes, purely for the sake of discussion, that the Department indeed does have jurisdiction to regulate in this area.

Besides the question of legal authority, industry spokesmen raised concerns with feasibility and cost. They noted the diversity of IFE displays in the industry, with some airlines offering overhead displays while may other airlines that offer IFE either have, or are transitioning to, seatback displays. Overhead displays should not be mandatorily captioned, industry representatives argue, because that will interfere with the viewing enjoyment of the vast majority of hearing passengers. Seatback displays might be closed-captioned (the defining feature of closed captioning is that captions may be turned on or off at the viewer's discretion with the push of a button), but only if the original content is closed-captioned in a format consistent with the formatting of that IFE display.

Some industry observers voiced frustration with what they see as the inability or unwillingness of some advocates to acknowledge the difficulty and cost of adapting original-content closed captioning to the seatback screen format. While it is true that most original content (movies, TV shows, and even most Internet releases) are now close-captioned in *some* format, those formats must be adapted for display on the seatback screen. Unfortunately, the legacy IFE systems now in

use do not employ a standard coding format, and the industry is working on – but still has not agreed upon – a standard format to be followed in future IFE installations. Moreover, airline content is often edited (for length and/or appropriateness) from the movie/TV version. This requires re-doing the closed captioning for the edited version, all of which adds to cost. All this means that adapting original-content closed-captioning to IFE closed-captioning is not as easy or cheap as it seems.

One response to the difficulty of bringing CC to IFE that I heard on my calls is simply to offer hearing- or sight-impaired passengers access to onboard WiFi that would allow them to stream their own preferred content in appropriately captioned or video-described format. Or simply allow such passengers to bring their own IPads, Galaxies and similar devices, which many fliers now have. Indeed, some industry spokespersons I interviewed suggested that the growing use of personal electronic devices among airline passengers will soon offer a practical solution without the need for government intervention to regulate IFE.

Spokespersons for hearing-and sight-impaired advocacy organizations disagree. They point out that many (though not all) airlines continue to offer IFE and they continue to charge for it, either separately or bundled with the purchase price. So long as they do that, advocates feel it is discriminatory and objectionable to fail to offer that entertainment in accessible format.

Under the law, of course, such an obligation is not absolute. Rather, it is qualified by considerations of feasibility and cost. In this case, all observers seem to agree that CC, video-description and IFE technology is moving rapidly, and most would agree that prospects for offering cost-effective closed-captioning and video-description, at least eventually, are improving. I learned from an IFE stakeholder-expert during my convening that half of the fleet flying today with in-seat video systems is capable of supporting closed captions, and *all* new IFE being sold today is closed-caption capable (in some format).

The issues in this area are highly technical. Fortunately, highly qualified technical experts have expressed a willingness to contribute their expertise to a reg-neg on this issue if it goes forward. In particular, the Airline Passenger Experience (APEX) has approximately 350 members, including more than 70 airlines and over 260 IFE hardware and content providers. It is working diligently in this field to promote standardization of IFE format and to coordinate positions, and would bring top-tier technical expertise and industry understanding and connection to a reg-neg on this issue. On the non-profit side, the National Center for Accessible Media (NCAM), affiliated with WGBY, has done pioneering work in the field of closed-captioning and video-description for decades, and also offered to contribute to the Department's reg-neg if it goes forward.

While all are open to discussion of accessible IFE, there is great concern in the airline industry with the prospect of a rule that might require airlines to tear out

legacy IFE (very expensive) or provide original closed-captions for motion pictures that has not been captioned in the original (most new motion pictures are closed-captioned but that is a voluntary undertaking, no law requires it). They also would like assurances that close captioning will be required only for English language content with closed captions in English.

Clearly, IFE is an area where minds are open, technology is advancing and key parties (including trop-tier experts with essential expertise) are willing and ready to roll up their sleeves and get to work in searching for cost-effective solutions to the challenge of providing accessible IFE.

Note on accessibility of cabin announcements

In the course of calls scheduled to discuss accessibility of IFE, several advocates for hearing and sight impaired passengers *sua sponte* raised a separate issue: the accessibility (or lack thereof) of important cabin announcements. The DOT's current rule on accessibility of audio-visual presentations (set forth in Annex D) requires carriers to ensure that "all new videos, DVDs, and other audio-visual displays played on aircraft for safety purposes, and all such new audio-visual displays played on aircraft for informational purposes that were created under [the carrier's] control, are high-contrast captioned . . . in the predominant language or languages in which [the carrier] communicates with passengers on flight."[1] However, the current rule does not require carriers to actually create an audio-visual display containing such important information as late arrival announcements, connecting gate assignments, etc.

Air carriers also are required by law ensure that passengers who self-identify as needing visual or hearing assistance have prompt access to the same information provided to other passengers on the aircraft, including announcement of departure or arrival delays, schedule changes, connecting gate assignments, etc. However, advocates for passengers who are hearing-impaired reported that while this requirement is *often* met, it also is frequently *not met*. Flight attendants are very busy and sometimes (too often) they fail to perform this small but important service in a timely manner. The result, advocates for the hearing-impaired informed me, is a heavy burden on hearing-impaired passengers who must scramble like other passengers to make quick connections in the chaos of a late arrival, but without the aid of audio announcements that hearing passengers take for granted.

Advocates for the hearing-impaired noted that this critical need seems to have been overlooked amidst all the attention given to In-Flight Entertainment. Yet it is fundamental to passengers' flying experience and falls squarely within the mandate of the Department in implementing the Air Carrier Access Act.

[1] 14 C.F.R. § 382.69.

Advocates accordingly ask that an assignment to explore *technological* avenues for enhancing accessibility of important cabin announcements be added to the scope of this reg-neg committees work, if such a committee is formed.

Though not discussed explicitly in the Federal Register notice of intent, perhaps some of the same experts who know IFE CC technology intimately might also be able to apply their ingenuity and technical sophistication to the challenge of improving the accessibility of cabin instructions as well.

4. Accessible Lavatories

The DOT's current rule on accessible lavatories -- set forth in Annex E hereto -- requires that airlines offer at least one accessible lavatory on new twin-aisle (wide body) passenger aircraft after April 1990, or delivered after April 1992 (for foreign carriers, the dates are May 2009 and May 2010, respectively). In addition, any airline installing a new lavatory on an existing wide-body aircraft must take that occasion to ensure that the new lavatory is accessible if there is no other accessible lavatory on that aircraft. The current rule does not specify precisely what is meant by "accessible", though it does indicate that an accessible lavatory must "permit a qualified individual with a disability to enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft's onboard wheelchair." It also must afford "privacy to persons using the on-board wheelchair equivalent to that afforded ambulatory users."[2]

When the Department first issued this rule in 1990, it reasoned that longer-haul flights would primarily involve large and wide-body jets. Events and trends since then, however, have undermined this assumption. In 2000, DOT's Bureau of Transportation Statistics published data showing that 75% of flights covering distances ranging from 1,500 – 2,000 miles, and 62% of flights covering 2,000 – 2,500 miles, were performed by narrow-body aircraft of 100 seats or more. By 2010, the share of flights by narrow-body aircraft in both these medium to long-distance ranges had increased to 87%.

