removing the period at the end of paragraphs (a)(3) and (b)(2); by inserting "; or" at the end of paragraphs (a)(3) and (b)(2); and by adding new paragraphs (a)(4) and (b)(3) to read as follows:

§ 133.43 Structures and design.

(a) * * *

(4) Section 21.25 of this chapter.

(b) * * *

(3) Section 21.25 of this chapter, except the device must comply with §§ 27.865(b) and 29.865(b), as applicable, of this chapter.

* * * * *

Issued in Washington, DC, on February 12, 1990.

James B. Busey,

Administrator.

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Tuesday
March 6, 1990

Part VI

Department of Transportation

14 CFR Part 382
49 CFR Part 27
Nondiscrimination on the Basis of Handicap in Air Travel and in Federally Assisted Programs; Final and Proposed Rules

14 CFR Parts 121 and 135
Exit Row Seating; Final Rule

DEPARTMENT OF TRANSPORTATION

14 CFR Part 382

[Docket No. 45657; Amdt. 382-3]

RIN 2105-AA18

Nondiscrimination on the Basis of Handicap in Air Travel

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department is issuing a final rule to implement the Air Carrier Access Act of 1986. The rule prohibits discrimination by air carriers on the basis of handicap, consistent with the safe carriage of all passengers. It includes general and administrative provisions and provisions concerning physical facilities and services to be provided to passengers with disabilities.

EFFECTIVE DATE: This rule is effective April 5, 1990.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th St., SW., Room 10424, Washington, DC 20590. Telephone 202-366-9306 (voice); 202-755-7687 (TDD).

SUPPLEMENTARY INFORMATION:

Other Documents Being Published With This Rule

This final rule is part of a package of rulemaking documents being published today, which collectively address issues relating to air travel for persons with disabilities. The other documents include a notice of proposed rulemaking (NPRM) to amend the Department's section 504 rule pertaining to federally-assisted airports (49 CFR 27.71), a supplemental notice of proposed rulemaking (SNPRM) concerning additional issues raised by comments to the Air Carrier Access Act rulemaking docket, and an advance notice of proposed rulemaking (ANPRM) requesting additional data about certain issues on which the Department lacked sufficient information to make a final decision in this rule. In addition, the Federal Aviation Administration is publishing its final rule on the subject of exit row seating.

Summary of Contents of Final Rule

For the convenience of readers, the following is a short summary of the highlights of this final rule:

- The rule applies to all air carriers providing air transportation. This does not include foreign air carriers. Indirect air carriers are not covered by certain provisions that concern the direct provision of air transportation services.
- A "qualified handicapped individual" is defined as a handicapped individual who validly obtains a ticket, comes to the airport for the flight, and meets nondiscriminatory contract of carriage requirements that apply to everyone. In conjunction with the provisions of the rule concerning refusal of transportation and requirements for attendants, this definition is fully consistent with the relevant provisions of the 1982 Civil Aeronautics Board rule on this subject, as Congress intended.
- Carriers must obtain an assurance of compliance from contractors who provide services to passengers.
- New aircraft (30 or more seats) must have movable aisle armrests on half the aisles in the aircraft.
- New widebody aircraft must have accessible lavatories. The ANPRM seeks more data on accessible lavatories for smaller aircraft.
- New aircraft (100 or more seats) must have priority space for storing a wheelchair in the cabin.
- Aircraft (60 or more seats) with an accessible lavatory must have an on-board chair. For flights on aircraft that do not have accessible lavatories, handicapped passengers who can use an inaccessible lavatory but need an on-board wheelchair to reach the lavatory can, with 48 hours' advance notice, have an on-board wheelchair on their flight.
- New aircraft requirements apply to planes ordered after the effective date of the rule or delivered more than two years after the effective date. No retrofit is required (although on-board wheelchairs will have to be provided within two years). However, as existing planes are refurbished, accessibility features would be added.
- Facilities and services at airports which carriers own or operate would have to meet the same accessibility standards that Federally-assisted airport operators must meet.
- Carriers may not refuse transportation to people on the basis of handicap. By Federal statute, carriers may exclude anyone from a flight if carrying the person would be inimical to the safety of the flight. If a carrier excludes a handicapped person on safety grounds, the carrier must provide a written explanation of the decision.
- Carriers may not limit the number of handicapped persons on a flight.
- Carriers may not require advance notice that a handicapped person is traveling. Carriers may require up to 48 hours advance notice for certain accommodations that require preparation time.
- Carriers may not require a handicapped person to travel with an attendant, except in certain very limited circumstances. If a handicapped person and the carrier disagree about whether these circumstances exist, the carrier may require the attendant, but the carrier cannot charge for the transportation of the attendant.
- Carriers may not keep anyone out of a seat on the basis of handicap, or require anyone to sit in a particular seat on the basis of handicap, except to comply with an FAA safety rule. FAA's final rule on exit row seating, being published today, allows carriers to place in exit rows only persons who can perform a series of functions necessary in an emergency evacuation.
- Carriers are required to provide boarding assistance, except that they need not hand-carry a person on board a small plane for which a lift, boarding chair, or other device will not work in the present state of technology. Assistance within the cabin is also required (but not extensive personal services).
- Disabled passengers' items stored in the cabin must conform to FAA carry-on baggage rules. Wheelchairs and other assistive devices have priority for in-cabin storage space over other passengers' items brought on board at the same airport, if the disabled passenger chooses to preboard.
- Wheelchairs and other assistive devices have priority over other items for storage in the baggage compartment.
- Carriers must accept battery-powered wheelchairs, including the batteries, packaging the batteries in hazardous materials packages when necessary. The carrier provides the packaging.
- Carriers may not charge for providing accommodations required by the rule.
- Other substantive provisions concern treatment of mobility aids and assistive devices, passenger information, accommodations of persons with hearing impairments, security screening, communicable diseases and medical certificates, and service animals.
- Training is required for carrier and contractor personnel who deal with the traveling public.
- Major and national carriers, and their code-sharing partners, must submit their procedures for complying with the rule to DOT for review.
- Carriers must establish their own compliance procedures, including provision for "complaints resolution officials" and responding to written

complaints. A DOT enforcement mechanism is also available.

Background

Air carrier policies and practices concerning disabled passengers have long been a troublesome and controversial subject. Many disabled passengers have objected to airline policies that they view as inconvenient, unnecessary, and discriminatory. Disabled passengers have also expressed concern about the seeming inconsistency of airline policies, asserting that it is often difficult for them to know, from one airline to the next or even from one terminal or flight crew to the next on the same airline, what conditions will be imposed on their ability to travel. Air carriers, on the other hand, have defended some of these policies as being necessary for safety, for economic reasons, or for the convenience of passengers.

In 1982, the Civil Aeronautics Board (CAB) promulgated 14 CFR part 382, a regulation intended to prohibit discrimination on the basis of handicap by certificated air carriers (i.e., the larger airlines) and commuter air carriers. The regulation was divided into subpart A (a general prohibition of discrimination), subpart B (specific requirements for service to disabled passengers) and subpart C (recordkeeping, reporting, and enforcement provisions). Only subpart A applied to all certificated and commuter carriers. Subparts B and C applied only to those carriers who received a direct Federal subsidy under the Essential Air Service program.

The legal authority for the regulation included section 504 of the Rehabilitation Act of 1973, as amended (which prohibits discrimination on the basis of handicap in Federally-assisted programs), section 404(a) of the Federal Aviation Act of 1958 (FA Act), as amended (which requires carriers to provide "safe and adequate" service), and section 404(b) of the latter Act (which prohibited "unjust discrimination" in air transportation; this subsection has since lapsed).

The Paralyzed Veterans of America (PVA) sued the CAB, arguing that even nonsubsidized carriers receive significant Federal assistance in the form of Federal Aviation Administration (FAA) air traffic control services and airport and airway improvement grants. Consequently, PVA said, all portions of the rule should apply to all carriers under section 504. The U.S. Court of Appeals for the District of Columbia agreed. *Paralyzed Veterans of America* v. *Civil Aeronautics Board*, ("*PVA* v. *CAB*"), 752 F.2d 694 (D.C. Cir., 1985). After its review of the case, the Supreme Court decided, in June 1986, that nonsubsidized carriers did not receive Federal financial assistance and, therefore, were not covered by section 504. *Department of Transportation* v. *Paralyzed Veterans of America* ("*DOT* v. *PVA*"), 477 U.S. 597 (1986). The result of this decision was to leave part 382 in effect, without change.

