

From: Mr. Andrew Mowry  
354 Harvard Street  
Cambridge, MA 02138

To: U.S. Department of Transportation  
1200 New Jersey Ave. SE  
Washington, DC 20590

**Comments in Response to the Notice of Proposed Rulemaking:  
“Traveling by Air with Service Animals”, Docket DOT-OST-2018-0068<sup>1</sup>**

I respectfully submit the following comments to the US Department of Transportation (DOT), responding to the Notice of Proposed Rulemaking (NPRM) that would amend existing rules concerning the Air Carrier Access Act (ACAA).

In its NPRM, the DOT properly frames the regulatory problem of service animal access to airplanes as a balancing of different stakeholders’ political and economic interests. It fails to justify the proposed rules on these terms, however, when presenting its cost-benefit analysis, which is incomplete. To support its conclusions and to show adherence to the “arbitrary or capricious” regulatory standard, the DOT must revise this analysis before promulgating final rules. I provide some suggestions to this end. Failure to do so exposes the proposed rules to legal challenge in the future, on the basis that they do not act in the public interest.

**Background:**

DOT rulemaking must interpret and apply the ACAA in a manner that fairly accounts for the interests of all parties.

Access to private services and infrastructure by those with disabilities is not a commonly cited example of market failure, yet without governmental demands for accommodation, adequate access is often under-served by private and public organizations. This is because accommodating access involves large costs to few entities, and the extra value they receive may be insufficient to justify the investment. This apparently simple reality, however, overlooks the value of the diffuse social benefits from accommodation. Society benefits from accommodated access through increased economic output, vibrancy, and inclusiveness, qualities which are consistently and implicitly valued in public legislation and expenditure. Accommodative access which is not privately cost-effective may then still be cost-effective on a social level.<sup>2</sup> Access to air travel for those people in need of animal assistance is just an example of this. Market-provided access prior to 1986 was deemed insufficient, leading to the passage of the ACAA and to subsequent DOT rulemakings, shifting an inefficient market equilibrium to a more efficient outcome via command-and-control style regulation.

Today’s rules mandate that airlines operating within the US accommodate service animals (including emotional support animals) for those passengers who require them free-of-charge and within the passenger cabin. The NPRM’s proposed changes to these rules can be summarized by the following:

1. Removing accommodation for emotional support animals,
2. Narrowing the definition of service “animal” only to service dogs,
3. Strengthening documentation requirements for service animals, and
4. Requiring service animals to be leashed or harnessed.

These changes are all deregulatory: they embody a looser interpretation of the ACAA, excluding more people from accommodation, reducing the economic burden on airlines, and decreasing benefits to the public and accommodated passengers. This dynamic is summarized in Figure 1. That the proposals are deregulatory is not at issue here – in fact, I agree with this direction – but such a change entails a re-balancing of the costs and benefits that accrue to different members of society, and this must be properly justified in the rulemaking process.

---

<sup>1</sup> “Traveling by Air with Service Animals”, 85 *Federal Register* 6448, 2020, to be codified at 14 CFR 382. URL in *References*.

<sup>2</sup> For example, a commercial building owner might not retrofit a property with elevators, since sales from new customers are not expected to generate enough revenue to cover the expense. The social value of access (more economic activity, more inclusive community), however, may more than exceed the difference. A government should then seek to subsidize the investment, spreading the cost among the public beneficiaries. (For evidence of the positive externalities of less discrimination and more equal access, see Cavalcanti and Talvaes, 2016.)