Advocates note that wheelchair-bound passengers wishing to board these flights must either dehydrate themselves prior to flight, "catheterize" themselves, or wear highly absorbent underwear and possibly sit in their own feces for part of the flight – none of which makes for a pleasant flying experience.

The Department first sought public input on whether to require accessible lavatories on narrow-body aircraft in the early 1990's and raised the question again on the occasion of issuing a Notice of Proposed Rulemaking in 2004 to regulate foreign carriers. On both occasions, the Department stopped short of adopting a requirement for accessible lavatories on single-aisle aircraft due to

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[2] 14 C.F.R. § 382.63(a).

carrier concerns with the possible revenue loss from seats permanently removed to accommodate the larger lavatories and other adverse impacts on galley space or in-flight operations.

Since then, however, both Boeing and Airbus have developed new designs that offer airlines the option of installing accessible lavatories without a loss of seats. Boeing's model appears to require a small reduction in seat pitch for a few rows of seats. Airbus has developed a model that places two lavatories side by side with an easily removable partition between them. Removing the partition opens up enough space to allow a wheelchair to be positioned next to the toilet, enabling a side transfer from wheelchair to toilet. Significantly, Airbus claims that this version does not entail *any* loss of seats or seat pitch. It does entail, however, the loss of trolleys in the rear galley, a trade-off that requires more frequent aircraft galley replenishments during stopovers, particularly for airlines that offer in-flight meal catering. Nonetheless, three airlines have already purchased this model for their single-aisle fleets despite the absence of any regulatory requirement to do so.

Airbus very recently informed me that a few weeks ago it rolled out a new "Lavatory Space Flex Version 2" that does not require removing a partition and does not entail any loss of seat or seat pitch. Moreover, depending on how it is configured, it involves minimal or no loss of galley space and may actually add a trolley compared to the baseline configuration. Though this design is brand new and has not yet been tested in commercial use, a major airline has chosen it for installation in its new aircraft deliveries from Airbus, scheduled for later this spring.

Boeing informed me that its accessible lavatory options are available for all models in the 737 family (its single aisle offering) while Airbus informs me that its accessible lavatory models (both versions) are available for its entire family of Airbus 319 and 320 models.

These developments are quite recent and offer the prospect of a significant reduction in both capital and operating costs for airlines providing accessible lavatories. Do they fundamentally change the equation for airlines and their accessibility regulators? It is too soon to say. More information on the cost and operating ramifications of these models would be needed to make that judgment. Because I learned of the Airbus and Boeing options rather late in the convening process I was unable to poll all airline representatives on their reaction to these developments. Some of the airline representatives that I did interview seemed unaware of these options: they repeated the old refrain that accessible lavatories would "cost a row of seats" even though none of the models now on the market have that consequence. In any case, most airline representatives I interviewed remain skeptical that a federal mandate to require accessible lavatories can be defended on cost-benefit grounds. They maintain that installing such lavatories would be inordinately expensive in relation to the number of passengers that would benefit, and cannot be justified on cost-benefit terms. Advocates for

wheel-chair bound passengers continue to dispute this claim and call for a new rule to require accessible lavatories on all new aircraft over a certain size.

Will new and better information gathered and shared through reg-neg consultations change minds or positions? That is hard to predict at this point. Even if one acknowledges that accessible lavatory designs have improved, that does not mean that such designs have reached the point where it would be cost-justified to require them by law on all new single-aisle aircraft over a certain size. The ultimate issue of cost-justification remains to be decided. Indeed, the point of the foregoing discussion is not to suggest that the question is resolved, but to affirm that it is *not* resolved, one way or the other. Answering that question in a rational way requires further information: from airlines who have purchased these lavatories; from passengers with disabilities and flight attendants who have flown on single-aisle flights employing accessible lavatories (as well as those who have flown on aircraft lacking such amenities); from Boeing, Airbus, other aircraft manufacturers such as Embraer; and from third-party suppliers of accessible lavatory modules (such as Zodiac) who specialize in the design and manufacture of accessible lavatories.

5. Medical Oxygen

According to information derived from FAA enplanement data for 2011 and oxygen service provision rate reported by airlines in their comments on the 2005 Oxygen Notice of Proposed Rulemaking (70 FR 53108 (September 7, 2005), roughly 110,600 US passengers each year – a figure that represents about 0.0126% of the 855 million total yearly enplanements -- suffer from a medical condition that requires them to use some form of supplemental oxygen to help them breathe during commercial flights. Current law (see Annex F) requires domestic and foreign carriers to allow such passengers to bring aboard their own Portable Oxygen Concentrators (POCs), provided the passenger notifies the airline in advance, establishes that the POC is a make and model approved for airline use, and demonstrates that he/she is bringing sufficient batteries to power the device for a flight that is 150% longer than the expected duration of the flight in question. Note that POCs are not canisters of compressed oxygen. Instead, they concentrate oxygen from the ambient air in the cabin, a process that requires considerable energy. Hence the concern with adequate battery life.

Most airlines considered the medical oxygen issue resolved with the rule requiring accommodation of POCs. However, it turns out that some passengers who require medical oxygen cannot use POCs because they require oxygen at a higher purity level or flow rate than POCs can provide. Others would prefer onboard oxygen, if it were supplied by carriers, particularly for long flights that challenge their battery-carrying capacity. How many passengers require medical oxygen beyond what POCs can provide? Estimates given me during interviews span a wide range. One advocate informally estimated that 500,000 passengers might fall into this category. A spokesman for a national medical association,

however, estimated the number at 20,000–30,000 and opined that a substantial portion of the passengers in this category may suffer from ailments that make it imprudent for them to travel in any case. The Department's estimates of the number of oxygen-dependent passengers who cannot use POCs likewise fall in the range of 20,000-30,000 passenger enplanements per year.

Airline representatives I spoke with were unanimous in strongly opposing any new requirement for carrier provision of onboard medical oxygen. They note that compressed oxygen bottles are hazardous, space consuming and hard to handle. Carrying them in the cargo-hold requires a hazmat certification. Airlines believe by complying with the recently-passed POC requirement they have met the need of the vast majority of oxygen-dependent passengers who are well enough to travel in the first place. Moreover, airlines see their job as transporting passengers, not running a hospital, and airline spokesmen I interviewed wondered aloud where their obligations would end if they were to start making themselves suppliers of first resort for the medical needs of the passengers they transport.