In specific response to the Supreme Court decision, Congress enacted the Air Carrier Access Act of 1986 (ACAA), which President Reagan signed into law on October 2, 1986. Congress enacted the statute with support from disability groups, airline industry groups, the Department of Transportation, and the Department of Justice. The Act amended section 404 of the FA Act to prohibit discrimination on the basis of handicap by all air carriers (the ACAA has been codified as section 404(c) of the FA Act, 49 U.S.C. 1374(c)). The text of the ACAA follows:

> Section 404 of the Federal Aviation Act of 1958 (49 U.S.C. 1374) is amended by adding at the end thereof the following new subsection:
>
> "PROHIBITION ON DISCRIMINATION AGAINST HANDICAPPED INDIVIDUALS
>
> "(c)(1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.
>
> "(2) For the purposes of paragraph (1) of this subsection the term 'handicapped individual' means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.
>
> "Sec. 3.1 Within one hundred and twenty days after the date of enactment of this Act, the Secretary of Transportation shall promulgate regulations to ensure nondiscriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers."

The legislative history of this statute stressed three major themes. First, the statute was enacted in response to the Supreme Court decision in *DOT* v. *PVA* that subparts B and C of the existing part 382 could apply only to carriers directly receiving Federal financial assistance. Second, the legislation responded to Congress' concern about leaving "handicapped air travelers subject to the possibility of discriminatory, inconsistent and unpredictable treatment on the part of air carriers." (Sen. Rept. 99–400 at 2 (1986)).

Third, the legislative history discussed the relationship between nondiscrimination and safety. The statute itself directs the Department to promulgate rules to ensure nondiscriminatory treatment of qualified handicapped individuals "consistent with the safe carriage of all passengers on air carriers." The Senate Report noted that the statute "does not mandate any compromise of existing DOT or Federal Aviation Administration (FAA) safety regulations." (*Id.* at 2).

In a floor statement, Senator Dole, the primary sponsor of the bill in the Senate, said that—

> Our intent * * * is that so long as the procedures of each airline [concerning the transportation of disabled passengers] are safe as determined by the FAA, there should be no restrictions placed upon air travel by handicapped persons. Any restrictions that the procedures may impose must be only for safety reasons found necessary by the FAA. Beyond this, the Secretary of Transportation should review each airline's procedures in light of the regulations to be promulgated pursuant to [the Act] to ensure that the procedures of each airline do not contain discriminatory requirements. (132 Cong. Rec. 21771, August 15, 1986.)

The legislative history of the ACAA is discussed in greater detail below as it applies to specific legal issues or specific sections of the final regulation.

In August 1986, in response to correspondence from blind individuals and Members of Congress, and prior to the enactment of the ACAA, the Department published an informational notice requesting comment on a series of issues of concern to blind air travelers. The Department received several hundred comments on that notice, which have been taken into account in the development of the ACAA rule.

Originally, the Department considered an interim final rule making the old part 382 applicable to all carriers, followed by a subsequent rulemaking to address changes in the rule and additional issues that parties wished to raise. However, the Department was urged by groups representing persons with disabilities to use the regulatory negotiation technique to develop proposed and final regulations, rather than publishing an interim final rule. In agreeing to use this technique, the Department and the parties were aware that the Department could not meet the statutory deadline for issuing final regulations. However, the disability groups involved preferred this approach even though it would delay the issuance of a notice of proposed rulemaking (NPRM).

In regulatory negotiation, the Department convenes an advisory committee under the Federal Advisory Committee Act. The committee consists of representatives of interests affected by the rulemaking. In this case, disability groups represented on the

committee included the Paralyzed Veterans of America (PVA), the National Council on Independent Living, the American Council of the Blind, National Federation of the Blind (NFB), National Association of Protection and Advocacy Systems, National Association of the Deaf, and the Society for Advancement of Travel for the Handicapped. Air travel industry representatives included the Air Transport Association (ATA), Regional Airline Association (RAA), National Air Carrier Association, National Air Transportation Association, Airport Operators Council International/ American Association of Airport Executives, and the Association of Flight Attendants. In addition to the Department, the Architectural and Transportation Barriers Compliance Board (ATBCB) represented the Federal Government's interest. A neutral mediator from the Federal Mediation and Conciliation Service chaired the committee.

The advisory committee met from June through November 1987. The group tentatively agreed on a substantial number of issues and produced draft consensus recommendations for proposed regulatory language on these points. Substantial progress was made, and differences narrowed, on several other issues. The negotiations were not completed, however, due to an impasse over the issue of exit row seat restrictions. As a result of this impasse, the parties never came to a formal vote or consensus (i.e., a sign-off) on the entire package. Consequently, while the Department used the results of the process as an important resource for developing the NPRM, the NPRM represented the Department's own proposals, since there were not final advisory committee recommendations on which to base the proposal.

The NPRM was published June 22, 1988 (53 FR 23574), with an initial comment closing date of September 20, 1988. Both disability groups and airline industry groups asked for a 90-day extension of the comment period (the ATA asked for an additional 30-day reply period as well). The Department granted these requests, and the comment and reply periods ended January 19, 1989.

The Department received over 300 comments on the NPRM. The lengthy comments submitted by the ATA, for the carriers, and PVA, on behalf of a large number of disability organizations, were the most comprehensive expressions of the views of the air carrier industry and disability community, respectively, that the Department received. These comments pertain to every section of the regulation. Other comments that addressed many of the provisions of the proposed rule were submitted by such parties as the RAA and NFB. The positions of these commenters are typically identified by name throughout the remainder of the preamble. The Department also took the comments of other parties fully into account; these comments (which often make the same substantive points as the ATA or PVA comment) are not always identified by the name of the commenter, however. The subsequent portions of the preamble discuss issues or regulatory provisions by summarizing the positions of the commenters and indicating the Department's response to those comments, as incorporated in the final rule.

Legal and Other General Issues

Commenters brought up five major legal or general issues in connection with the rulemaking, in addition to their comments on specific provisions of the NPRM. These issues concern the standard to be applied to accessibility modifications of aircraft and facilities (i.e., equal access vs. section 504 standard and what constitutes an undue burden), the relationship between the safety and nondiscrimination aspects of the ACAA and its effect on carrier discretion, the basis in the record for the rulemaking, preemption of state law, and whether carriers discriminate on the basis of handicap.

1. Equal Access/504 Standard Comments

Comments—PVA says that the purpose of the ACAA is to require "equal access." To fulfill this purpose, "DOT must require air carriers to adapt all feasible accommodations necessary for equal access," which means that DOT "must focus on making air carriers fully accessible, except where flight safety is clearly compromised or where accommodations would be technically impossible or would cost so much to threaten the existence of an air carrier." Equal access is a different, and more stringent, standard than required by section 504.

This equal access standard emerges, in PVA's view, from the legislative history of the ACAA. PVA cites statements by Senator Dole (that the purpose of the ACAA is "to provide equal access to air transportation," (132 *Cong. Rec.* 21770 (August 15, 1986)) and Senator Metzenbaum (that "all Americans should be treated equally when they [use] commercial air carriers" (*Id.* at 21772), for this proposition. Along similar lines, Senator Cranston said that "full access is vital to millions of individuals' pursuit of business and personal matters." (*Id*). PVA also cites statements in the House by Rep. Snyder and Rep. Ackerman to the effect that the bill is intended to prevent handicapped persons from being "second class citizens when it comes to air travel." (130 *Cong. Rec.* 24070–71, September 18, 1986.) PVA also cites statements by various members, discussed later in this preamble, saying that restrictions on handicapped passengers may be imposed only for safety purposes, and argues that this means that access can be limited only for safety reasons.

ATA argues that it is clear from the legislative history that the ACAA was intended to circumvent the decision of the Supreme Court in *DOT* v. *PVA* that section 504 did not apply to nonsubsidized carriers, since there are not recipients of Federal financial assistance. ATA cites statements to this effect by Senator Dole (*Id.* at 21770) and in the Senate Report on the bill (S. Rept. No. 99–400 at 2 (1986)), and could have cited numerous other such statements. ATA mentions that Senator Dole also commented that the bill incorporated "compromise definitions which rely heavily on language and precedents from the Rehabilitation Act." (132 *Cong. Rec.* 21770, August 15, 1986).