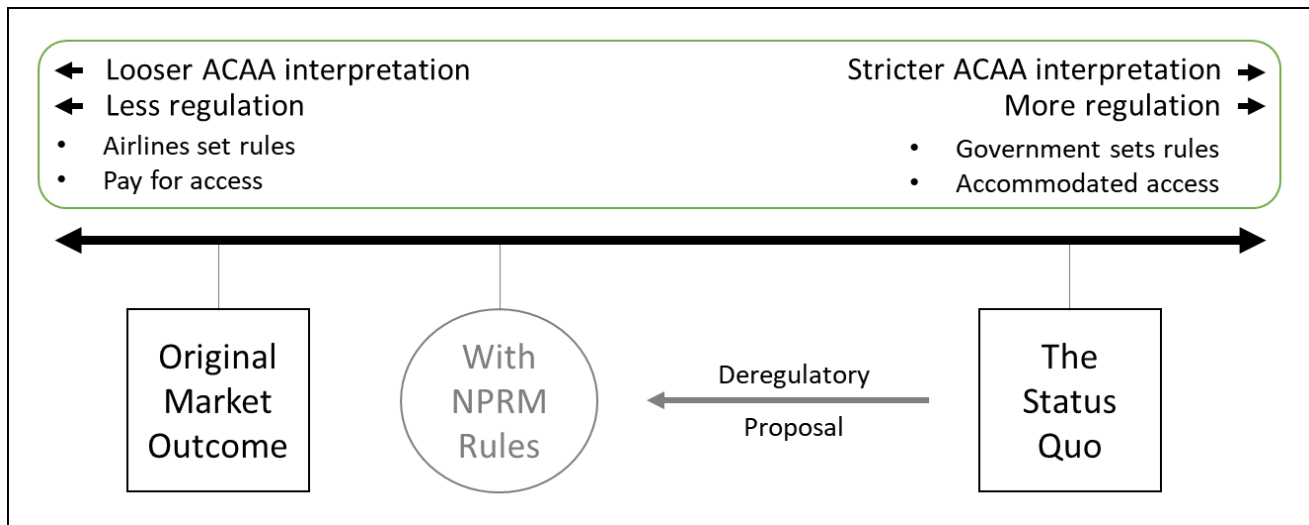


Figure 1.

The process governing administrative rulemaking, as dictated by the Administrative Procedure Act, holds that “the agency shall give interested persons an opportunity to participate in the rule making” and that the DOT must make “consideration of the relevant matter presented”.<sup>3</sup> It embodies the principles of a fiduciary administration, wherein federal agencies have positive “responsibilities to act deliberatively and reasonably in promoting the public welfare”.<sup>4</sup> Such principles are recognized via Executive Order: agencies must regulate in the “most cost-effective manner” with regulations that “impose the least burden on society” after a “reasoned determination that the benefits of the intended regulation justify its costs”.<sup>5</sup> Upon review by the legal system, such reasoning must satisfy the standard that the DOT’s “determinations not be ‘arbitrary’ or ‘capricious’”.<sup>6</sup> In revising its rules for implementation of the ACAA, the DOT must remain committed to a fair interpretation of that legislation that promotes the public interest subject to legal constraints.

**Comment 1:**

The DOT uses a Cost-Benefit Analysis framework to analyze impacts on stakeholders, but its flawed implementation fails to satisfy the standard for proper rulemaking. This must be corrected.

The DOT performs a detailed analysis for each of its proposed rule changes, summarizing comments received during the Advance Notice period, and highlighting potential impacts on stakeholders. To synthesize its discussion, and to justify its conclusions under the above-mentioned regulatory standard, the DOT quantifies these impacts using a Cost-Benefit Analysis (CBA). The analysis is incomplete, however, and cannot support the proposals in its flawed state. To illustrate this, it is useful first to identify the major stakeholders in the ACAA and their interests. There are three major groups: the airline companies, passengers needing animal support, and the general public. These groups differ in important ways.

The airlines are few in number, well-resourced, and alike in motivation.<sup>7</sup> As economic agents, they seek to sell a maximum number of seats at the highest price and to maintain passenger satisfaction. They are, in general, interested in a looser interpretation of the ACAA – one with less expansive requirements on accommodation – that minimizes the costs<sup>8</sup> they must shoulder. Passengers needing animal support are relatively more in number.<sup>9</sup> Depending on the health and safety requirements of each passenger, animal support during travel ranges from a weak preference to an absolute

<sup>3</sup> Administrative Procedure Act, 5 U.S.C. § 553.

<sup>4</sup> Criddle, 2009.

<sup>5</sup> Executive Order 12866, “Regulatory Planning and Review”.

<sup>6</sup> Ashford and Caldart, 2008.