Advocates that I spoke with are divided on the priority they attach to requiring airline provision of supplemental oxygen. One advocate favors such a requirement, noting that many airlines used to provide this service for a fee and a few continue to do so (though that number shrank significantly after passage of the POC rule). Other advocates shared the industry view that only a tiny fraction of those who require medical oxygen need anything more than a POC, and that many of those passengers in this category are so ill that it may not be prudent for them to travel in any case.

While advocates disagree on the importance of bottled oxygen, some advocates urged the Department to address problems with the current system for the provision of batteries for POCs. They assert that purchase or rental of specialized POC batteries is extraordinarily expensive, with vendors charging monopoly prices. Batteries also can be heavy, depending on how many are needed, and advocates have noted that it is difficult and cumbersome for ailing passengers to bring sufficient batteries from their homes, along with luggage. They hoped that an oxygen working group will be convened and charged, at a minimum, with exploring the feasibility of arrangements whereby airlines/airports would stock suitable batteries in terminals for rental at fair prices to passengers who need them, and simply load them onto the plane as needed to accommodate passengers who file timely requests.

5. Legroom

Current DOT regulations (see Annex C) require that airlines provide special accommodation in seating to passengers with disabilities, particularly to passengers that have a fused or immobilized leg, or are traveling with a service animal.

A person with a disability traveling with a service animal must be given either a bulkhead seat or a seat other than a bulkhead seat, "as the passenger requests." A person with a fused or immobilized leg must be provided "a bulkhead seat or other seat that provides greater legroom than other seats." The rule stipulates that airlines may accommodate such passengers in one of two ways:

(1) Airlines may block "an adequate number" of bulkhead/extra legroom seats from early pre-flight sale so that the seats are not released to general passengers until 24 hours before the scheduled flight; or

(2) Airlines may designate "an adequate number" of the seats used to provide seating accommodations as "priority" seats for passengers with a disability. Passengers who buy/select these seats prior to 1 hour before check-in must be informed that they are subject to being reassigned to a different seat if the extra-legroom/bulkhead seat they select is required by a passenger with a disability who is traveling with an assistant or service animal and/or has a fused or immobilized leg.

Under the current rule, other passengers with disabilities – i.e., those whose disability does not involve an immobilized leg or require a service dog (hereafter referred to as "generally disabled passengers") -- may request such a seat more than 24 hours in advance of a scheduled flight, and must be given such a seat if it is available and not "blocked" for passengers with disabilities, even if that seat is not yet available for assignment to the general passenger population. If the carrier uses the "priority" seating method described above, a generally disabled passenger asserting a need for a bulkhead/extra legroom seat must be assigned that seat on request, with the understanding that they may be displaced by a passenger traveling with a service animal or having a fused/immobilized leg.

All the foregoing is subject to one important caveat stated in the current rule: "[The carrier] is not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased in order to provide an accommodation required by this part."

Such is the current rule governing the rights of passengers with disabilities to bulkhead seats or seats with extra legroom. My understanding, based on the briefing materials supplied to me by the Department, is that two developments in recent years have prompted the Department to re-examine various aspects of the current rule.

First, the Department has been made aware of other significant categories of air travelers who may have legitimate claim to bulkhead-extra-legroom seats. For example, in 2012, the Department received a petition for a rule change from petitioner who suffers from Fibrodysplasia Ossificans Progresiva (FOP), a condition which causes the patient to experience significantly increased pain and discomfort from prolonged sitting in a flex-knee position. The petition asked the

Department to amend 14 C.F.R. § 382.81 to place the petitioner on a par with passengers having a fused or immobilized leg. Similarly, the Department recognizes (and my interviews confirmed) that some airline passengers who suffer from autism may benefit from sitting in a bulkhead seat. The question arises, what are the rights and the priority of such passengers –vis-à-vis the airlines and other passengers with disabilities – to an accommodation for their extra-legroom/bulkhead needs? This question arose in conversations with stakeholders and is squarely presented in the briefing materials provided me by the Department. It is not clear whether this issue is within the statement of scope set forth in the Department's Federal Register notice of intent to explore a reg-neg. Given this confusion, it may be helpful for the Department to offer an explicit clarification of whether it intends to include this issue in the reg-neg, or not.

The second development mentioned above raises an issue which clearly is meant for this rulemaking: what is meant by "class of service" in this context?

The development in question involves the advent and growth of "Economy Plus" or "Premium Economy" seats – or sometimes just "Extra Legroom" seats. These seats may, or may not, be separated from other seats by a partition or bulkhead. They may, or may not, come bundled with additional amenities such as special meals, beverages, entertainment, priority boarding, etc. What they have in common for our purposes is that they offer extra legroom, and airlines can charge more for them. In fact, they have become a major marketing tool and revenue source for airlines, and their popularity is only growing as seat pitch in "Economy" shrinks on many airlines.

The advent of Premium Economy (as I shall call it hereafter for ease of reference, though different airlines give it different names) is not in and of itself a concern for passengers with a disability. What has made it a concern, according to advocates I interviewed, is that some airlines have responded to the allure of extra revenue from Premium Economy by classifying all or virtually all seats in front of bulkheads or offering extra legroom as Premium Economy -- leaving few if any such seats remaining in coach or "Economy." These carriers then reason as follows: (1) the current rule requires carriers only to block/prioritize seats within the "same class of service" as the seat purchased by the passenger with a disability; (2) Premium Economy is a different "class of service" from regular Economy; (3) all seats with extra legroom are in Premium Economy; ergo, (4) the requestor with a disability who purchases a coach seat is not entitled to a seat with extra legroom, certainly not without paying the upgrade charge.

In fairness to the disputants in this matter, it must be said that the Department's rule is not clear on key points. 14 C.F.R. § 382.83 provides that carriers must provide bulkhead/extra-legroom seating to a disabled requestor within the same class of service as the seat purchased by that requestor:

(1) "You [the carrier] may 'block' an adequate number of seats used to provide [extra legroom] seating accommodations required by § 382.81 . . ." or

(2) "You may designate an adequate number of the seats used to provide seating accommodations required by § 382.81 as 'priority seats' for passengers with a disability.

Nowhere does the regulation indicate what is an "adequate number." Nor does the regulation define "class of service." In this author's judgment, clarification of such questions in a new regulation (or at least in a guideline) would seem in order regardless of one's position on what the clarification should provide.

Airline representatives, on the other hand, noted that most airlines make reasonable efforts to accommodate passengers who need extra legroom, through informal means. They argued that this is not an area where further federal regulation is needed, and my preliminary conversations suggest that most airlines, if polled today, would oppose any new federal mandates that risk curtailing their revenues from this new and attractive class of "Premium Economy" seating.