PVA rejoins that even if one assumes that 504 standards apply, 504 requires affirmative steps to accommodate persons with disabilities. PVA cites *Dopico* v. *Goldschmidt* 687 F.2d 644 (2d Cir., 1982) and *APTA* v. *Lewis*, 655 F.2d 272 (D.C. Cir., 1981) for this proposition. The issue, PVA says, is the extent of the accommodation required. While "undue financial and administrative burdens" are not required, *Southeastern Community College* v. *Davis*, 442 U.S. 392, 413 (1979), it is appropriate to look at the overall size of the program, including the size of facilities and budget; the type of operation; the nature and cost of the accommodations needed; and the effect of making the accommodations on the program's accomplishments.

PVA says that the 1987 air carrier operating revenues were $57 billion with $2.5 billion annual earnings. The industry's assets total about $54 billion, including more than $35 billion in flight equipment. Against this, DOT's extended 20-year cost projection of $393.4 million for accessible lavatories, on-board wheelchairs, movable armrests and training is far from an undue burden—less than one percent of the industry's annual operating revenues for a single year. Carriers could pay for

it by a ten-cent surcharge on each ticket. This is far from an undue burden, in PVA's view. PVA also cites *ADAPT* v. *Dole*, 676 F. Supp. 635 (E.D. Pa., 1988) for the proposition that it is inconsistent with section 504 to arbitrarily limit requirements to spend money for accessibility.

ATA views costs differently. It emphasizes case law (e.g., *Southeastern Community College; APTA; Alexander* v. *Choate*, 469 U.S. 287 (1985); *Handicapped Action Committee* v. *Rhode Island Transit Authority*, 718 F.2d 490 (1st Cir., 1985)) which discusses limits on the reach of section 504 where cost burdens or fundamental alterations of programs are involved. ATA distinguishes cases cited by PVA by pointing to the fact that most construe not only section 504 but also section 16 of the Urban Mass Transportation Act, which calls for "special efforts" to accommodate handicapped persons and requires specific service criteria. Moreover, ATA's cost projections show an $80 million dollar annual cost for the key NPRM requirements, which would amount to 36 percent of the industry's average annual net profits of $221 million. This is clearly an undue burden, ATA argues. Congress did not contemplate that the ACAA would involve such a burden. For this proposition, ATA cites statements by Rep. Hammerschmidt (that the bill would not "impose any financial burdens on the airlines," 132 *Cong. Rec.* 24016, September 18, 1986) and in the Senate Report ("the net effect of the regulations * * * will not significantly increase the regulatory burden imposed on air carriers." (S. Rept. 99–400 at 3 (1986)).

DOT Response—It is clear that Congress intended section 504 standards to apply to implementation of the ACAA. The context of the passage of the ACAA and all the legislative history that addresses the subject make clear that Congress intended the ACAA to put the ACAA in the place of Section 504, which the Supreme Court in *DOT* v. *PUT* had said did not apply to non-subsidized carriers. Floor comments about "equal access" and "second class citizenship" do not evince an intent by Congress to create a new, separate standard for accessibility, beyond that of section 504. The language of the statute is essentially similar to that of Section 504, and, even considered in light of the legislative history, does not give rise to an inference that a stricter-than 504 standard is established by the statute. Even recent case law in the transit area (see *ADAPT* v. *Skinner*, 881 F.2d 1184 (3d Cir., *en banc*, 1989)) does not claim to find a right of equal access under section 504.

Given that section 504 standards apply to this ACAA rule, it follows that the regulations may not impose "undue financial or administrative burdens" (see *Southeastern Community College* and *APTA*) or require fundamental changes in the carriers' programs (see *Southeastern Community College* and *Alexander*). This leaves the difficult question of what constitutes an "undue" burden. The term clearly carries the implication that some burdens are "due," while others are not. Neither statutes nor case law provide any "bright line" between the two.

To PVA, virtually any burden is "due," since costs of accommodations are small compared to carrier assets, operating revenues, or annual earnings. To ATA, the NPRM proposes "undue" burdens because costs would represent a large percentage of net profits. Neither view is complete. In a private sector industry (as contrasted to public enterprises, like most mass transit authorities), the ability of enterprises to make a profit is an important consideration, which it would not be reasonable to ignore. On the other hand, the overall magnitude of the industry is also a relevant consideration, since the total resources available to accommodate handicapped persons are significant in an industry of this size.

The Department is not adopting any specific view of what must constitute a "due" or "undue" burden. Rather, the Department has evaluated the need for various proposed accommodations and the cost of these accommodations. The regulation is intended to strike a reasonable balance between disability groups' concerns about sufficient accommodations being provided and carriers' concerns about the costs of those accommodations. Such a balance, we believe, is fully consistent with—indeed, mandated by—section 504 principles which apply to the ACAA.

2. Safety, Nondiscrimination and Discretion

Comments—ATA argues that several provisions of the NPRM (e.g., definition of qualified handicapped individuals, refusals of service, attendants) clash with Federal Aviation Act prinicples. Under the FA Act, FAA rules are "minimum standards" (49 U.S.C. 1421(a)) and FAA rules are to take into account the duty of air carriers to perform their functions "with the highest degree of safety" (49 U.S.C. 1421(b)). ATA notes that the Supreme Court has recognized these provisions. *U.S.* v. *Variq Airlines*, 467 U.S. 797 (1984). ATA understands these provisions to mean that carriers are intended to be able to exceed FAA safety rules and that "some discretionary decision making on the part of airline personnel is inevitable" when dealing with disabled passengers. *PVA* v. *CAB*, 752 F. 2d at 720–21.

ATA cites several cases in which courts have permitted air carriers or other transportation employers to restrict employment in the interest of safety. *Usuery* v. *Tamiami Trail Tours*, 531 F. 2d 224 (5th Cir., 1976); *Harriss* v. *Pan American Airways*, 437 F. Supp. 413 (N.D. Cal., 1977)), *aff'd* 649 F.2d 670 (9th Cir., 1980); *Levin* v. *Delta Air lines*, 730 F.2d 994 (5th Cir, 1984); *Murnare* v. *American Airlines*, 667 F.2d 98 D.C. Cir., 1981; and *Johnson* v. *American Airlines*, 745 F.2d 988 (5th Cir., 1984). These cases involved older drivers, pilots and flight engineers (*Useury, Murnare* and *Johnson*) or pregnant flight attendants (*Harriss* and *Levin*). The courts found that they could be denied employment on *bona fide* occupational qualification/business necessity grounds related, at least in part, to safety considerations.

ATA also cited cases in which courts upheld carriers' discretion in imposing restrictions on disabled passengers. *Anderson* v. *USAir*, 619 F. Supp. 1191 (D.D.C., 1985), *aff'd on other grounds* 818 F.2d 49 (D.C. Cir. 1987) and *Adamsons* v. *American Airlines*, 444 N.E. 2d 21 (N.Y., 1982). *Anderson* involved a blind passenger evicted from an exit row. The District Court found that the carrier's policy was consistent with section 504, part 382, and FAA regulations. The Court of Appeals did not consider the section 504 claim, but found for the carrier on the basis that there was no private right of action under section 404(a) of the FA Act. The court explicitly did not decide what effect the ACAA might have had on the case, since it was enacted after the incident in question. *Adamsons* involved a refusal to provide transportation to a passenger who was paralyzed from the waist down by a recent undiagnosed spinal hematoma, was crying out from evident severe pain, and was using a catheter and disposal bag. The court held that the carrier did not abuse its discretion under section 1111 of the FA Act (49 U.S.C. 1511), which allows carriers to deny passage when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

In its comment on this issue, ATA did not discuss the language or legislative history of the ACAA. PVA, on the other hand, focused its argument there. PVA quoted Senator Dole:

> our intent in [the ACAA] is that so long as the procedures of each airline are safe as determined by the FAA, there should be no

restrictions placed upon air travel [by] handicapped persons. Any restrictions that the procedure may impose must be only for safety reasons found necessary by the FAA. (132 *Cong. Rec.* 21771, August 15, 1986.)

PVA also cites similar statements by Rep. Mineta (132 *Cong. Rec.* 24070, September 18, 1986) and other members of Congress. In PVA's view, unless FAA, through rulemaking, has found a particular restriction to be necessary, the ACAA precludes a carrier from imposing it.

PVA also refers to FAA's history of action under 14 CFR 121.586. This regulatory provision tells carriers to file procedures with FAA for dealing with passengers who may need assistance in an emergency evacuation. As stated in *Southwest Airlines Enforcement Proceeding* (DOT Docket No. 42425), this rule imposes "an affirmative obligation upon the Administrator to respond when a safety * * * problem may exist with [the airline policies.]" If FAA has not affirmatively acted to nullify or change a carrier policy, then that policy must be considered to be safe, and more restrictive policies are not "necessary" for safety. PVA then points to a number of relatively liberal carrier policies which FAA has not required to be changed in areas like number limits and attendants. As in *Southwest Airlines*, PVA says that more restrictive policies are contrary to nondiscrimination requirements.

