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Public Interest Comment¹ on
The Department of Transportation's Proposed Rule
Traveling by Air with Service Animals

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The George Washington University Regulatory Studies Center

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Transportation's (DOT) proposed rule on traveling by air with service animals does not represent the views of any particular affected party or special interest, but it is designed to evaluate the effect of DOT's proposal on overall consumer welfare.

Introduction

People with disabilities have tremendously benefited from the use of service animals, which increase the accessibility of public spaces, events, and transportation. However, multiple parties from a variety of perspectives have called for greater regulatory clarity on what qualifies as a service animal, how airlines should classify emotional support animals (ESAs) for air travel, whether uncommon species should be allowed aboard planes, and how to mitigate health and safety risks caused by animal behavior. To address these issues, DOT published a notice of proposed rulemaking (NPRM) titled "Traveling by Air with Service Animals" on February 5,

¹ This comment reflects the views of the author and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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2020.³ This public interest comment summarizes the rulemaking, evaluates the proposal’s key provisions and analysis, and makes recommendations for improving DOT’s analysis of its proposed action. We specifically emphasize the need for DOT to explicitly evaluate alternatives to its preferred option and highlight the importance of distinguishing transfers from social welfare effects.

Background

The advance notice of proposed rulemaking (ANPRM), issued in May 2018, discussed inquiries from both industry and public stakeholders about the transportation of service animals.⁴ In summary, DOT noted that “[the Air Carrier Access Act] regulation could be improved to ensure nondiscriminatory access for individuals with disabilities while simultaneously preventing instances of fraud and ensuring consistency with other Federal regulations.”⁵ While there is agreement that amendments to service animal transportation are needed, there is little consensus on what the final outcome should entail.

The section of the ANPRM titled “Need for a Rulemaking” listed multiple factors, including complaints by consumers, claims that unusual species like peacocks and iguanas are service animals, pets falsely claimed as service animals, animal misbehavior, differences in airline and airport regulations, requests for rulemaking from different stakeholders, and statutory mandates from the FAA Extension, Safety and Security Act of 2016.⁶ For example, the Psychiatric Service Dog Society “petitioned [DOT] in 2009 to eliminate a provision in the Department’s Air Carrier Access Act regulation that permitted airlines to require documentation and 48 hours’ advance notice for users of psychiatric service animals.”⁷ More recently, Airlines for America issued a “request to initiate a rulemaking to amend its service animal regulation ... ask[ing] that DOT harmonize its service animal definition under its Air Carrier Access Act regulation with DOJ’s Americans with Disabilities Act Regulation.”⁸ The airlines also requested that a rule address appropriate documentation for service animals and health and safety protections for passengers.⁹ Further proposals and requests were brought forward by air carriers and disability organizations.

Prior to the NPRM, DOT also formed a 27-member Advisory Committee on Accessible Air Transportation (ACCESS) in 2016 to discuss air travel for people with disabilities. However, DOT notes in the NPRM that the committee “was not able to reach consensus on how the service

³ 85 FR 6448 (February 5, 2020). Available at: <https://www.federalregister.gov/d/2020-01546>. Docket ID: DOT-OST-2018-0068. Available at: <https://www.regulations.gov/document?D=DOT-OST-2018-0068-12959>.

⁴ 83 FR 23832 (May 23, 2018). Available at: <https://www.federalregister.gov/d/2018-10815>.

⁵ 83 FR 23832.

⁶ 83 FR 23834-5.

⁷ 83 FR 23835.

⁸ 83 FR 23835.

⁹ 83 FR 23835.

animals regulations should be revised.”¹⁰ DOT put out a request for data and comments in the ANPRM on ten different issues regarding service animals. These included psychiatric service animals, ESAs, containment of ESAs, species limitations, number of service animals per passenger, social behavior training, control of the service animal, large service animals, veterinary forms, and code-share flights.¹¹ The agency received 3,350 comments on the ANPRM.¹²

DOT’s NPRM recognizes the need to address access for individuals with disabilities and prevent fraudulent classification of service animals. One goal of the NPRM is to align DOT’s definition of a service animal with the Department of Justice’s (DOJ) definition. Changing DOT’s definition requires amending the existing regulations that implement the Air Carrier Access Act (ACAA).¹³ Although the rule changes DOT’s definition of a service animal, several provisions are left to the discretion of airlines. In particular, the rule indicates that airlines “are permitted to” enforce certain policies related to species, health forms, behavior and training attestation, relief attestation, number of service animals per passenger, large service animals, and the control of service animals.¹⁴ Additionally, airlines will be able to classify ESAs as pets, and by doing so, impose an animal transportation fee.¹⁵