Thus, while the vagueness of the current regulation may suggest clarification in a new rule or guidance, it seems equally clear that this will not be an easy issue to resolve consensually. Moreover, unlike IFE and lavatories, this is not an area involving either technical complexity (as in IFE) or recent developments in the design options available to carriers (as in lavatories) – meaning that it is unlikely that a negotiated rulemaking on this topic would add much to the Department's understanding of the issues, thus enabling it to write a more informed rule if consensus is not reached. In that event, time spent in the reg-neg process arguing over this issue would be largely time wasted. In my judgment, this factor makes the legroom issue somewhat less attractive as a candidate for inclusion in a reg-neg than some of the other issues.

6. Reporting

DOT regulations (see Annex G) currently require US and foreign carriers to submit to DOT an annual report summarizing the number of disability-related complaints they have received during the prior calendar year, broken by down by type of service and nature of the complaint.

The Department is considering expanding this reporting requirement to include, in addition, the number of disability-related requests received by that carrier in the past year; and, in case of wheelchair requests, the time period within which wheelchair assistance is provided to passengers with disabilities. The Department asked me to poll stakeholders on the advisability of exploring this possibility as part of the reg-neg committee's work, if such a committee is convened.

Based on my interviews, I must report that the advocacy community seems not much interested in this proposal, while the industry and flight attendants flatly oppose it. A couple of industry representatives told me that the time-to-provide-wheelchair reporting requirement is simply unworkable: developing precise records recording each disabled passenger's time of request and time of wheelchair receipt would require airlines to move to a completely electronic wheelchair request system which most do not now have. Airline representatives expressed concern that, in essence, they would be re-vamping their wheelchair assistance programs to generate a Department statistic.

As for the idea of requiring airlines to report total annual disability assistance requests, industry stakeholders voiced a deep concern that collecting this information will be much harder than it seems at first glance. Unlike complaints -- which are generally in writing and relatively few in number -- service requests are often oral and could be extremely numerous. Producing the Department's desired statistic would require that a written record be created for each such request, a potentially enormous undertaking. Must a flight attendant make and submit a written record every time a hard-of-hearing person asks for assistance hearing an onboard change-of-gate announcement? If so, the time spent producing that record will add to the flight attendant's burden of helping that passenger, and distract the flight attendant from other duties.

Classification problems also must be anticipated. For example, suppose an elderly passenger decides, spur of the moment, that she is tired and would like wheelchair assistance getting to her gate. Is that an ACAA request for assistance that must be tallied?

The Department's purpose in requesting this information is clear, valid and perfectly understandable: the Department would like to have a "denominator" of total requests for assistance to use to place the numerator of total requests for disability assistance in perspective. After all, X number of complaints may be regarded as a large number, or a small number, depending on how many disability assistance requests were fielded in the course of generating X complaints.

During our interviews, we discussed other ways that the Department might accomplish its analytical objectives. One representative offered the view that much of the benefit of a statistic for total assistance requests by passengers with disabilities could be served by simply using "number of total annual enplanements" for each airline in the denominator. This representative suggested that since what matters most in evaluating performance is an airline's position on the 'curve' – i.e., its performance relative to other airlines -- generating a ratio of total complaints to total enplanements should suffice to support a credible ranking.

In general, airline representatives expressed a willingness to work with the Department to explore cost-effective ways to meet its data needs. But they were

quite concerned that the approaches proposed were either unnecessary, unworkable, or both.

Advocates for the passengers with disabilities, meanwhile, seemed more interested in talking about the need for better enforcement. Some complained that passenger wheelchairs are far too frequently broken in the cargo hold, while passengers with disabilities are far too frequently denied boarding inappropriately. They noted that such cases are already reported and become statistics in an annual report. But the more important question is, in these stakeholders' view, what happens then? These stakeholders expressed interest in working with regulators and industry to agree on a feedback mechanism – be it web disclosure in highly user-friendly format or more traditional enforcement – to reward the best airlines and deter the worst airlines in their treatment of passengers with disabilities.

In sum, while disability advocacy groups raised numerous complaints with airline service and expressed a wish for stronger enforcement of disability laws, there does not seem to be a great interest among either advocates or industry representatives for including the data-gathering issue posed by the Department within the scope of a reg-neg.

III. Review of statutory factors relevant to the Department's decision on whether to convene a negotiated rulemaking committee in this case

The Negotiated Rulemaking Act of 1996 provides, in relevant part:

"An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether:

> (1) there is a need for a rule;
>
> (2) there are a limited number of identifiable interests that will be significantly affected by the rule;
>
> (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who: (A) can adequately represent the interests identified under paragraph (2); and (B) are willing to negotiate in good faith to reach a consensus on the proposed rule;
>
> (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
>
> (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
>
> (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment."[3]

Based on my interviews with agency staff and stakeholders, I am able to offer the following findings that may be of use to the Secretary in making his decision:

(1) The need for this rule is a matter of policy judgment by the Department. No statute or court order unequivocally requires that the Department issue a rule on any or all of these issues at this time. However, the Department has received numerous complaints and/or petitions for rulemaking in each of the first five of these six areas. With a few slight modifications discussed above, my calls confirm those concerns. Committing to a reg-neg on an issue does not – and should not – entail a pre-judgment of the question of whether a new rule on that issue is justified or, if so, what it should provide.

(2) Though highly diverse, the interests affected by this rule are reasonably clear and limited in number. The issues implicate airlines, flight attendants, a handful of aircraft manufacturers, select equipment suppliers, passengers with disabilities and the flying public.

(3) Each of these constituencies are well-represented by trade associations or advocacy groups, be they cross-disability groups or advocates for more narrowly-defined disabilities. Besides these associational representatives, airlines, aircraft manufacturers and suppliers often have considerable in-house expertise which they expressed a willingness to share with the reg-neg group. I interviewed a number of possible representatives for this report; others may emerge from subsequent interviews and the negotiated rulemaking committee nomination process (should the Department choose to take that path).

(4) As discussed earlier in this memorandum, prospects for consensus on the six issues on the table vary widely depending on the issue, and those prospects may evolve over the course of deliberations as new information emerges. Based strictly on what I heard during my calls, I do not judge that there is a high probability of consensus on the lavatory and legroom issues at the present time. Prospects for accord on the IFE, medical oxygen and reporting issues will depend in large part on how the issues are framed and on what options and information surface during the talks. Prospects for consensus on amending the definition of service animals seems reasonably high, though that will not be an easy task given the range of interests involved. In all cases, it seems likely that convening a reg-neg

[3] Negotiated Rulemaking Act of 1996, 5 U.S.C.A. § 563(a).

committee with the diversity and caliber of stakeholder representatives I interviewed should yield, at a minimum, useful information and insights into the options available to the Department and the costs and benefits of those options. The Department will then be in a better position to decide in each case how, or whether, to modify the existing rule via conventional rulemaking.