PVA denies that any of the cases cited by FAA held that "concern for safety must prevail". It distinguishes the employment discrimination cases ATA cites on the ground that carriers can properly impose more stringent conditions on their employees than upon passengers, and points out that, even in the employment discrimination area, the proponents of a discriminatory requirement must meet a burden of proof as to its necessity; mere assertion of a safety rationale is not enough. Under *Usuery*, PVA argues, a carrier must be able to demonstrate the likelihood of injury or death to make this showing.

In addition, employment discrimination law requires objective evidence (not subjective assumptions) to establish a basis for a facially discriminatory restriction and provides that, if acceptable, less restrictive means are available, they must be used. *Wright* v. *Olin*, 697 F.2d 1172, 1190–91 (4th Cir., 1982).

PVA objects to carrier "discretion," which it views as the heart of inconsistent and arbitrary treatment that handicapped persons have suffered over the years. Detailed rules remove the need for carrier discretion, PVA argues.

DOT Response—This regulation is for the purpose of implementing a statute. The ACAA mandates that carriers not discriminate in providing air transportation. The statute also requires that DOT's rules be consistent with the safe carriage of all passengers. As a statutory matter, DOT is required to achieve both objectives.

On this subject, the Senate Report says the legislation "does not mandate any compromise of existing * * * FAA safety regulations." It says that carriers are intended not to impose upon handicapped travelers "any regulations or restrictions unrelated to safety * * *" Senator Dole stated that any restrictions that carriers impose "must be only for safety reasons found necessary by the FAA. Beyond this, the Secretary should review each airline's procedures to ensure that [they] do not contain discriminatory procedures."

In the House, Representative Mineta said that the Department should ensure that carriers "impose only those restrictions necessary for safety." Legislators said that DOT should review carrier policies to ensure they conform with the regulations promulgated under the ACAA (Representatives Mineta and Hammerschmidt; Senators Metzenbaum and Dole). They also said a purpose of the rule was to ensure consistency in carrier policies (Senator Cranston; Representatives Mineta and Snyder).

To review carrier procedures against the criteria of a nondiscrimination rule and to ensure consistency among carrier procedures clearly implies the power to constrain carrier discretion. DOT has this authority under the ACAA and will exercise it in promulgating and implementing this rule.

In doing so, the Department is not mandated to alter existing FAA safety regulations. We will not do so. When FAA "finds" that a restriction is "necessary" for safety, that is a legitimate ground for a carrier imposing a restriction. FAA can be said to have made a "finding" that a restriction is "necessary" for safety only when it issues a regulation mandating that specific restriction. FAA advice or suggestions, or carrier practices which FAA has not found to be unsafe, are not equivalent to FAA findings that a restriction is "necessary for safety."

This view is consistent with the provisions of 49 U.S.C. 1421(a). FAA safety regulations are "minimum standards," i.e., they constitute a "bottom line" that FAA has found necessary for safety. The regulations establish what carriers "need to have" to be safe. Absent other legal constraints, carriers have the discretion to impose additional requirements intended to enhance safety. Doing so, in the absence of other legal constraints, is also consistent with carrier's common law obligation to ensure the highest level of safety.

The ACAA is precisely such a legal constraint on the carrier's discretion to impose additional requirements, above the "minimum standards" found to be necessary for safety by the FAA, where the additional requirements affect handicapped persons in a way differently from other passengers. Where a restriction required as necessary for safety by an FAA rule mandates different treatment, the ACAA does not stand in its way. Where an optional carrier action, not mandated by an FAA safety rule, would require different treatment, the ACAA prohibits it.

ATA is correct in saying that 49 U.S.C. 1421(b) refers to maintaining "the highest degree of safety." This statement, which in context refers to a consideration that the FAA is to take into account in developing its safety rules, does not constitute a legal basis on which carriers may ignore nondiscrimination requirements. Nor, realistically, can it be read as a legal mandate that carriers take every action that would arguably enhance safety. Newer aircraft may well be safer than older aircraft. More experienced pilots may well be safer than less experienced pilots. It may be safer never to carry any children or elderly persons, and to concentrate on carrying only ablebodied adults. It is probably safer to refuse to transport any carry-on items in the cabin. Yet no one, least of all ATA, would argue that carriers must ground their old planes and young pilots. Carriers have discretion, under FAA's "minimum standard" carry-on baggage rule, to ban carry-on baggage completely, but few if any do so. Carriers regularly carry large numbers of children and elderly passengers. All these carrier actions are sensible, and fully consistent with law. 49 U.S.C. 1421(b) is not a mandate to the contrary in these areas, any more than it is a mandate to impose restrictions on handicapped passengers that are not necessary for safety, as determined by an FAA rule.

The several employment practices cases ATA cites do not stand for the proposition that an assertion of a safety rationale for a carrier practice must necessarily triumph over nondiscrimination requirements. They simply stand for the proposition that there are some fact situations that lead

courts to conclude that a particular carrier practice involves a *bona fide* occupational qualification or business necessity. That a court believes that a carrier has shown a sufficient safety rationale to establish that a 62 year old flight engineer or a pregnant flight attendant should not be employed does not demonstrate that DOT is legally precluded from implementing the ACAA in a way that constrains carrier discretion.

Where courts have directly considered a carrier's treatment of handicapped passengers, the results are mixed. Sometimes (e.g., *Anderson* and *Adamsons, supra*) carrier actions are upheld. Other times (e.g., *Angel* v. *Pan American World Airways,* 519 F. Supp. 1173 (D.D.C., 1981); *Jacobson* v. *Delta Airlines,* 742 F. 2d 1202 (9th Cir., 1984)) carriers actions are rejected. In all these cases, carriers asserted safety rationales for imposing restrictions on handicapped passengers. In all cases, the courts examined these rationales on their merits; they did not simply determine that the assertion of a safety concern ended the inquiry.

The decisions in all four of these cases are consistent with this final rule. The final rule permits carriers to exercise their discretion under 49 U.S.C. 1511 to exclude passengers who would or might be inimical to the safety of flight (*Adamsons*). It defers to an FAA rule permitting restrictions on exit row seating (*Anderson*). It would prohibit attendant requirements for persons who can assist in their own evacuation (*Angel*) and administrative requirements for handicapped passengers that are not required for all passengers (*Jacobson*).

Consistent with the Department's decision in the *Southwest Airlines* case, the Department also determines that if the FAA has not concluded that less restrictive carrier procedures are inconsistent with safety, then carrier requirements which are more restrictive of handicapped passengers would not be necessary for safety, and are therefore inconsistent with the ACAA.

ATA relies on language in *PVA* v. *CAB* for the proposition that airlines must have "decisional discretion" in many aspects of providing service to handicapped passengers. That decision pointed out, however, that the old Part 382 significantly limited the discretion of airline personnel. 752 F. 2d at 720–21. Carriers were not to have "unbridled discretion." *Id.* at 721. Clearly, the decision does not stand for the proposition that an agency rule may not limit carrier discretion in any way. The only argument is over what the constraints are. Against the background of the ACAA (see discussion below under "Carrier Discrimination"), the Department is amply justified in concluding that constraints differing from those of the CAB version of Part 382 are well within the scope of the ACAA, since these constraints are necessary in order to solve the kinds of problems which the statute addresses.

In discussing the CAB's resolution of these issues, the court in *PVA* v. *CAB* said that it could not say that "the agency's decision * * * manifests a clear error in judgment" or that the CAB's regulatory language "lacked a rational basis," such that the PVA's Administrative Procedure Act challenge to this portion of the regulation would prevail.

This finding cannot fairly be said to have established that the CAB's resolution was in some sense legally mandatory or binding. It has not established a legal requirement for DOT to copy the former Part 382. Like the CAB under the statutes it implemented, the Department is free to exercise its reasonable "decisional discretion" under the ACAA, even where the substantive result may differ from the CAB's 1982 decisions.

PVA correctly points out that the Senate Report suggested that DOT "may wish to refer to existing regulations * * * including, but not limited to * * * [the existing] 14 CFR part 382 * * *" (S. Rept. 90–400 at 5 (1986)). Clearly, Congress did not mandate that DOT would be bound to photocopy the old version of the rule.