Statutory Authority

DOT’s rulemaking authority is codified at 49 U.S.C. 40113. Discrimination protections for air travel have evolved over the last two and a half decades. The ACAA, enacted in 1986, established protections for domestic air travel but did not extend to foreign air travel until 2000.¹⁶ DOT notes that “[the ACAA] does not specify how U.S. and Foreign air carries must act to avoid such discrimination [and that the statute] does not specify how the department should regulate with respect to these issues.”¹⁷

Multiple mandates from Congress give DOT the authority to proceed with this rulemaking. The FAA Extension, Safety, and Security Act of 2016 “requires that the Department issue a supplemental [NPRM] on various access issues ... including traveling by air with service animals.”¹⁸ The FAA Reauthorization Act of 2018 (the FAA Act) “requires the Department to conduct a rulemaking proceeding on the definition of the term service animal and to develop

¹⁰ 85 FR 6451.

¹¹ 83 FR 23838.

¹² Docket ID: DOT-OST-2018-0068. Available at: <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>.

¹³ 85 FR 6448.

¹⁴ 85 FR 6452.

¹⁵ 85 FR 6448.

¹⁶ 85 FR 6448.

¹⁷ 85 FR 6448.

¹⁸ 85 FR 6451.

minimum standards for what is required for [service animals] and [ESAs].”¹⁹ Congress also provided other factors to evaluate such as photo identification and training documentation for service animals.²⁰ DOT must also consider the health and safety and passengers in regard to service animals.²¹

Current and Proposed Service Animal Definitions

Currently, there are two competing agency definitions of service animals. In 2011, DOJ revised its regulations under the Americans with Disabilities Act (ADA) to define 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.”²² 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.”²³ One distinction between these definitions is DOT’s policy that any animal, with certain exceptions and training, can be a service animal. The NPRM would revise this definition so that only dog species 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 enforce breed restrictions. Furthermore, under the proposal, airlines are not prohibited from accommodating additional species of service animals.

Compliance with Regulatory Analysis Requirements

Executive Order 12866 guides executive branch agencies in the proper process to establish new regulations and modify existing ones. The order’s regulatory philosophy has undergirded federal agency decision-making through four administrations and remains pertinent to DOT’s proposed rulemaking:

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs

¹⁹ 85 FR 6451.

²⁰ 85 FR 6451.

²¹ 85 FR 6451.

²² 85 FR 6499.

²³ 85 FR 6455.

and benefits of available regulatory alternatives, including the alternative of not regulating.²⁴

DOT offers a sensible rationale that its proposal would correct a problem created by current regulatory definitions.²⁵ But to thoroughly evaluate the suitability of the proposed rule, DOT must demonstrate a clear linkage between the agency’s proposal and the objectives it hopes to accomplish – namely, “to ensure that our air transportation system is safe for the traveling public and accessible to individuals with disabilities.”²⁶ In fact, to the extent that airlines have incentives to provide services that appeal to passengers, including accommodating passengers with disabilities, offering airlines more discretion on how they treat service animals would be beneficial. By removing the requirement that airlines transport ESAs free of charge, DOT’s proposed rule might incentivize airlines to charge a lower price for traveling with ESAs while balancing health and safety concerns related to ESAs on airplanes. In full compliance with Executive Order 12866, DOT should expand its regulatory evaluation to show that its preferred option is the best method for achieving the stated goals.²⁷

Recommendation 1: DOT should conduct a more comprehensive regulatory impact analysis of its proposed rule and release a supplemental notice with opportunity for public participation.

DOT should more clearly analyze the significance of the identified problems, connect those problems to the impacts they produce, and transparently consider the tradeoffs of different approaches with the potential net benefits in mind.

Problem Analysis

Executive Order 12866 directs agencies to identify “the failures of private markets or public institutions that warrant new agency action,”²⁸ consider how to modify existing regulations that have contributed to the problem,²⁹ and “avoid regulations that are inconsistent, incompatible, or duplicative with ... those of other Federal agencies.”³⁰ Market failures generally consist of externalities, the provision of public goods, market power, and inadequate or asymmetric

²⁴ Executive Order 12866 of September 30, 1993, “Regulatory Planning and Review,” Sec. 1(a). Available at: <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

²⁵ However, a clear consensus on the key goal and specific approach of the rulemaking does not necessarily exist.