(5) Experience suggests that negotiated rulemaking typically takes a bit longer than normal rule drafting, but it often makes up that time by producing a better proposal which shortens and streamlines the comment process. I hope and expect that pattern will be followed in this case. That said, it is important for the facilitator to be economical with participants' time and hard-headed about results. If at any point it becomes apparent that all reasonably available information has been gathered, presented and considered on a particular issue – and there still is no resolution – the facilitator should recommend terminating discussion of that issue at that point, placing the issue in the hands of the Department for resolution under normal procedures.

(6) The Department informs me it is committed to providing assistance to the Committee by hosting its meetings in an accessible venue, and by providing appropriate analytical support.

(7) My understanding is that the Department is prepared to propose for public comment any consensus reached by the negotiating group to the extent allowed by law, in keeping with standard practice for negotiated rulemaking. The question arises as to what happens if the parties reach consensus on some issues but not others. In general, given how distinct these six issues are, my recommendation is that the Department extend this commitment separately for each issue, so that participants have confidence that if they reach consensus on Issue A, the Department will propose that consensus even if they did not reach consensus on Issue B.

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Annex A

Air Carrier Access Act (excerpt)

§ 41705. Discrimination against handicapped individuals

(a) In general. In providing air transportation, an air carrier, including (subject to section 40105(b) [49 USCS § 40105]) any foreign air carrier, may not discriminate against an otherwise qualified individual on the following grounds:

> (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.

(b) Each act constitutes separate offense. For purposes of section 46301 [49 USCS § 46301], a separate violation occurs under this section for each individual act of discrimination prohibited by subsection (a).

(c) Investigation of complaints.

> (1) In general. The Secretary shall investigate each complaint of a violation of subsection (a).
>
> (2) Publication of data. The Secretary shall publish disability-related complaint data in a manner comparable to other consumer complaint data.
>
> (3) Review and report. The Secretary shall regularly review all complaints received by air carriers alleging discrimination on the basis of disability and shall report annually to Congress on the results of such review.
>
> (4) Technical assistance. Not later than 180 days after the date of the enactment of this subsection [enacted April 5, 2000], the Secretary shall--
>
>> (A) implement a plan, in consultation with the Department of Justice, the United States Architectural and Transportation Barriers Compliance Board, and the National Council on Disability, to provide technical assistance to air carriers and

individuals with disabilities in understanding the rights and responsibilities set forth in this section; and

(B) ensure the availability and provision of appropriate technical assistance manuals to individuals and entities with rights or responsibilities under this section.

ANNEX B

14 C.F.R. Part 382 Provisions on Rights and Obligations of Carriers Regarding Service Animals

§382.117 Must carriers permit passengers with a disability to travel with service animals?

(a) As a carrier, you must permit a service animal to accompany a passenger with a disability.

(1) You must not deny transportation to a service animal on the basis that its carriage may offend or annoy carrier personnel or persons traveling on the aircraft.

(2) On a flight segment scheduled to take 8 hours or more, you may, as a condition of permitting a service animal to travel in the cabin, require the passenger using the service animal to provide documentation that the animal will not need to relieve itself on the flight or that the animal can relieve itself in a way that does not create a health or sanitation issue on the flight.

(b) You must permit the service animal to accompany the passenger with a disability at any seat in which the passenger sits, unless the animal obstructs an aisle or other area that must remain unobstructed to facilitate an emergency evacuation.

(c) If a service animal cannot be accommodated at the seat location of the passenger with a disability who is using the animal, you must offer the passenger the opportunity to move with the animal to another seat location, if present on the aircraft, where the animal can be accommodated.

(d) As evidence that an animal is a service animal, you must accept identification cards, other written documentation, presence of harnesses, tags, or the credible verbal assurances of a qualified individual with a disability using the animal.

(e) If a passenger seeks to travel with an animal that is used as an emotional support or psychiatric service animal, you are not required to accept the animal for transportation in the cabin unless the passenger provides you current documentation (*i.e.,* no older than one year from the date of the passenger's scheduled initial flight) on the letterhead of a licensed mental health professional (*e.g.,* psychiatrist, psychologist, licensed clinical social worker, including a medical doctor specifically treating the passenger's mental or emotional disability) stating the following:

(1) The passenger has a mental or emotional disability recognized in the Diagnostic and Statistical Manual of Mental Disorders—Fourth Edition (DSM IV);

(2) The passenger needs the emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger's destination;

(3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and

(4) The date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.

(f) You are never required to accommodate certain unusual service animals (*e.g.,* snakes, other reptiles, ferrets, rodents, and spiders) as service animals in the cabin. With respect to all other animals, including unusual or exotic animals that are presented as service animals (*e.g.,* miniature horses, pigs, monkeys), as a carrier you must determine whether any factors preclude their traveling in the cabin as service animals (*e.g.,* whether the animal is too large or heavy to be accommodated in the cabin, whether the animal would pose a direct threat to the health or safety of others, whether it would cause a significant disruption of cabin service, whether it would be prohibited from entering a foreign country that is the flight's destination). If no such factors preclude the animal from traveling in the cabin, you must permit it to do so. However, as a foreign carrier, you are not required to carry service animals other than dogs.

(g) Whenever you decide not to accept an animal as a service animal, you must explain the reason for your decision to the passenger and document it in writing. A copy of the explanation must be provided to the passenger either at the airport, or within 10 calendar days of the incident.

(h) You must promptly take all steps necessary to comply with foreign regulations (*e.g.,* animal health regulations) needed to permit the legal transportation of a passenger's service animal from the U.S. into a foreign airport.

(i) Guidance concerning the carriage of service animals generally is found in the preamble of this rule. Guidance on the steps necessary to legally transport service animals on flights from the U.S. into the United Kingdom is found in 72 FR 8268-8277, (February 26, 2007).

ANNEX C

14 C.F.R. Part 382 Provisions on seating accommodations for persons with people with a disability

§382.81 For which passengers must carriers make seating accommodations?

As a carrier, you must provide the following seating accommodations to the following passengers on request, if the passenger self-identifies to you as having a disability specified in this section and the type of seating accommodation in question exists on the particular aircraft. Once the passenger self-identifies to you, you must ensure that the information is recorded and properly transmitted to personnel responsible for providing the accommodation.

(a) For a passenger who uses an aisle chair to access the aircraft and who cannot readily transfer over a fixed aisle armrest, you must provide a seat in a row with a movable aisle armrest. You must ensure that your personnel are trained in the location and proper use of movable aisle armrests, including appropriate transfer techniques. You must ensure that aisle seats with movable armrests are clearly identifiable.