3. Basis for the Rulemaking

Comments—ATA argued that DOT may not use the regulatory negotiation, and any tentative agreements reached by the advisory committee, as a basis for the proposed rule, since final, binding consensus was never reached. ATA also contends that the proposed rule is not based on adequate information concerning the need for this rule; i.e., an independent body of information supporting the need for any new rule, and for this proposal in particular. DOT failed to explore alternative approaches like simply making the CAB version of part 382 applicable to all air carriers.

PVA suggested a number of bases for the rulemaking. These included the legislative history of the ACAA (i.e., the inability of the old part 382 regulations to prevent discrimination and inconsistency), post-1982 changes in the industry (i.e., a more detailed rule is needed in a deregulated environment), the material in the record of the proceeding (including material provided by or for the advisory committee), and complaints filed with DOT.

DOT Response—ATA correctly points out that there was no final, binding agreement reached through the regulatory negotiation. However, the parties to the regulatory negotiation provided a substantial volume of material and contributed much valuable information to the discussions. Public meetings and input from non-members of the advisory committee produced additional information. All of this material became part of the basis for the NPRM.

The Department committed to the parties that, to the greatest extent feasible, it would use tentative agreements reached by the committee as the basis for portions of the NPRM. We did so. The NPRM was the Department's proposal; it did not purport to be a consensus proposal of the committee. Nevertheless, the information generated through the regulatory negotiation process is properly part of the record and basis for this rulemaking.

If ATA is contending that some separate, independent basis or body of information is a prerequisite to issuing an NPRM, it misunderstands the regulatory process. An NPRM is intended to be a vehicle for securing comments and data that will form the basis for a final rule. Beyond the ACAA's statutory requirement for rulemaking, no other basis is needed for the NPRM.

The Department did consider simply publishing an interim final rule applying the old version of part 382 to all carriers. This consideration is a matter of public record, and was known by members of the regulatory negotiation advisory committee, and the ATA knew this fact when it agreed to participate in the negotiation. The Department did not follow this course for several reasons. First, it responded to requests from parties that the rulemaking be produced through regulatory negotiation. Second, it was aware that the old part 382 did not address a number of issues of concern to passengers and carriers. Third, under the statute, DOT was not bound to use the old rule without change. Fourth, the legislative history indicated that Congress was deeply dissatisfied with carrier actions under the old rule (see discussion below under "Carrier Discrimination"). The rationales for additional rulemaking suggested in PVA's comments have substantial validity, and constitute additional grounds for moving to a new, more detailed, regulation in place of the old Part 382.

4. Preemption of State Law

Comments—ATA urges that the rule expressly preempt state laws protecting persons with disabilities as applied to the provision of air transportation. The rule is national in scope, part of the Federal regulation of air travel, and "occupies the field." Carriers should not be subject to differing state-to-state regulation as well as Federal regulation. ATA also cites section 105 of the FA Act, which preempts from state law matters affecting "services" to airline passengers.

PVA opposes a preemption provision. It is not necesssary and could restrict other options for improving the accessibility of air transportation (e.g., through state enforcement that may be more responsive to complainants than DOT), and could have unintended consequences (e.g., unintended coverage of hotel accommodations that are part of an air travel package). Any state regulations that directly conflict with the rule would be preempted, in any case. Also, section 105 is a narrow statute, which does not preclude all state regulation in matters related to air transportation.

DOT Response—This is a detailed, comprehensive, national regulation, based on Federal statute, that substantially, if not completely, occupies the field of nondiscrimination on the basis of handicap in air travel. Moreover, providing transportation to passengers is clearly a "service" within the meaning of section 105 of the FA Act (49 U.S.C. 1305(a)(1)), bringing that statute's preemptive force into play. courts have found that section 105 preempts state law in the area of nondiscrimination on the basis of handicap (*Anderson, supra*, 619 F. Supp. at 1198; 818 F.2d at 57; *Hingson* v. *Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th cir., 1984)).

Consequently, interested parties should be on notice that there is a strong likelihood that state action on matters covered by this rule will be regarded as preempted. However, the Department will offer its opinion on preemption matters on a case-by-case basis, where it is requested.

5. Carrier Discrimination

Comments—ATA contends adamantly that carriers do not discriminate against handicapped passengers. The industry provides good service to persons with disabilities, providing many accommodations and carrying wheelchairs, for example, with minimal problems of loss or damage. (Advance notice is important to permitting accommodations to be made, ATA adds). ATA complains that the tone of the NPRM unfairly made it appear that carriers regularly discriminate. Indeed, ATA says, there is little evidence of well-founded consumer complaints of discrimination. Occasional incidents of insensitivity, or passenger service mistakes that sometimes can affect any passenger, do not equate to a pattern of discrimination.

PVA views the matter differently. The "horror stories" and documented complaints of many handicapped passengers, language in carrier manuals, comments of some carriers to the docket, and the absence of adequate physical accessibility and accommodations all provide evidence of discriminatory attitudes and practices on the part of carriers and their personnel. PVA also points to the legislative history of the ACAA, which makes numerous references to carrier discrimination and arbitrariness.

DOT Response—The debate between carriers and disability groups on this issue takes on, at times, a rather unhelpful "No, I didn't—Oh yes you did" tone. It is fair to say that no one attempts to paint carriers as "bad guys" who, because of some animus against persons with disabilities, set out deliberately to make handicapped passengers' travel experiences miserable. It is also fair to say, based on the record of the rulemaking, that carriers—from a mixture of motives including safety, carrier convenience, and uncertainty about how to accommodate handicapped passengers—take actions which many passengers with disabilities view as discriminatory.

This debate is, in one important sense, irrelevant to this rulemaking. The Department is charged with implementing the ACAA, which prohibits discrimination. Whether or not carriers engage in widespread discrimination, the Department has the duty of promulgating a rule that forbids discriminatory practices.

However, it is clear from the legislative history of the ACAA that Congress believed that a wide variety of discriminatory practices continued to exist under the old Part 382 and that legislative action was necessary to correct the abuses. For example, the Senate Report referred to the concern, post-*DOT* v. *PVA*, That handicapped passengers would be "subject to discriminatory, inconsistent, and unpredictable treatment" and mentioned the concerns of disabled passengers about discriminatory or inconsistent requirements. (S. Rept. 40–400 at 2 (1986)).

The problems to which the Committee and several individual members referred included refusals to provide transportation, extra charges, segregated waiting areas and aircraft seating, loss of or damage to equipment, requirements to sit on a blanket, and overly long advance notice requirements. These issues, as well as the overall issue of ensuring consistency in airline procedures, are matters which this rule addresses.

Section-by-Section Analysis

This portion of the preamble discusses each regulatory section of the NPRM, the comments made about it, and the Department's responses to the comments. For convenience, the regulatory sections are discussed in the order they appear in the final rule.

Section 382.1—Purpose

NPRM—The proposed rule stated that the purpose of the regulation was to prohibit carriers from discriminating against qualified handicapped individuals on the basis of handicap in the provision of air transportation, consistent with the safe carriage of all persons. The proposed provision also stated three policy aims of the rule—access to air transportation for handicapped passengers, imposition of only safety-related restrictions on their travel, and predictable services for them. The section also stated that nothing in the rule was intended to impose undue financial burdens.

Comments—PVA objected to the "undue burdens" and "consistent with the safe carriage of all passengers" language of the proposed section. A large number of other disability community commenters also objected to the "safe carriage" language, and a few of these comments also objected to the mention of "undue burdens." The Architectural and Transportation Barriers Compliance Board (ATBCB) and Department of Justice (DOJ) suggested clarifications of the "undue burdens" language to better express their views of the application of this concept. ATA and RAA, while agreeing that the "safe carriage" and "undue burdens" concepts were appropriate, objected to the three policy statements, which they felt put an inappropriate gloss on the requirements of the statute. ATA suggested reducing the section to a simple statement that the rule was intended to carry out the statute.

DOT Response—The purpose section of any regulation is not intended to be an operative provision. It imposes no requirements. Nor is it intended to set a tone for the rule that favors one party or

another's position. To avoid this pitfall, and to avoid making policy statements which, as RAA suggests, may be superfluous in light of the substantive sections of the rule, we have concluded that the ATA's suggestion of simplifying the section has merit. Therefore, the final rule section states that the purpose of the rule is to implement the ACAA and recites, verbatim, the language of the Act. The Department also agrees with commenters that the Department would not have the authority, under the ACAA, to impose undue administrative or financial burdens on carriers, or cause them to alter the nature of their programs. The rule has been designed to avoid doing so. Some potential requirements, which may increase carrier burdens, are among those about which comment is being sought in the accompanying ANPRM and SNPRM. At the time the Department conducts additional rulemaking pursuant to these documents, we will consider whether additional steps to avoid undue burdens are needed, as some comments (e.g., from DOJ) suggested.