<sup>7</sup> Just fourteen airlines are identified as “Majors” by the DOT, who share a market which totaled \$55 Billion in operating revenue in the first quarter of 2019 (DOT, 2019), and all but two belong to the major industry interest group “Airlines for America”: <https://www.airlines.org/about-us/>.

<sup>8</sup> These costs include, for example: staff training, reseating passengers bothered by the animals, possible property damage or health issues, increased costs of compliance with FAA safety regulations, etc.

<sup>9</sup> “Airlines For America” reports 751,000 emotional-support animals transported in 2017 (this NPRM).

necessity, and the accommodation required for the animal can also vary substantially. They favor, in general, a stricter interpretation of the ACAA that maximizes the amount and quality of accommodation. The general public, which includes those airline passengers without a need for animal support, is numerous and highly variable in terms of impact from the ACAA. On one hand, frequent flyers may suffer large and recurring negative externalities from the presence of others' animals.<sup>10</sup> On the other hand, members of the public who never or rarely fly may instead only enjoy the positive and diffuse social benefits discussed in the Background of this comment.

TABLE ES-1—SUMMARY OF IMPACTS DUE TO PROPOSED RULEMAKING [Millions of 2018 dollars]	
Impact	Annual value
Paperwork burden for passengers traveling with service animals .....	– \$3.0.
Discomfort to passengers who no longer will travel with ESAs .....	Not quantified.
Eliminated deadweight loss; transfer of surplus from consumers to producers (increased fees paid by passengers travelling with ESAs).	\$75.1 (total).
Reduction in negative externalities caused by ESAs .....	Not quantified.
Secondary market impacts due to reduced demand for ESA documentation Service .....	Not quantified.

Figure 2.

As stated above, the DOT summarizes impacts to these stakeholders with a CBA, which is reproduced in Figure 2. The summary analysis succeeds by considering both economic and non-economic impacts, and by accepting that some impacts resist responsible quantification, but otherwise it is problematic. Specifically:

1. The collection of “Impacts” is eclectic, not representing the full tally of issues covered in the NPRM.
2. Major categories, especially those that might reveal shortcomings of the proposal, are neglected.<sup>11</sup>
3. The largest impact (“Eliminated deadweight loss”) is identified belatedly in the back-matter of the NPRM as a transfer payment and so “not having implications for the net benefits calculation”. Its presence in the summary table is thus misleading.
4. The impacts assigned a value of “Not quantified” do not receive further treatment, although they may be significant or uncertain.

The difficulties of cost-benefit analysis<sup>12</sup> are well known to the DOT: beyond publishing detailed manuals for the benefit of grant applicants<sup>13</sup>, the Department has also released more thorough CBAs to accompany other NPRMs.<sup>14</sup> Yet this attempt is incomplete. I have constructed a framework for an alternative CBA in Figure 3 that makes a serious attempt at addressing issues (1), (2), and (3) above. It systematically categorizes the positive and negative impacts that accrue to each stakeholder group, and each category contains multiple entries that more fully represent the thoughtful discussion and research that the DOT performed for the NPRM. It is not exhaustive, but rather a starting point for the DOT to expand. Issue (4) should also be addressed by comparing the possible impacts of “Not Quantified” items against those that are quantified, and by explaining how these impacts are accounted for in the analysis conclusions.

<sup>10</sup> Due to reduced foot space, potential allergic reactions, noise and odors, emergency exit blockages, etc.

<sup>11</sup> For example, the extensive margin of the “market” for animal access is not considered. Some people who used to fly with animals no longer will (extensive margin), just as some people who used to fly with animals will now pay more for the accommodation (intensive margin).

<sup>12</sup> Cost-benefit analysis has been roundly criticized for providing a veneer of objectivity to analysis that is actually filled with subjective decisions. Though responsible CBA has major benefits – transparent reasoning and objective evaluation that may promote better rulemaking – any number of methodological deficiencies might destroy its value. Key difficulties include selection of the impacts to consider, techniques for quantifying qualitative impacts, techniques for monetizing non-monetary impacts, and techniques for discounting impacts in the far future. For more discussion, see: Ackerman and Heinzerling, 2002, and Arrow et al., 1996.