(b) You must provide an adjoining seat for a person assisting a passenger with a disability in the following circumstances:

(1) When a passenger with a disability is traveling with a personal care attendant who will be performing a function for the individual during the flight that airline personnel are not required to perform (*e.g.,* assistance with eating);

(2) When a passenger with a vision impairment is traveling with a reader/assistant who will be performing functions for the individual during the flight;

(3) When a passenger with a hearing impairment is traveling with an interpreter who will be performing functions for the individual during the flight; or

(4) When you require a passenger to travel with a safety assistant (see §382.29).

(c) For a passenger with a disability traveling with a service animal, you must provide, as the passenger requests, either a bulkhead seat or a seat other than a bulkhead seat.

(d) For a passenger with a fused or immobilized leg, you must provide a bulkhead seat or other seat that provides greater legroom than other seats, on the side of an aisle that better accommodates the individual's disability.

§382.83 Through what mechanisms do carriers make seating accommodations?

(a) If you are a carrier that provides advance seat assignments to passengers (*i.e.,* offer seat assignments to passengers before the day of the flight), you must comply with the requirements of §382.81 of this part by any of the following methods:

(1) You may "block" an adequate number of the seats used to provide the seating accommodations required by §382.81.

(i) You must not assign these seats to passengers who do not meet the criteria of §382.81 until 24 hours before the scheduled departure of the flight.

(ii) At any time up until 24 hours before the scheduled departure of the flight, you must assign a seat meeting the requirements of this section to a passenger with a disability meeting one or more of the requirements of §382.81 who requests it, at the time the passenger initially makes the request.

(iii) If a passenger with a disability specified in §382.81 does not make a request at least 24 hours before the scheduled departure of the flight, you must meet the passenger's request to the extent practicable, but you are not required to reassign a seat assigned to another passenger in order to do so.

(2) You may designate an adequate number of the seats used to provide seating accommodations required by §382.81 as "priority seats" for passengers with a disability.

(i) You must provide notice that all passengers assigned these seats (other than passengers with a disability listed in §382.81 of this part) are subject to being reassigned to another seat if necessary to provide a seating accommodation required by this section.

(ii) You may provide this notice through your computer reservation system, verbal information provided by reservation personnel, ticket notices, gate announcements, counter signs, seat cards or notices, frequent-flier literature, or other appropriate means.

(iii) You must assign a seat meeting the requirements of this section to a passenger with a disability listed in §382.81 of this part who requests the accommodation at the time the passenger makes the request. You may require such a passenger to check in and request the seating accommodation at least one hour before the standard check-in time for the flight. If all designated priority seats that would accommodate the passenger have been assigned to other passengers, you must reassign the seats of the other passengers as needed to provide the requested accommodation.

(iv) If a passenger with a disability listed in §382.81 does not check in at least an hour before the standard check-in time for the general public, you must meet the

individual's request to the extent practicable, but you are not required to reassign a seat assigned to another passenger in order to do so.

(b) If you assign seats to passengers, but not until the date of the flight, you must use the "priority seating" approach of paragraph (a)(2) of this section.

(c) If you do not provide advance seat assignments to passengers, you must allow passengers specified in §382.81 to board the aircraft before other passengers, including other "pre-boarded" passengers, so that the passengers needing seating accommodations can select seats that best meet their needs.

(d) As a carrier, if you wish to use a different method of providing seating assignment accommodations to passengers with disabilities from those specified in this subpart, you must obtain the written concurrence of the Department of Transportation. Contact the Department at the address cited in §382.159 of this part.

§382.85 What seating accommodations must carriers make to passengers in circumstances not covered by §382.81 (a) through (d)?

As a carrier, you must provide the following seating accommodations to a passenger who self-identifies as having a disability other than one in the four categories listed in §382.81 (a) through (d) of this part and as needing a seat assignment accommodation in order to readily access and use the carrier's air transportation services:

(a) As a carrier that assigns seats in advance, you must provide accommodations in the following ways:

(1) If you use the "seat-blocking" mechanism of §382.83(a)(1) of this part, you must implement the requirements of this section as follows:

(i) When a passenger with a disability not described in §382.81(a) through (d) of this part makes a reservation more than 24 hours before the scheduled departure time of the flight, you are not required to offer the passenger one of the seats blocked for the use of passengers with a disability listed under §382.81.

(ii) However, you must assign to the passenger any seat, not already assigned to another passenger that accommodates the passenger's needs, even if that seat is not available for assignment to the general passenger population at the time of the request.

(2) If you use the "designated priority seats" mechanism of §382.83(a)(2) of this part, you must implement the requirements of this section as follows:

(i) When a passenger with a disability not described in §382.81 makes a reservation, you must assign to the passenger any seat, not already assigned to another passenger, that accommodates the passenger's needs, even if that seat is not available for assignment to the general passenger population at the time of the request. You may require a passenger making such a request to check in one hour before the standard check-in time for the flight.

(ii) If such a passenger is assigned to a designated priority seat, he or she is subject to being reassigned to another seat as provided in §382.83(a)(2)(i) of this subpart.

(b) On flights where advance seat assignments are not offered, you must provide seating accommodations under this section by allowing passengers to board the aircraft before other passengers, including other "pre-boarded" passengers, so that the individuals needing seating accommodations can select seats that best meet their needs.

(c) If you assign seats to passengers, but not until the date of the flight, you must use the "priority seating" approach of section 382.83(a)(2).

§382.87 What other requirements pertain to seating for passengers with a disability?

(a) As a carrier, you must not exclude any passenger with a disability from any seat or require that a passenger with a disability sit in any particular seat, on the basis of disability, except to comply with FAA or applicable foreign government safety requirements.

(b) In responding to requests from individuals for accommodations under this subpart, you must comply with FAA and applicable foreign government safety requirements, including those pertaining to exit seating (see 14 CFR 121.585 and 135.129).

(c) If a passenger's disability results in involuntary active behavior that would result in the person properly being refused transportation under §382.19, and the passenger could be transported safely if seated in another location, you must offer to let the passenger sit in that location as an alternative to being refused transportation.

(d) If you have already provided a seat to a passenger with a disability to furnish an accommodation required by this subpart, you must not (except in the circumstance described in §382.85(a)(2)(ii)) reassign that passenger to another seat in response to a subsequent request from another passenger with a disability, without the first passenger's consent.

(e) You must never deny transportation to any passenger in order to provide accommodations required by this subpart.

(f) You are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased in order to provide an accommodation required by this part.

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Annex D

14 C.F.R. Part 382 Provisions on Accessibility of Safety Instructions and Information

§382.69 What requirements must carriers meet concerning the accessibility of videos, DVDs, and other audio-visual presentations shown on-aircraft to individuals who are deaf or hard of hearing?