²⁶ 85 FR 6448.

²⁷ DOT, “Traveling by Air with Service Animals (NPRM) - Regulatory Evaluation,” ID: DOT-OST-2018-0068-4792, January 2020. Available at: <https://www.regulations.gov/document?D=DOT-OST-2018-0068-4792>.

²⁸ Executive Order 12866, Sec. 1(b)(1).

²⁹ Executive Order 12866, Sec. 1(b)(2).

³⁰ Executive Order 12866, Sec. 1(b)(10). This is consistent with DOT’s intention to align its regulations with those of DOJ’s ADA definition of a service animal.

information.³¹ However, DOT’s analysis suggests that the root of the problem stems from a failure of public institutions. Even where DOT identifies negative externalities, these factors appear to be a product of the current definitions established by existing regulations.

Under the “need for rulemaking” section in the preamble, DOT offers eight “compelling factors” why it believes the proposal is warranted.³² While three of the factors deal with legal mandates and petitions from stakeholders to revise the regulations, the remaining five factors identify the nature of the problems DOT is seeking to address: a) service animal complaints; b) inconsistent federal definition of service animal; c) unusual species of animals; d) pets on aircraft; and e) misbehavior by service animals.

Nevertheless, more analysis should be done to evaluate the extent of the problems and to design a solution reasonably tailored to address those problems.³³ We explore DOT’s analysis of these five factors and recommend how DOT can improve its identification and analysis of identified problems.

Recommendation 2: To better inform the design of the rule and illuminate key tradeoffs, DOT should clarify its identification of the problems it intends to solve and connect those problems to the resulting impacts.

a) Service Animal Complaints

The NPRM indicates that DOT’s Aviation Consumer Protection Division and airlines are receiving a greater number of “service animal-related complaints,” suggesting that “the provision of assistance to passengers traveling with service animals is an area of increasing concern for passengers with disabilities.”³⁴ Contextualizing these complaints made by or on behalf of passengers with disabilities would be helpful for interpreting their implications and connecting them to DOT’s approach. For instance, are airlines failing to uphold their obligations under existing requirements,³⁵ stemming from confusion over the current definition of service animals? Are passengers with disabilities facing unmerited discrimination because of perceived problematic or fraudulent behavior related to emotional support animals?

Furthermore, a more thorough examination of the increase in complaints is needed. While DOT points to the year-over-year increase in complaints as evidence of a growing problem, could this increase be attributable to another factor, such as a commensurate increase in airline passengers?

³¹ OMB Circular A-4 (September 17, 2003), pp. 4-5. Available at: <https://www.reginfo.gov/public/jsp/Utilities/a-4.pdf>.

³² 85 FR 6449.

³³ See, Executive Order 12866, Sec. 1(b)(1), 1(b)(5), 1(b)(11).

³⁴ 85 FR 6449.

³⁵ If so, would an approach focused on enforcement, or including enforcement provisions, be better suited to the identified problem?

As such, considering the trend in complaints normalized over all complaints received could shed light on the extent of the problem.³⁶ Service animal complaints are not explicitly discussed in the regulatory evaluation, but such analysis would help DOT design a tailored solution.

b) Inconsistent Federal Definition of Service Animal

The NPRM also highlights how “inconsistencies between DOT’s ACAA and DOJ’s ADA definition of a service animal present practical challenges for airlines and airports, and are a source of confusion for individuals with disabilities and the traveling public.”³⁷ In short, DOJ’s regulations apply to “public and commercial airports and airport facilities operated by businesses like restaurants and stores” while DOT’s regulations govern “airlines and their facilities and services.”³⁸

The discrepancy between DOJ’s narrower definition and DOT’s broader one is a problem that rulemaking is well-suited to addressing. Examining how existing regulations contribute to problems and modifying them so they can better achieve their goals is a core principle of Executive Order 12866.³⁹ Considering how modifying existing definitions would both reduce inconsistencies and achieve the objectives of ACAA regulations is critical to regulatory design. To the extent that DOJ’s definition also creates unique or related problems, DOT should analyze whether adopting a suboptimal definition is worth the tradeoff of forgoing the potential benefits of another option that better accomplishes the objectives of the ACCA. To guide its decision-making, DOT might consider reviewing DOJ’s rulemaking record and supporting analysis for the ADA definition of a service animal.