We would point out that, as with any OST regulation, regulated parties may avail themselves of the procedures of 49 CFR § 5.11 if they believe that an exemption is warranted from any provision of the rule, for undue burdens or other reasons. To be considered favorably under this procedure, an exemption request must be based on special circumstances faced by the party requesting the exemption that make it impracticable to comply with the generally applicable requirement. Exemptions are not intended to be a backdoor device for amending a rule; issues considered during the rulemaking or matters which apply to a class of regulated parties are not appropriate grounds for an exemption request.

Section 382.3—Applicability

NPRM—The NPRM would have applied the rule to all air carriers providing air transportation. An exception was made for indirect air carriers, to whom provisions concerning aircraft operations would not have applied (on the assumption that indirect air carriers, by definition, do not engage in aircraft operations). Finally, the section stated that nothing in the rule was intended to authorize or require carrier noncompliance with an FAA safety rule.

Comments—ATA suggested that the language of the proposal concerning compliance with FAA safety rules was unnecessary. It recommended adding a provision disclaiming application of the rule to services or facilities of air carriers which are provided or located in foreign countries and controlled by foreign governments and where U.S. carriers have no authority to require compliance with DOT regulations. ATA agreed with the proposed exclusion of coverage for indirect air carriers, as did RAA, which also suggested excluding charter flights on the basis that they were negotiated contracts.

PVA disagreed with the exclusion for indirect air carriers, citing several examples of situations in which indirect carriers may provide services covered by the provisions of the rule relating to flight operations (e.g., seat assignments made by tour operators, arrangements for baggage handling by a tour operator representative accompanying a flight, provision of flight information, making arrangements related to service animals, etc.).

PVA also suggested using regulation of indirect air carriers as a mechanism for extending coverage to foreign air carriers in some situations (e.g., by prohibiting a U.S. tour operator from booking a tour on an inaccessible foreign airline). Another PVA suggestion relating to foreign carriers would involve amending the Department's section 504 regulation for Federally-assisted airports to require the airports to include provisions in their leases with foreign carriers obligating the carriers to meet regulatory standards equivalent to those of this regulation. PVA also asked for an amendment to the Department's section 504 regulation to cover carriers receiving Essential Air Service (EAS) subsidy.

PVA, like ATA, suggested that the proposed paragraph on FAA safety regulations should be deleted. Finally, PVA said that the rule should require nondiscrimination on the basis of handicap in carriers' employment practices, at least for those jobs involved in the provision of air transportation. Since the statute applies to carriers "in the provision of air transportation," and since pilots, baggage handlers, ticket agents, etc., do work related to providing air transportation, PVA argued, the statute should be read to prohibit discrimination in filling such positions. ATA strongly disagreed with PVA on this point, saying that there was no basis in the statute for coverage of employment practices.

Some other disability organizations and state and local government commenters agreed with PVA with respect to coverage of indirect carriers under all provisions of the regulation. The National Air Carrier Association argued against any coverage of charter flights, especially on flights chartered by the Department of Defense. The International Air Transport Association (IATA) suggested that the rule should clarify that foreign travel agents and foreign providers of airport facilities at non-U.S. locations were not covered by the rule. The ATBCB concurred in PVA's position concerning coverage of foreign air carriers via lease provisions at Federally-assisted airports. The NFB joined the consensus concerning deletion of the FAA safety rule language.

DOT Response—All parties who addressed the subject suggested that the FAA safety rule language of the NPRM could be deleted. It is clear, as a matter of law, that carriers must comply with FAA safety rules. However, re-emphasizing this point in the regulation, while perhaps not legally essential, is not harmful, and is a useful reminder of the relationship between nondiscrimination requirements and FAA safety rules. We would also point out that FAA, in addition to "CFR" regulations, issues Airworthiness Directives which have mandatory effect on carriers, and also issues guidance interpreting regulations. This provision is intended to encompass any FAA safety issuance having mandatory effect.

The Department does not agree with ATA that it is appropriate to exclude from coverage all activities of U.S. carriers carried out in foreign countries. The ACAA clearly applies to air carriers (i.e., U.S. carriers) in the provision of air transportation. The provision of air transportation is not limited, under the Federal Aviation Act, to the provision of air transportation within the borders or airspace of the United States. By accepting this suggestion, the Department would effectively amend the ACAA to narrow its scope from what Congress provided.

At the same time, the Department agrees with IATA's comment that the regulation should not cover foreign travel agents and airport operators at locations outside the United States. These parties are not U.S. air carriers; enforcement action against them, even if possible legally, would be very difficult practically. New language has been added to the regulation excluding these parties from coverage.

Extending coverage to foreign air carriers via their leases at Federally-assisted airports, as PVA suggests, is clearly beyond the scope of this rulemaking. That is, the Department could not do so under the authority of the ACAA, to which this rulemaking pertains, but would need to do so by proposing an amendment to 49 CFR

§ 27.71, the Department's section 504 regulation for Federally-assisted airports. The Department is not persuaded that following this suggestion would be a good idea.

Departmental officials have stated, as pointed out in the PVA comment, that a lease mechanism of this kind could have been used to extend part 382 requirements to non-subsidized carriers, had Congress not made this unnecessary by enacting the ACAA. However, there is a serious issue of whether imposing conditions on foreign carriers via airport leases would be consistent with bilateral or multilateral agreements governing international air transportation. This is particularly so if the lease arrangements purported to bind foreign carriers' activities, even those not carried out in the United States. If the lease arrangements only governed activities taking place in the U.S., the efficacy of the requirements would be doubtful. PVA's other suggestion, to prohibit indirect air carriers from engaging inaccessible foreign air carriers, is also inadvisable. There is no evidence that Congress contemplated any coverage of foreign carriers. Moreover, many foreign carriers do charter or tour work as a sideline. It would not be economically rational for them to make modifications in their facilities and services like those called for in this rule for a small portion of their total business. Consequently, they would probably rather drop out of providing service arranged by U.S. indirect air carriers than bear the expense. The result would be fewer choices, less competition, and higher consumer prices for passengers using the services of U.S. indirect carriers, without a consequent improvement in accessibility for handicapped passengers.

In the NPRM, the Department proposed to exempt indirect air carriers from coverage under several sections of the rule because those sections involved the direct provision of air transportation services, which is precisely what indirect air carriers do not do. The rationale for the Department's proposal was that it was silly to purport to apply to indirect carriers requirements for doing in an accessible fashion things that they did not do at all. PVA did, however, cite several at least hypothetical examples of services which could be provided by indirect carriers that, if provided by direct carriers, would be covered by the rule. Indirect carriers are covered by the general nondiscrimination provision of section 382.7, which has been changed to provide that an indirect carrier, if it offers services that are covered under the rule for direct air carriers, must also comply with the provisions in question with respect to these services or accommodations.

EAS carriers, like other air carriers, are subject to these regulations. PVA suggests duplicate coverage under the DOT 504 rule to cover the possibility of intrastate carriers receiving EAS subsidy but not being subject to the ACAA, as well as a means of applying fund cutoff sanctions for violations by EAS carriers. The Department will include in the NPRM it will publish concerning the airport accessibility section of its section 504 rule a proposal to specify that EAS carriers, as a condition of financial assistance, must comply with the applicable requirements of Part 382. The Department will do so because, as a matter of law, any party receiving assistance is subject to section 504.

The Department agrees with ATA's view that covering employment practices under Part 382, as PVA urges, has no basis in the statute. The CAB's original Part 382 rulemaking, the *PVA* v. *DOT* litigation, the text of the ACAA, and the statute's legislative history all focus on the provision of air transportation services to passengers with disabilities; they do not raise the issue of employment practices in any way. The ACAA requires that services and facilities be provided to handicapped passengers without discrimination; it is silent with respect to the rights of those who provide the services. Carriers, like other private employers, are subject to various Federal and state requirements for nondiscrimination in employment. It is these requirements, not the ACAA, that would provide recourse for any person who believed that a carrier had discriminated in employment.

Finally, the Department sees no basis under the statute for excluding charter service from the regulation. Charter service is, of course, different from scheduled service in many respects. But it is air transportation provided by an air carrier, which means that the ACAA covers it.