<sup>13</sup> DOT, 2018.

<sup>14</sup> E.g., “National Performance Management Measures...”, 82 *Federal Register* 5970, 2017, codified at 23 CFR 490. URL in *References*.

Alternative CBA		
Category	Impact	Annual Value (\$M)
Positive impacts on airlines	Increased revenues from animal fares (intensive margin) "eliminated deadweight loss"	\$75.1
	Reduced costs from animal accommodation (extensive margin)	?
Negative impacts on airlines	Public relations problems associated with more exclusive access	?
	...	...
Positive impacts on public	Reduction in negative externalities from others' animals	NQ
	...	...
Negative impacts on public	Reduced demand for ESA documentation service (extensive margin)	NQ
	Decreased vibrancy from less accommodation (extensive margin)	?
Positive impacts on those with animals	Increased paperwork burden	-3.0
	Reduction in negative externalities from others' animals	?
Negative impacts on those with animals	Discomfort from less accommodation (extensive margin)	NQ
	Decreased vibrancy from less accommodation (extensive margin)	?
	Increased costs from animal fares (intensive margin) "eliminated deadweight loss"	?
	...	...
<b>Grand Total</b>	...	...

Figure 3. Line items from the DOT CBA in black. Additions in red.

Ultimately, the prepared analysis must complement the rules proposed by the DOT for revising its interpretation of the ACAA: it should convincingly show that the impacts offer a combination of increased expected value to the public or reduction in risk to exposed groups. Qualitative analysis has a part to play, but should be approached systematically and summarized in the context of quantitative impacts.

Returning to the fiduciary principles of administrative law, the DOT has a positive responsibility to serve the public welfare via its regulations, and the analysis it has offered does not illustrate that it has met that expectation. Worse, since the proposed rules would loosen the interpretation of the ACAA to the benefit of airlines and to the detriment of the passengers requiring accommodated access, the appearance implies an unjust bias in favor of the airlines. Without amendment, this analysis then may, instead of supporting the proposed rules, actually fuel litigation challenging them as arbitrary or capricious and as a deviation from the DOT's duty to the public interest. It is therefore imperative that the DOT get in front of this issue with a more thorough analysis prior to final rulemaking.

I thank the Department for its work and consideration.  
Respectfully submitted,

Mr. Andrew Mowry

## References:

1. Ashford, Nicholas, and Charles Caldart, "Chapter 5, Administrative Law", *Environmental Law, Policy, and Economics: Reclaiming the Environmental Agenda*, 2008.
2. Ackerman, Frank, and Lisa Heinzerling, "Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection", 150 *University of Pennsylvania Law Review*, 2002.
3. Arrow, Kenneth, et al., "Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?", 272 *Science*, 1996.
4. Cavalcanti, Tiago, and José Tavares, "The Output Cost of Gender Discrimination: A Model-based Macroeconomics Estimate", 126(590) *The Economic Journal*, 2016.
5. Criddle, Evan, "Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking", 88 *Texas Law Review*, 2009.
6. DOT, "Airline Quarterly Financial Review: First Quarter 2019", 2019. Accessible online at <https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/aviation-policy/360346/2019q1quarterlyfinancialreportmajors.pdf>.
7. DOT, "Benefit-Cost Analysis Guidance for Discretionary Grant Programs", 2018. Accessible online at <https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/transportation-policy/284031/benefit-cost-analysis-guidance-2018.pdf>.
8. Executive Order 12866, "Regulatory Planning and Review". Accessible online at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.
9. FR, "National Performance Management Measures...", 82 *Federal Register* 5970, 2017, codified at 23 CFR 490. Accessible online at [https://www.fhwa.dot.gov/tpm/rule/pm3\\_nprm.pdf](https://www.fhwa.dot.gov/tpm/rule/pm3_nprm.pdf)
10. FR, "Traveling by Air with Service Animals", 85 *Federal Register* 6448, 2020, to be codified at 14 CFR 382. Accessible online at <https://www.federalregister.gov/documents/2020/02/05/2020-01546/traveling-by-air-with-service-animals>.