c) Unusual Species of Animals

Another issue identified in the NPRM is how unusual species of animals accompanying passengers “erodes the public’s trust and confidence in service animals.”⁴⁰ The examples pointed out in the regulatory evaluation indicate the problem may stem from ill-defined provisions for ESAs or from passengers who misrepresent their pets as ESAs.⁴¹ However, is this problem inherent to unusual species (or those perceived to be unusual), or does it result from animals that lack proper training as service animals but happen to be unusual species? To the extent that the problem is driven by passengers who exploit lax policies on ESAs by bringing untrained animals

³⁶ Alternatively, total passengers or a more appropriate figure could be used. Experts in airline transportation matters would be better suited to suggest what the right denominator would be.

³⁷ 85 FR 6449.

³⁸ 85 FR 6449-50.

³⁹ Executive Order 12866, Sec. 1(b)(2).

⁴⁰ 85 FR 6450.

⁴¹ For examples of ill-defined provisions for ESAs, *see*, Regulatory Evaluation, pp. 12-13; for discussion of passengers misrepresenting their pets, *see*, pp. 3, 18.

on flights, should DOT consider unusual species a systemic problem? More analysis on that point is warranted.

d) Pets on Aircraft

Related to the previous factor, issues caused by pets on aircraft seem to underline problems with unusual species of animals. Based on the NPRM, two issues are apparent: false claims of pets as ESAs or service animals, and untrained animals creating safety concerns.⁴² According to the regulatory evaluation, poor pet behavior may create negative externalities for airline staff and other passengers.⁴³ Furthermore, passengers who claim pets as ESAs receive an implicit subsidy from the airline and at the expense of other travelers.⁴⁴ Connecting the two related problems (false claims and poor training) with those impacts (negative externalities and implicit subsidization) would help clarify what empirical analysis is needed to understand the significance of these problems.

DOT had difficulty determining how many pets were falsely claimed as ESAs and estimating the negative externalities created by untrained animals. However, better defining the impacts stemming from pets on aircraft would aid in exploring alternative ways to assess these effects. DOT should search for data sources that may, even imperfectly, shed light on the problems at hand. For instance, if the proportion of passengers falsely claiming their pets as ESAs has increased over time, then we would expect to see a decline in the share of passengers with pets relative to the share of passengers with ESAs. Data may provide evidence for this substitution effect.

e) Misbehavior by Service Animals

Finally, the NPRM states that “[a]irlines have reported increases in the number of behavior-related service animal incidents on aircraft, including urinating, defecating, and biting.”⁴⁵ Closely related to the other factors, it is unclear whether these incidents stem from poorly trained (but legitimate) service animals or if they stem from untrained ESAs or pets mischaracterized as ESAs. Furthermore, whether these trends are actual or perceived, as suggested by the NPRM,⁴⁶ is also unclear, underscoring the concerns of greater burdens voiced by disability rights activists.

DOT should further analyze whether such reported misbehavior is a systemic problem. When behavior-related service animal incidents are adjusted for the total number of service animals brought on flights, does this affect the trend? Is the ratio of incidents to total flights with service

⁴² 85 FR 6450.

⁴³ Regulatory Evaluation, pp. 11-12

⁴⁴ Regulatory Evaluation, p. 17.

⁴⁵ 85 FR 6450.

⁴⁶ 85 FR 6450.

animals increasing? If DOT cannot answer those questions, the agency should proactively track whether any final rulemaking reduces the prevalence of behavior-related incidents.

Alternatives

Executive Order 12866 underscores the importance of regulatory design and directs agencies to “assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”⁴⁷ Rather than being a simple checkbox exercise or secondary consideration, alternatives are at the core of regulatory analysis because they require decision-makers to systematically think through their options and elucidate tradeoffs among those different approaches.

Perhaps the most significant gap in DOT’s regulatory evaluation is that it does not evaluate alternative approaches that could produce potentially better outcomes. The NPRM does offer some insight into DOT’s reasoning in choosing its proposed approach – e.g., deciding against a definition that included capuchin monkeys and miniature horses as service animals – suggesting that the agency at least implicitly weighed different alternatives.⁴⁸ However, such implicit analysis lacks transparency, ignores the value of explicitly comparing tradeoffs, and precludes the public from adequately weighing in on those decisions.