Section 382.5—Definitions

NPRM—The NPRM defined a "qualified handicapped individual" as meaning, for purposes of receiving air transportation, one who has a valid ticket and presents himself or herself at the airport and who meets reasonable, nondiscriminatory contract of carriage conditions applicable to all passengers. Other definitions in the NPRM were largely adapted either from existing section 504 or Federal Aviation Act sources.

Comments—Most comments focused on the definition of qualified handicapped individual, as applied to the provision of air transportation. ATA, and other industry commenters, objected to the NPRM definition as insufficient. They recommended use of the definition found in the original CAB version of part 382.

ATA points to language in the Senate Report for the bill that became the ACAA which says that "The phrase 'otherwise qualified handicapped individual' is intended to be consistent with DOT's definition in [the existing regulation as issued by the CAB]." ATA also refers to the affirmance of the CAB's definition of this term in *PVA* v. *CAB*, 752 F. 2d 694, 720–21 (D.C. Cir., 1985) in support of its position. The CAB version of the language, as distinct from the NPRM version, ATA contends, is necessary to provide the discretion to carrier personnel to determine when a handicapped person can safely be carried.

PVA generally agreed with the NPRM definition; it specifically argued that the "willingness to comply' language of the original Part 382 should not be made part of the definition, since it implied that handicapped persons were somehow more intractable than other passengers. Other disability community commenters agreed with PVA on these points. PVA suggested adding langauge that would cover provision by carriers of services such as air cargo and parking lots, language that would cover persons who attempt to use carrier services but cannot for lack of accommodations to their disabilities, and language to clarify that handicapped persons do not cease to be "qualified" because their tickets were for a different flight than they wound up taking (e.g., because of a cancellation of the original flight). Finally, PVA viewed the "contract of carriage" conditions language of the NPRM as superfluous, since all passengers have to comply with such conditions.

There were some comments on the definition of "handicapped individual." ATA supported removing references to the "is regarded as having an impairment" basis for being considered handicapped as relevant only to employment situations, not air travel. Two disability organizations commented on this point, one agreeing with ATA and the other disagreeing.

ATA made two suggestions for technical changes to other definitions. These included a reference to carrier control of a "facility" and more specific

language defining an "indirect air carrier." PVA asked for either a more inclusive definition of "scheduled air service" or, preferably, the elimination of the definition and the application of all requirements of the rule to both scheduled and non-scheduled service. One disability organization asked for a definition of "hearing impaired" and another for a definition of "ground" and "boarding" wheelchairs.

DOT Response—With respect to "handicapped individual," the Department is not removing the references to "is regarded as having an impairment." This provision is in the ACAA itself and it is also consistent with Section 504 and Federal Section 504 rules, as well as the 1982 CAB version of Part 382. There is no reason to delete it.

We have adopted ATA's suggested changes in "facility" and "indirect air carrier," which appear to be useful clarifications of the terms consistent with the rule's purposes. In response to the PVA comment about "scheduled service," we have modified the definition to include a reference to the carrier's published schedules and computer reservation in addition to the reference to the *Official Airline Guide*.

With respect to "qualified handicapped individual," the Department is aware that the legislative history of the ACAA includes a statement that the new rule's definition should be "consistent" with that of the existing part 382. A statement of intention in legislative history falls well short of being a statutory requirement, of course. Moreover, in order to achieve "consistency" between the substantive effect of the old Part 382 definition and the current rule, it is not essential to photocopy the words of the original definition. To the extent that comments from the ATA and other parties suggest that we are legally bound to repeal the original definition verbatim, we disagree.

The elements of the definition of qualified handicapped individual in the original part 382 definition are all found in this final rule. The new definition of "qualified handicapped individual" itself ("purchases or posesses a valid ticket for air transportation * * * and presents himself * * * at the airport for * * * the flight * * *.") covers the same ground as a phrase in the old definition ("who tenders payment for air transportation"), though the new version is more specific.

Old (c)(2) ("whose carriage will not violate the requirements of the Federal Aviation Regulations * * * or, in the reasonable expectation of carrier personnel * * * jeopardize the safe completion of the flight or the health or safety of other persons * * *.") concerns the question of when a handicapped person may be denied transportation for safety-related reasons. In this final rule, this function is performed by § 382.31(d), which references several authorities under which carrier personnel may deny transportation to any individual on safety grounds. Section 382.31(d) provides "decisional discretion" fully consistent with the provisions of the Federal Aviation Act and Federal Aviation Regulations concerning refusals to provide transportation, and repitition of the same essential authority in this definition is unnecessary. Of couse, it would be inappropriate to grant, or give the impression of granting, more or different authority through a definition than the substantive portion of the rule, and the statutes and rules cited therein, would provide.

Old (c)(3) concerns the question of when a carrier may require that an individual have an attendant in order to be provided transportation. It says that a qualified handicapped person is one who—

> is willing and able to comply with reasonable requests of carrier personnel or, if not, is accompanied by a responsible adult passenger who can ensure that the requests are complied with. A request will not be considered reasonable if: (i) It is inconsistent with this part; or (ii) It is neither safety-related nor necessary for the provision of air transportation.

In this rule, § 382.35 governs the situations in which a carrier may require a handicapped passengers to travel with an attendant, in order to be provided transportation. This section permits carriers to require attendants for persons who, because of a mental disability or severe hearing and vision impairments, are unable to understand the safety-related instructions (e.g., required safety briefings). Section 382.35 also includes criteria pertaining to other persons for whom an attendant may be required for safety reasons (e.g., inability to assist in one's own evacuation). No participants in the regulatory negotiation or commenters on the NPRM suggested other categories of person who would be unable to comply with carrier personnel's safety-related instructions.

The reference in the new definition of "qualified handicapped individual" to meeting "reasonable nondiscriminatory contract of carriage requirements applicable to all passengers" encompasses the meaning of "willingnes" to compy with reasonable requests of carrier personnel. All passengers, handicapped or not, are required to comply with such conditions, one of which, explicitly or implicitly, is compliance with reasonable carrier requests. A passenger who refuses to do so (and it is refusal to comply, not the seeing attitude of "willingness," that is really to the point), whether or not handicapped, may properly be the subject of adverse action by the carrier. (It is axiomatic, of course, that a carrier request that is inconsistent with this regulation is not a reasonable request.)

For example, if an FAA safety rule provides that only persons who can perform certain functions can sit in an emergency exit row, then carrier peronnel can request, consistent with this Part, that individual unable to perform these functions sit in another row. A person who refused to do so—whether a passenger with a disability or a passenger traveling with small children—could properly be denied transportation by the carrier. On the other hand, someone would not cease to be a qualified handicapped individual because he or she declined with a request that was inconsistent with the regulation (e.g., refused to respond to a "quiz" about the content of safety briefing).

We do not agree with PVA that retaining the "willingness to comply" concept burdens passengers unnecessarily or implies that handicapped passengers are less cooperative than others. It is not unreasonable, in the Department's view, to condition membership in a protected class on compliance with requirements applicable to all passengers as well as legitimate safety-related requirements that may be specific to members of the class.

In every substantive respect, then, this final regulation achieves the objective of consistency with the old Part 382's definition of "qualified handicapped person." At the same time, the new definition has been drafted to be simpler, more understandable, and less likely to create duplication or confusion with the relevant substantive sections of the regulation. Permitting duplicative or inconsistent standards on the same subject in a definition and a substantive section of the rule would reduce the predictability that is one of the goals of the regulation and would substantially complicate enforcement. It could also lead to uncertainty which could result in arbitrary actions by carriers.

Some of PVA's additional concerns about the definition are addressed by paragraphs (a) and (b) of the definition, which concern obtaining tickets and information, using the carrier's ground facilities, etc. These paragraphs were

otherwise not the subject of comment. We agree with PVA that the fact that a person first bought a ticket for a cancelled flight, rather than the flight the person actually took, should not render the person "unqualified." The point is obvious enough that it seems unnecessary to state it in the regulatory text, however. We have changed the provision concerning purchase of a ticket to include situations where a handicapped person makes a good faith effort to buy a ticket but is frustrated by barriers (e.g., a deaf person is unable to buy a ticket because the carrier's TDD is out of order).

Section 382.7—General Prohibition of Discrimination

NPRM—The NPRM would prohibit a carrier, directly or through contracting or licensing, from discriminating on the basis of handicap in providing air transportation, requiring a handicapped person to accept special services not requested by the passenger, excluding a handicapped person from generally available services that he or she can use, or retaliating against any handicapped person for asserting rights under the ACAA or Part 382.