(a) As a carrier, you must ensure that all new videos, DVDs, and other audio-visual displays played on aircraft for safety purposes, and all such new audio-visual displays played on aircraft for informational purposes that were created under your control, are high-contrast captioned. The captioning must be in the predominant language or languages in which you communicate with passengers on the flight.

(b) The requirements of paragraph (a) of this section go into effect with respect to audio-visual displays used for safety purposes on November 10, 2009.

(c) Between May 13, 2009 and November 9, 2009, U.S. carriers must ensure that all videos, DVDs, and other audio-visual displays played on aircraft for safety purposes have open captioning or an inset for a sign language interpreter, unless such captioning or inset either would interfere with the video presentation so as to render it ineffective or would not be large enough to be readable, in which case these carriers must use an equivalent non-video alternative for transmitting the briefing to passengers with hearing impairments.

(d) The requirements of paragraph (a) of this section go into effect with respect to informational displays on January 8, 2010.

§382.119 What information must carriers give individuals with vision or hearing impairment on aircraft?

(a) As a carrier, you must ensure that passengers with a disability who identify themselves as needing visual or hearing assistance have prompt access to the same information provided to other passengers on the aircraft as described in paragraph (b) of this section, to the extent that it does not interfere with crewmembers' safety duties as set forth in FAA and applicable foreign regulations.

(b) The covered information includes but is not limited to the following: information concerning flight safety, procedures for takeoff and landing, flight delays, schedule or aircraft changes that affect the travel of persons with disabilities, diversion to a different airport, scheduled departure and arrival time, boarding information, weather conditions at the flight's destination, beverage and

menu information, connecting gate assignments, baggage claim, individuals being paged by airlines, and emergencies (*e.g.,* fire or bomb threat).

Annex E

14 CFR Part 382 Provisions on Accessible Lavatories

§382.63 - What are the requirements for accessible lavatories?

(a) As a carrier, you must ensure that aircraft with more than one aisle in which lavatories are provided shall include at least one accessible lavatory.

(1) The accessible lavatory must permit a qualified individual with a disability to enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft's on-board wheelchair.

(2) The accessible lavatory must afford privacy to persons using the on-board wheelchair equivalent to that afforded ambulatory users.

(3) The lavatory shall provide door locks, accessible call buttons, grab bars, faucets and other controls, and dispensers usable by qualified individuals with a disability, including wheelchair users and persons with manual impairments.

(b) With respect to aircraft with only one aisle in which lavatories are provided, you may, but are not required to, provide an accessible lavatory.

(c) You are not required to retrofit cabin interiors of existing aircraft to comply with the requirements of this section. However, if you replace a lavatory on an aircraft with more than one aisle, you must replace it with an accessible lavatory.

(d) As a foreign carrier, you must comply with the requirements of paragraph (a) of this section with respect to new aircraft you operate that were initially ordered after May 13, 2009 or which are delivered after May 13, 2010. As a U.S. carrier, this requirement applies to you with respect to new aircraft you operate that were initially ordered after April 5, 1990, or which were delivered after April 5, 1992.

(e) As a foreign carrier, you must comply with the requirements of paragraph (c) of this section beginning May 13, 2009. As a U.S. carrier, these requirements apply to you with respect to new aircraft you operate that were initially ordered after April 5, 1990, or which were delivered after April 5, 1992.

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Annex F

14 CFR Part 382 Provisions on Medical Oxygen

§382.133 What are the requirements concerning the evaluation and use of passenger-supplied electronic devices that assist passengers with respiration in the cabin during flight?

(a) Except for on-demand air taxi operators, as a U.S. carrier conducting passenger service you must permit any individual with a disability to use in the passenger cabin during air transportation, a ventilator, respirator, continuous positive airway pressure machine, or an FAA-approved portable oxygen concentrator (POC) on all flights operated on aircraft originally designed to have a maximum passenger capacity of more than 19 seats, unless:

> (1) The device does not meet applicable FAA requirements for medical portable electronic devices and does not display a manufacturer's label that indicates the device meets those FAA requirements, or
>
> (2) The device cannot be stowed and used in the passenger cabin consistent with applicable TSA, FAA, and PHMSA regulations.

(b) Except for foreign carriers conducting operations of a nature equivalent to on-demand air taxi operations by a U.S. carrier, as a foreign carrier conducting passenger service you must permit any individual with a disability to use a ventilator, respirator, continuous positive airway pressure machine, or portable oxygen concentrator (POC) of a kind equivalent to an FAA-approved POC for U.S. carriers in the passenger cabin during air transportation to, from or within the United States, on all aircraft originally designed to have a maximum passenger capacity of more than 19 seats unless:

> (1) The device does not meet requirements for medical portable electronic devices set by the foreign carrier's government if such requirements exist and/or it does not display a manufacturer's label that indicates the device meets those requirements, or
>
> (2) The device does not meet requirements for medical portable electronic devices set by the FAA for U.S. carriers and does not display a manufacturer's label that indicates the device meets those FAA requirements in circumstances where requirements for medical portable electronic devices have not been set by the foreign carrier's government and the foreign carrier elects to apply FAA requirements for medical portable electronic devices, or

(3) The device cannot be stowed and used in the passenger cabin consistent with applicable TSA, FAA and PHMSA regulations, and the safety or security regulations of the foreign carrier's government.

(c) As a U.S. carrier, you must provide information during the reservation process as indicated in paragraphs (c)(1) through (c)(6) of this section upon inquiry from an individual concerning the use in the cabin during air transportation of a ventilator, respirator, continuous positive airway machine, or an FAA-approved POC. The following information must be provided:

(1) The device must be labeled by the manufacturer to reflect that it has been tested to meet applicable FAA requirements for medical portable electronic devices;

(2) The maximum weight and dimensions (length, width, height) of the device to be used by an individual that can be accommodated in the aircraft cabin consistent with FAA safety requirements;

(3) The requirement to bring an adequate number of batteries as outlined in paragraph (f)(2) of this section and to ensure that extra batteries carried onboard to power the device are packaged and protected from short circuit and physical damage in accordance with SFAR 106, Section 3 (b)(6);

(4) Any requirement, if applicable, that an individual contact the carrier operating the flight 48 hours before scheduled departure to learn the expected maximum duration of his/her flight in order to determine the required number of batteries for his/her particular ventilator, respirator, continuous positive airway pressure machine, or POC;

(5) Any requirement, if applicable, of the carrier operating the flight for an individual planning to use such a device to check-in up to one hour before that carrier's general check-in deadline; and

(6) For POCs, the requirement of paragraph 382.23(b)(1)(ii) of this Part to present to the operating carrier at the airport a physician's statement (medical certificate) prepared in accordance with applicable federal aviation regulations.