Circular A-4, which represents OMB’s guidance on regulatory best practices, offers greater specificity on how agencies should consider alternatives. Relevant to the multiple provisions of this proposed rule, agencies should “explore modifications of some or all of a regulation’s attributes or provisions to identify appropriate alternatives”⁴⁹ and “study alternative levels of stringency to understand more fully the relationship between stringency and the size and distribution of benefits and costs among different groups.”⁵⁰ The NPRM lists the various regulatory and deregulatory provisions,⁵¹ and the regulatory evaluation evaluates whether the provisions reflect a change in how regulated entities would have to comply.⁵² While these comparisons to the status quo are helpful, according to Circular A-4, simply reporting a comparison between the selected proposal and the baseline is inadequate.⁵³

Instead, the impacts of different regulatory provisions should be analyzed separately, so that the incremental benefits, costs, and transfers for each provision can be assessed.⁵⁴ As Circular A-4

⁴⁷ Executive Order 12866, Sec. 1(a).

⁴⁸ *See*, 85 FR 6454.

⁴⁹ Circular A-4, p. 7.

⁵⁰ Circular A-4, p. 8.

⁵¹ 85 FR 6452.

⁵² Regulatory Evaluation, pp. 6-7.

⁵³ Circular A-4, p. 16.

⁵⁴ *See*, Circular A-4, p. 17: “You should analyze the benefits and costs of different regulatory provisions separately when a rule includes a number of distinct provisions. If the existence of one provision affects the benefits or costs

instructs, “determining the net benefits of the proposed regulation with and without” certain provisions can elucidate the consequences of DOT’s chosen approach relative to other options.⁵⁵

In fact, the basis for this incremental analysis of individual provisions exists in the regulatory evaluation: “While the analysis was able to describe conceptually how this rule would yield positive net benefits, this conclusion is potentially confounded due to potential positive public values and demonstrated negative externalities in ESA travel.”⁵⁶ In other words, DOT could explicitly use similar reasoning about the potential direction of unquantified effects – e.g., negative externalities from ESAs – to evaluate alternatives, such as defining ESAs as service animals.

DOT could translate its assessment of certain provisions of the proposed rule into what Circular A-4 characterizes as an analysis of “at least three options” of varying stringency: “the preferred option; a more stringent option that achieves additional benefits (and presumably costs more) beyond those realized by the preferred option; and a less stringent option that costs less (and presumably generates fewer benefits) than the preferred option.”⁵⁷ This approach may also assist DOT with accounting for the uncertainties associated with qualitative impacts by at least clarifying the way certain provisions are expected to alter the direction of net benefits.

Recommendation 3: DOT should expand its regulatory analysis to evaluate multiple alternative approaches of varying stringency and better account for uncertainty.

One specific alternative DOT might consider along with its preferred approach, which defines service animals as only one species of animal, is a standard that includes a performance-based definition for a service animal that is neutral to the species of service animal. Both Executive Order 12866 and Circular A-4 support specifying performance standards as a key alternative regulatory approach.⁵⁸

To assess performance, airlines could use the standardized DOT forms for health, behavior attestation, and relief attestation that already would certify compliance for dogs.⁵⁹ Furthermore, to mitigate concerns about the size of service animals like miniature horses, DOT could incorporate considerations of size into such a standard, permitting airlines to make reasonable

arising from another provision, the analysis becomes more complicated, but the need to examine provisions separately remains. In this case, you should evaluate each specific provision by determining the net benefits of the proposed regulation with and without it.”

⁵⁵ Circular A-4, p. 17.

⁵⁶ Regulatory Evaluation, p. 19.

⁵⁷ Circular A-4, p. 16.

⁵⁸ See, Circular A-4, p. 8; also see, Executive Order 12866, Sec. 1(b)(8): “Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.”

⁵⁹ 85 FR 6466, 6468, 6470.

size requirements. In fact, DOT is proposing size requirements in its preferred option in the NPRM.⁶⁰ Since these provisions could eliminate certain very large breeds of dogs, applying it to other species may be reasonable too. DOT states in its NPRM that it evaluated other species of service animals but decided against including them in the proposal.⁶¹ While this might be the most net beneficial decision, DOT should directly contrast a broader performance standard against its chosen approach.⁶² In other words, justifying its preferred option by comparing it against alternatives of different stringency would strengthen DOT's rulemaking.

