

## When Pigs Fly? DOT Says Not for Free.

By: John Bertino | March 11, 2020

People with disabilities have tremendously benefited from the use of service animals, which increase the accessibility of public spaces, events, and transportation. However, confusion and complaints regarding service and emotional support animals (ESAs) in airplanes have led to calls for greater regulatory clarity on what qualifies as a service animal, whether uncommon species should be allowed aboard planes, and how to control animal behavior. To address these issues, the Department of Transportation (DOT) released a [notice of proposed rulemaking \(NPRM\)](#) last month, titled “Traveling by Air with Service Animals.” This commentary summarizes the NPRM and highlights some of the proposal’s key provisions and analysis.

A [goal of the NPRM](#) is to align and provide some clarity on the federal definition of a service animal by amending existing regulation under the Air Carrier Access Act (ACAA). The proposed change would give airlines the discretion to recognize ESAs as pets and impose an animal transportation fee. [Additional provisions](#) include the option for airlines to cap the number of service animals at two per person and replace their existing animal service forms with [DOT forms](#). These forms include information on health, behavior, and relief attestation. Lastly, the NPRM addresses the transportation of large service animals and potential liability issues.

### What is a service animal? It depends...

Currently, there are two competing agency definitions of service animals. In 2011, Department of Justice (DOJ) revised its regulations under the [Americans with Disabilities Act \(ADA\)](#), providing the [definition of a service animal](#) as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or mental disability.” [DOT’s current definition](#) of a service animal is “any animal that is individually trained or able to provide assistance to a qualified person with a disability or any animal shown by documentation to be necessary for the emotional well-being of a passenger.” One distinction between these definitions is DOT’s policy that any animal, with certain exceptions and training, can be a service animal. Under the NPRM, only dog species

### In brief...

The Dept. of Transportation is seeking comments on regulations related to animals on planes. Commenters should help the agency improve its benefit-cost analysis, and further clarify all of the trade-offs facing consumers and industry.

would be considered service animals, therefore aligning more closely with DOJ’s definition. This definition limits the species of service animals to dogs but does not impose breed restrictions.

### **Statutory Authority**

Since its inception in 1986, the ACAA has expanded discrimination protections to persons with disabilities for domestic and foreign air travel. The NPRM notes that, while airlines are prohibited from denying service based on disability, the statute provides little or no direction on how to regulate these issues. The basis for DOT to regulate, including non-discrimination issues, is authorized by [49 U.S.C. 40113](#), which grants DOT rulemaking authority. Through the [Federal Aviation Administration \(FAA\) Authorization Act of 2018](#) (FAA Act), Congress also [mandated](#) DOT to develop required standards for service animals and ESAs and to determine whether DOT should align its definitions with those of DOJ.

### **Observance of Regulatory Principles**

The NPRM generally aligns with Executive Order (EO) [12866’s second principle](#), stating that “[e]ach agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.” There is reason to believe that DOT is correcting existing regulation by outlining [several factors](#) that have become apparent under the existing regulatory landscape. These include the confusion and non-alignment of service animal definitions, uncommon species of animals on aircraft, and animal misbehavior.

DOT does not evaluate alternative approaches that could produce potentially better outcomes. Additionally, DOT could provide additional data on incidents that have occurred with complaints surrounding uncommon species and the misbehavior of service animals. For example, DOT reports on the number of service animal complaints but does not provide the nature or severity of these complaints.

At its core, the [regulatory evaluation](#) addresses the impact ESAs have on the market. The status quo of current travel is beneficial for passengers who classify their non-ESA animals as ESA animals to avoid paying animal fees. Subsequently, airlines lose the opportunity to collect these fees. As explained in the [evaluation](#), this policy implicitly subsidizes certain passengers with pets at the expense of those without pets and those with legitimate claims for service animals. Taking advantage of this service may reduce the number of seats available to other passengers and minimize available space, which is already limited.

### **Accounting and Benefit-Cost Considerations**

The regulatory evaluation discusses both quantified and unquantified benefits and costs, but the agency’s categorization of how these are counted needs additional clarification. [Circular A-4](#) provides guidance on how agencies should articulate their analysis in terms of developing and measuring benefits and costs.

According to A-4, transfers should be reported “separately and avoid misclassification of transfer payments as benefits and costs.” Within the context of the evaluation, transfers refer to the ESA travel fees passengers may have to pay airlines. Airlines then would accept the fees as revenue. This “transfer” of payments between ESA passengers and the airlines is neither a societal benefit nor a societal cost because they cancel each other out. The evaluation should separately and clearly identify transfers from societal costs and benefits by categorizing them into their own sections.

Furthermore, the evaluation acknowledges unquantified effects such as the value others derive from having ESAs on flights, secondary markets, and externalities. For example, externalities caused by animals can present themselves in many different shapes, sounds, and sizes. The analysis references an incident involving an ESA dog biting a flight attendant and an agent in 2018. Other disturbances have included noise and flight delays. In general, to the extent that the presence of ESAs on planes causes a disruption for other passengers, amending existing regulations could create benefits for these other passengers. A-4 notes that the agency should “categorize or rank the qualitative effects in terms of their importance... and distinguish the effects that are likely to be significant enough to warrant serious consideration.” DOT should better articulate how these effects are categorized as benefits and costs, reporting these findings in their respective sections.

Lastly, a challenge for DOT is estimating the demand curve for ESA travel. This is difficult because no fees have been associated with ESAs in the past. According to A-4, “when market prices are hard to measure or markets do not exist... you need to develop appropriate proxies that stimulate market exchange.” This may be difficult because of the unique market for ESAs. However, the agency should demonstrate that it has evaluated all reasonable considerations before concluding there is insufficient data.

### **Public Comment**

DOT’s [Advance Notice of Proposed Rulemaking \(ANPRM\)](#), issued in May 2018, encouraged the public to comment on a variety of issues related to service animals. The agency received a total of 3,350 comments on the ANPRM. These included stakeholder comments on issues such as different animal species, animals that should be considered in the service animal definition, and whether ESAs should be considered in the definition.

DOT invites interested parties to [comment](#) on its revised definitions by April 6, 2020 through [Regulations.gov](#).