(d) As a foreign carrier operating flights to, from or within the United States, you must provide the information during the reservation process as indicated in paragraphs (d)(1) through (d)(7) of this section upon inquiry from an individual concerning the use in the cabin during air transportation on such a flight of a ventilator, respirator, continuous positive airway machine, or POC of a kind equivalent to an FAA-approved POC for U.S. carriers:

(1) The device must be labeled by the manufacturer to reflect that it has been tested to meet requirements for medical portable electronic devices set by the foreign carrier's government if such requirements exist;

(2) The device must be labeled by the manufacturer to reflect that it has been tested to meet requirements for medical portable electronic devices set by the FAA for U.S. carriers if requirements for medical portable electronic devices have not been set by the foreign carrier's government and the foreign carrier elects to apply FAA requirements for medical portable electronic devices;

(3) The maximum weight and dimensions (length, width, height) of the device to be used by an individual that can be accommodated in the aircraft cabin consistent with the safety regulations of the foreign carrier's government;

(4) The requirement to bring an adequate number of batteries as outlined in paragraph (f)(2) of this section and to ensure that extra batteries carried onboard to power the device are packaged in accordance with applicable government safety regulations;

(5) Any requirement, if applicable, that an individual contact the carrier operating the flight 48 hours before scheduled departure to learn the expected maximum duration of his/her flight in order to determine the required number of batteries for his/her particular ventilator, respirator, continuous positive airway pressure machine, or POC;

(6) Any requirement, if applicable, of the carrier operating the flight for an individual planning to use such a device to check-in up to one hour before that carrier's general check-in deadline; and

(7) Any requirement, if applicable, that an individual who wishes to use a POC onboard an aircraft present to the operating carrier at the airport a physician's statement (medical certificate).

(e) In the case of a codeshare itinerary, the carrier whose code is used on the flight must either inform the individual inquiring about using a ventilator, respirator, CPAP machine or POC onboard an aircraft to contact the carrier operating the flight for information about its requirements for use of such devices in the cabin, or provide such information on behalf of the codeshare carrier operating the flight.

(f)(1) As a U.S. or foreign carrier subject to paragraph (a) or (b) of this section, you must inform any individual who has advised you that he or she plans to operate his/her device in the aircraft cabin, within 48 hours of his/her making a reservation or 24 hours before the scheduled departure date of his/her flight,

whichever date is earlier, of the expected maximum flight duration of each segment of his/her flight itinerary.

(2) You may require an individual to bring an adequate number of fully charged batteries onboard, based on the battery manufacturer's estimate of the hours of battery life while the device is in use and the information provided in the physician's statement, to power the device for not less than 150% of the expected maximum flight duration.

(3) If an individual does not comply with the conditions for acceptance of a medical portable electronic device as outlined in this section, you may deny boarding to the individual in accordance with 14 CFR 382.19(c) and in that event you must provide a written explanation to the individual in accordance with 14 CFR 382.19(d).

Annex G

14 CFR Part 382 Provisions on Complaint Reporting Requirements

§382.157 What are carriers' obligations for recordkeeping and reporting on disability-related complaints?

(a) For the purposes of this section, a disability-related complaint means a specific written expression of dissatisfaction received from, or submitted on behalf, of an individual with a disability concerning a difficulty associated with the person's disability, which the person experienced when using or attempting to use an air carrier's or foreign carrier's services.

(b) If you are a carrier covered by this part, conducting passenger operations with at least one aircraft having a designed seating capacity of more than 60 passengers, this section applies to you. As a foreign carrier, you are covered by this section only with respect to disability-related complaints associated with any flight segment originating or terminating in the United States.

(c) You must categorize disability-related complaints that you receive according to the type of disability and nature of complaint. Data concerning a passenger's disability must be recorded separately in the following areas: vision impaired, hearing impaired, vision and hearing impaired, mentally impaired, communicable disease, allergies (*e.g.*, food allergies, chemical sensitivity), paraplegic, quadriplegic, other wheelchair, oxygen, stretcher, other assistive device (cane, respirator, etc.), and other disability. Data concerning the alleged discrimination or service problem related to the disability must be separately recorded in the following areas: refusal to board, refusal to board without an attendant, security issues concerning disability, aircraft not accessible, airport not accessible, advance notice dispute, seating accommodation, failure to provide adequate or timely assistance, damage to assistive device, storage and delay of assistive device, service animal problem, unsatisfactory information, and other.

(d) You must submit an annual report summarizing the disability-related complaints that you received during the prior calendar year using the form specified at the following internet address: http://382reporting.ost.dot.gov/. You must submit this report by the last Monday in January of each year for complaints received during the prior calendar year. You must make submissions through the World Wide Web except for situations where you can demonstrate that you would suffer undue hardship if not permitted to submit the data via paper copies, disks, or e-mail, and DOT has approved an exception. All fields in the form must be completed; carriers are to enter "0" where there were no complaints in a given category. Each annual report must contain the following certification signed by your authorized representative: "I, the undersigned, do certify that this report has been prepared under my direction in accordance with the regulations in 14 CFR

Part 382. I affirm that, to the best of my knowledge and belief, this is a true, correct, and complete report." Electronic signatures will be accepted.

(e) You must retain correspondence and record of action taken on all disability-related complaints for three years after receipt of the complaint or creation of the record of action taken. You must make these records available to Department of Transportation officials at their request.

(f)(1) As either carrier in a codeshare relationship, you must comply with paragraphs (c) through (e) of this section for—

(i) Disability-related complaints you receive from or on behalf of passengers with respect to difficulties encountered in connection with service you provide;

(ii) Disability-related complaints you receive from or on behalf of passengers when you are unable to reach agreement with your codeshare partner as to whether the complaint involves service you provide or service your codeshare partner provides; and

(iii) Disability-related complaints forwarded by another carrier or governmental agency with respect to difficulties encountered in connection with service you provide.

(2) As either carrier in a codeshare relationship, you must forward to your codeshare partner disability-related complaints you receive from or on behalf of passengers with respect to difficulties encountered in connection with service provided by your code-sharing partner.

(g) Each carrier, except for carriers in codeshare situations, shall comply with paragraphs (c) through (e) of this section for disability-related complaints it receives from or on behalf of passengers as well as disability-related complaints forwarded by another carrier or governmental agency with respect to difficulties encountered in connection with service it provides.

(h) Carriers that do not submit their data via the Web shall use the disability-related complaint data form specified in appendix A to this part when filing their annual report summarizing the disability-related complaints they received. The report shall be mailed, by the date specified in paragraph (d) of this section, to the following address: U.S. Department of Transportation, Aviation Consumer Protection Division (C-75), 1200 New Jersey Avenue, SE., West Building, Room W96-432, Washington, DC 20590.