Importantly, such a performance-based standard could be more stringent for airlines than DOT's chosen option, while also extending broader guarantees to passengers with disabilities. By contrast, under the NPRM, airlines must accommodate passengers with service animals that meet the revised definition (i.e., dogs), but airlines would also have discretion about how to treat other species of service animals and ESAs. As a result, some airlines might develop more permissive policies that broaden the species of service animals allowed on planes and permit passengers to travel with ESAs without charge (or at reduced charge). Put simply, considering the incentives of airlines when assessing the effects of different alternatives is essential.

Impact Analysis

Executive Order 12866 guides agencies to “assess both the costs and the benefits of the intended regulation” – including qualitative effects – and “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”⁶³ The directives to consider alternatives and assess their estimated costs and benefits become even more important because of the uncertainty of the estimates and limited data availability in DOT's NPRM. Furthermore, these uncertainties complicate the directive to tailor “regulations to impose the least burden on society,”⁶⁴ although conducting thorough impact analysis can mitigate those limitations.

Distinguishing Transfers from Impacts on Social Welfare

Table ES-1 in the NPRM lays out five impacts of the proposed rule, along with their annual values.⁶⁵ Three impacts are unquantified. However, despite outlining the key impacts of the rule,

⁶⁰ 85 FR 6461.

⁶¹ 85 FR 6454.

⁶² Another reason that DOT appears to be restricting the definition to dogs is that it aligns with DOJ's definition. I think that's a reasonable desire, which if I understand correctly is backed up by statutory directive. However, my question is: what if DOJ's definition is suboptimal or overly restrictive? That suggests to me that DOT at the very least should evaluate an alternative definition, even if it can't adopt it under its statutory authority (this could help inform lawmakers and policymakers about how to revise underlying statutes).

⁶³ Executive Order 12866, Sec. 1(b)(6).

⁶⁴ Executive Order 12866, Sec. 1(b)(11).

⁶⁵ 85 FR 6453. *Also see*, Table 5 in the Regulatory Evaluation.

DOT's regulatory evaluation does not adequately distinguish transfers from societal benefits and costs. "The primary economic impact of this proposed rulemaking is that it eliminates a market inefficiency,"⁶⁶ of which the greatest result is a transfer (rather than a change in social welfare) from passengers with ESAs to airlines in the form of fees for traveling with animals that no longer qualify as service animals. Reducing the market inefficiency will also remove the deadweight loss associated with the effective price ceiling of zero on ESA travel.

Permitting airlines to charge a price for ESA travel creates a transfer and eliminates the efficiency loss for those transactions where "airlines must provide ESA services beyond the point where marginal benefits exceed marginal costs."⁶⁷ Specifically, this translates into an efficiency loss when airlines must transport ESAs without being fully compensated for that exchange.⁶⁸

DOT estimates the total impact of permitting airlines to charge passengers for ESA travel at \$75.1 million, but it does not separate transfers from benefits (because it lacks the data to compute what portion of the \$75.1 million constitutes an efficiency loss). Circular A-4 instructs that transfers should be reported "separately and avoid the misclassification of transfer payments as benefits and costs."⁶⁹ To more clearly differentiate transfers from social impacts with consequences for economic efficiency, DOT could use OMB's suggested format for an Accounting Statement in Circular A-4.⁷⁰

Recommendation 4: DOT should present social costs and benefits separately from transfers in its summary of the rule's estimated effects, even for impacts that are unquantified or difficult to isolate.

Evaluating Unquantified Impacts

DOT also requests data to estimate multiple unquantified effects of the proposed rule. First, as the regulatory evaluation considers, public values may also exist for requiring that passengers with ESAs travel for no additional cost. In other words, "the presence of social value beyond the private consumption value for ESA travel" may shift the demand curve outward.⁷¹ Second, negative externalities caused by ESAs, including biting, barking, or other disruptive behavior, affect other passengers and airline employees. These health and safety risks impose social costs.

⁶⁶ 85 FR 6452.

⁶⁷ Regulatory Evaluation, pp. 8-9.

⁶⁸ See, Regulatory Evaluation, p. 9: "Both airlines and passengers experience consequences from this efficiency loss: airlines must provide ESA accommodation without receiving anything in exchange, leading them to reduce other services that passengers might prefer."

⁶⁹ Circular A-4, p. 46.

⁷⁰ See, Circular A-4, p. 47.

⁷¹ Regulatory Evaluation, p. 10.

The regulatory evaluation offers some examples of these incidents, but DOT explains that it lacks systematic data.⁷²

Circular A-4 offers direction for cases “when market prices are hard to measure or markets do not exist,” advising that agencies “need to develop appropriate proxies that stimulate market exchange.”⁷³ Despite the difficulties associated with the unique market for ESAs, DOT should demonstrate that it has attempted reasonable efforts to develop proxies before concluding there are insufficient data.

For instance, although DOT has “insufficient data to estimate the demand curve for ESA travel,”⁷⁴ could DOT consider a range of placeholder estimates taken from the market for pet travel to substitute for these data? The agency argues a convincing case that ESAs are more analogous to pets than service animals in its regulatory evaluation.⁷⁵ Elsewhere, DOT explains the difficulties with deriving estimates for ESA travel, primarily because the agency only knows “one point on the demand curve” and lacks “an estimate of the price elasticity of demand for ESA travel or an elasticity from a related market that could serve as its surrogate.”⁷⁶ The market for pet travel on airplanes, where data to estimate demand at different prices might be more readily available,⁷⁷ could temporarily approximate ESA travel. Perhaps DOT could generate a range of estimates, including a high and low estimate, to gauge the general proportion of the “subsidy” for passengers with ESAs relative to the eliminated deadweight loss.

DOT presents a discussion of the direction of key unquantified effects to argue its proposal will produce net benefits:⁷⁸

- Societal non-use values positively associated with ESA travel would reduce net benefits;
- Negative externalities associated with ESA travel would increase net benefits.

Circular A-4 notes that agencies 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.”⁷⁹ As a result, DOT should supplement its discussion net benefits with a ranking of key qualitative effects, for purposes of comparison, and explain why its proposal is anticipated to produce better results than reasonable alternatives.

⁷² Regulatory Evaluation, p. 11.

⁷³ Circular A-4, p. 19.

⁷⁴ Regulatory Evaluation, p. 17.

⁷⁵ See, Regulatory Evaluation, starting at p. 12, for section 4.2.3, “ESAs versus Pets or Traditional Service Animals.”

⁷⁶ Regulatory Evaluation, p. 16.

⁷⁷ See, Regulatory Evaluation, Appendix B: Pet Transportation Fees.

⁷⁸ See, RIA, pp. 18-19.

⁷⁹ Circular A-4, p. 45.

Recommendation 5: DOT should expand its discussion of projected net benefits, including how the agency's preferred approach is more likely to produce net benefits than alternative regulatory approaches.

Anticipating Unintended Consequences

Finally, as OMB guidance suggests, agencies should consider potential unintended consequences and “countervailing risks” of regulatory actions.⁸⁰ One area where DOT should give special attention to unintended consequences is for passengers with disabilities who use service animals that are not dogs. DOT’s proposed rule suggests the impacts on those who use non-dog service animals are minimal because of lack of evidence of widespread use.⁸¹ However, this assessment ignores the long-term impacts of DOT’s policy.

Evidence suggests that using dogs as service animals was a growing trend throughout the 20th century.⁸² In all likelihood, the market for service animals will continue to develop, improving the resources and options for individuals with disabilities. Put simply, the rule might discourage innovations in the species of service animals that assist individuals with disabilities.

Recommendation 6: DOT should consider the future impacts on innovation of its rulemaking, including negative effects on emerging markets for other species of service animals.

Implementing a forward-looking plan for retrospective review, such as promoted in the next section, could complement efforts to support new innovations in the market for service animals.

Retrospective Review

The uncertainties and lack of data present in the current rulemaking necessitate an agency plan for evaluating the effectiveness of any final rule, which may also help rectify those limitations in future analyses. Planning for retrospective review would be useful because DOT would be better prepared to modify its rulemaking to address issues that remain or new problems that emerge. Executive Order 13563 underscores the importance of planning for review at the outset of rulemaking:

To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify,

⁸⁰ See, OMB, Regulatory Impact Analysis: A Primer, p. 7. Available at:

https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

⁸¹ Regulatory Evaluation, pp. 15-16.

⁸² See, e.g., <https://www.igdf.org.uk/about-us/facts-and-figures/history-of-guide-dogs/>;

https://adata.org/legal_brief/individuals-disabilities-and-their-assistance-animals-brief-history-and-definitions;

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5243836/>.

streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.⁸³

A key design component of a forward-looking rule is for regulators to “[s]et clear performance goals and metrics for outputs and outcomes.”⁸⁴ Thus, DOT should build in metrics to collect or observe that adequately measure the effects of any final policy change. For instance, DOT suggests it has “insufficient data to estimate the demand curve for ESA travel.”⁸⁵ To rectify this limitation, the agency should proactively include measures within any final agency action that would aid in assessing demand for ESA travel.⁸⁶ The agency should also suggest a future date (e.g., five years after finalization) to reevaluate the policy change and answer questions that assess the effectiveness of the rulemaking. Examples of relevant questions may include:

- Do the identified problems still exist? If yes, have those problems improved or worsened?
- What new problems may have emerged?
- What are the trends in ESA travel? To what extent can they be attributed to the rulemaking?

Recommendation 7: DOT should plan for retrospective review by identifying and collecting key metrics that would aid in assessing the effectiveness of any final rule.

Executive Order 13771

According to the NPRM, this rulemaking is a significant regulatory action under Executive Order 12866 and internal DOT policies.⁸⁷ According to OMB guidance, significant actions from executive branch agencies that impose costs greater than zero are subject to Executive Order 13771.⁸⁸ Nevertheless, despite evidence of imposing costs greater than zero,⁸⁹ DOT’s preamble does not comment on this action’s status under Executive Order 13771. According to

⁸³ Executive Order 13563, Sec. 6(a). Available at:

<https://www.transportation.gov/sites/dot.gov/files/docs/Executive%20Order%2013563.pdf>.

⁸⁴ Marcus C. Peacock, Sofie E. Miller, and Daniel R. Pérez (2018), “A Proposed Framework for Evidence-Based Regulation,” GW Regulatory Studies Center Working Paper, February 2018, p. 22. Available at:

<https://regulatorystudies.columbian.gwu.edu/proposed-framework-evidence-based-regulation>.

⁸⁵ Regulatory Evaluation, p. 17.

⁸⁶ Examples of relevant metrics would include, at the very least, the number of ESAs traveling by year and airline and the price assessed by airlines for ESA travel.

⁸⁷ 85 FR 6472.

⁸⁸ OMB, Guidance Implementing Executive Order 13771, Titled “Reducing Regulation and Controlling Regulatory Costs,” April 5, 2017, p. 3: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

⁸⁹ See, 85 FR 6474; also see, Regulatory Evaluation, p. 15.

Reginfo.gov, the rulemaking is currently designated as “other” under Executive Order 13771.⁹⁰ Any final action by DOT should include an explicit Executive Order 13771 designation – whether it be regulatory, deregulatory, other, etc. – along with a rationale for why that designation is warranted.⁹¹

Conclusion

This public interest comment summarizes the DOT’s proposed rulemaking on traveling by air with service animals. We argue that DOT should more clearly analyze the significance of the identified problems, connect those problems to the impacts they produce, and transparently consider the net benefits of alternative approaches. Below, we summarize our recommendations:

1. DOT should conduct a more comprehensive regulatory impact analysis of its proposed rule and release a supplemental notice with opportunity for public participation.
2. DOT should clarify its identification of the problems it intends to solve and connect those problems to the resulting impacts.
3. DOT should expand its regulatory analysis to evaluate multiple alternative approaches of varying stringency and better account for uncertainty.
4. DOT should present social costs and benefits separately from transfers in its summary of the rule’s estimated effects, even for impacts that are unquantified or difficult to isolate.
5. DOT should expand its discussion of projected net benefits, including how the agency’s preferred approach is more likely to produce net benefits than alternative regulatory approaches.
6. DOT should consider the future impacts on innovation of its rulemaking, including negative effects on emerging markets for other species of service animals.
7. DOT should plan for retrospective review by collecting key metrics that would aid in assessing the effectiveness of any final rule.

⁹⁰ RIN: 2105-AE63, accessed April 6, 2020,

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2105-AE63>.

⁹¹ Bridget C.E. Dooling, Mark Febrizio, and Daniel R. Pérez (2019), “Accounting for regulatory reform under Executive Order 13771: Explainer and recommendations to improve accuracy and accountability,” Brookings Institution, November 2019. Available at: https://www.brookings.edu/wp-content/uploads/2019/11/ES_11072019_DoolingFebrizioPerez.pdf.