Cbmments—PVA generally supported the NPRM provision, particularly the prohibition of discrimination via contract. PVA pointed out that such provisions are typical of regulations implementing Federal civil rights laws. PVA also suggested adding language to the "no retaliation" provision saying that it applied to persons acting on behalf of handicapped passengers, as well as to the passengers themselves.

ATA recommended deleting the section and replacing it with a one sentence statement tracking the nondiscrimination language of the ACAA itself. ATA suggests that to do more would unreasonably expand the scope of the ACAA, the language of which does not mention any parties other than air carriers themselves. ATA also requested the deletion of the proposal to prohibit mandating special services (e.g., preboarding), saying that this could disrupt or delay operations and make it difficult to administer required special briefings. ATA also objected to the tone of the "no retaliation" section, saying that it unfairly implied that airlines engaged in discriminatory acts.

RAA and several individual carriers agreed with ATA's position regarding preboarding, while a number of disabled individuals and disability groups supported the prohibition on mandatory special services of this kind. The ATBCB suggested that it was appropriate to offer, but not require, preboarding. A few carriers suggested softening the "no retaliation" language by substituting "take adverse action." A few disability groups supported PVA's suggestion for retaining the "no retaliation" language.

NFB suggested deleting "except when specifically permitted by another section of this part" from the end of the provision prohibiting the exclusion of handicapped persons from generally available services.

DOT Response—Elsewhere in its comments, ATA argues strongly that standards and principles derived from section 504 of the Rehabilitation Act of 1973 should govern implementation of the ACAA. We agree. It is completely consistent with section 504 to prohibit discrimination directly, or through contractual, licensing or other arrangements. Virtually every Federal Government regulation implementing section 504 has such language on "general nondiscrimination" (see for instance the Department of Transportation's section 504 rule, 49 CFR 27.7(b)(1)). The original CAB version of part 382, which ATA in many other respects takes as its model, includes similar language. See former 14 CFR 382.7. Other Federal civil rights rules have similar language (see for instance the Department's rule to implement Title VI of the Civil Rights Act of 1964, 49 CFR 21.5(b)(1)). This issue is discussed further under § 382.9 below.

With respect to the issue of mandatory special services, that of preboarding aroused the greatest interest. Carriers typically offer passengers the opportunity to preboard; this is well, since it permits parents with small children, persons with disabilities, and others the opportunity to get settled in their seats before other passengers board. Many persons with disabilities take advantage of this opportunity. A carrier policy that requires persons identified by carrier personnel as handicapped to preboard, whether they want to or not, runs afoul of a requirement not to discriminate, however. It involves singling out for special treatment, on the basis of a disability, individuals who believe themselves to be perfectly able to enplane with the general passenger population (e.g., a blind or deaf person who does not have a mobility impairment).

No FAA regulation requires any passenger to preboard and carriers' comments did not provide any other cogent safety rationale for required preboarding under this rule. Some carrier comments suggested that mandatory preboarding facilitated providing the FAA-mandated special safety briefings for passengers who may require assistance in an emergency evacuation. It may well be easier to administer these briefings for passengers who preboard. While administering these briefings after all passengers have boarded may create inconvenience, the briefings can nonetheless occur, and convenience is not a proper basis for imposing restrictions on handicapped passengers under the ACAA.

For these reasons, the "by contract and otherwise" and "no mandatory special services" provisions will remain unchanged; the latter now makes specific mention of preboarding.

With respect to the "no retaliation" section, the Department will adopt both the PVA comment that its protection should extend to persons who act on behalf of handicapped passengers and the carrier comment that the word "retaliate" should be changed to "take adverse action," as a means of moderating the provision's tone.

The substance remains the same. It is a clear violation of any nondiscrimination statute for a regulated party to take action against a member of the protected class because that person asserted his or her rights under the statute. PVA alleged, and ATA denied, that some carriers have "blacklisted" handicapped passengers who were viewed as "troublemakers" because they too actively asserted what they viewed as their legal rights. The Department hopes that this allegation is unfounded. It is clear that such action would be contrary to this regulation.

The Department will retain the "except when specifically permitted by another section of this Part" language. There may be a few instances (e.g., exit row seating under § 382.37 and the FAA safety regulation it references) in which some persons with disabilities may be excluded from services available to the general passenger population. This language avoids regulatory inconsistency in such cases.

Section 382.9—Assurances from Contractors

NPRM—This section proposed that carriers' agreements with contractors who provide services directly to passengers, including carriers' agreements of appointment with travel agents, would include a clause prohibiting discrimination on the basis of handicap by the contractors in activities performed on behalf of the carriers.

Comments—ATA made the same argument here as with respect to the mention of contractors under the

previous section, adding that obligations apply to contractors in other contexts simply because Federal civil rights laws apply to recipients of Federal financial assistance.

PVA argues for expansion of the proposed section, saying that it should not be limited to activities of contractors in providing services directly to passengers (e.g., it should apply to contract baggage handlers who never see a passenger, but may load his or her wheelchair onto the aircraft) and that it should not be limited to contractors' activities on behalf of carriers (e.g., that travel agents should be required to make their offices physically accessible). As with carriers, PVA says that contractors' employment practices should be covered.

Several individual carriers agreed with ATA that this section should be deleted; IATA added that it should be clarified that travel agents outside the U.S. are not intended to be covered. A number of disability groups argued for retention of the section, saying that travel agents and contractors should not be allowed to discriminate. The ATBCB suggested that the regulation should include a standard assurance clause.

DOT Response—As discussed under § 382.7, the Department believes that under the ACAA, like section 504 and other civil rights laws, the actions that contractors take on behalf of regulated parties, like the actions regulated parties take themselves, are subject to nondiscrimination requirements.

ATA errs when it attributes coverage of contactors under other Federal civil rights statutes to the fact that regulated parties receive Federal funds. This is because ATA's argument confuses the event that triggers coverage with the application of that coverage, once coverage has been triggered. Under section 504, for example, the receipt of Federal assistance triggers the application of nondiscrimination requirements to Federally—assisted transit authorities. Without Federal funds, there is no regulated party. Under the ACAA, being an air carrier providing air transportation triggers coverage under nondiscrimination requirements. Congress specifically decided, in response to the Supreme Court's decision in *PVA* v. *DOT* (which said section 504 did not apply to airlines which did not receive Federal assistance), that carriers would be a regulated party without receipt of Federal funds.

Once Congress has designated who the regulated party is, all the regulated party's activities that affect the protected class are subject to nondiscrimination requirements. Otherwise, the purpose of the statute could not be acheived. If a contractor to the regulated party (e.g., a private bus company that provides bus service on certain routes, a security screening contractor for an airline) performs functions which the regulated party would otherwise perform with its own employees, and which affect handicapped persons, the contractor's activities are subject to the same nondiscrimination requirements that would apply if the regulated party's own employees performed them. The transit authority cannot ignore requirements for transportation of handicapped persons on a certain route because a contractor provides that service; an air carrier cannot ignore the application of part 382 to security screening because a contractor performs this task.

Any party subject to a nondiscrimination statute like section 504 or the ACAA may contract out its functions; it can never contract away its responsibility to ensure nondiscrimination.

Under § 382.7, all discrimination by carriers via the actions of contractors is prohibited, regardless of the role played by contractors. Section 382.9 focuses on those contractors who provide services to handicapped passengers. A written assurance makes sense to formally put these contractors and the carriers on contractual notice of their obligations and to provide a contractual means by which the carrier can effect changes in the contractors' behavior, when necessary. This applies alike to contractors who have direct personal contract with passengers (e.g., for security screening) and those who perform services which do not necessarily include personal contact (e.g., baggage handling). On the other hand, contractors who may perform services for the carrier, but not as such for passengers (e.g., the airline's accounting firm or a repair station for aircraft), are not intended to have to provide assurances.

The Department disagrees with PVA's comment that this section should require travel agents' offices to be subject to physical accessibility requirements or that activities of travel agents other than those on behalf of air carriers should be covered. Travel agents perform the function of acting as agents for the sale of air carrier tickets. As long as that function is available to handicapped persons, by one means or another, and travel agents do not discriminate against handicapped persons in performing it (e.g., by declining to accept orders from handicapped passengers because they believe making reservations for them involves extra work), the statute is satisfied. In addition, adding physical accessibility requirements for travel agents' offices would raise serious questions about undue burdens and present perhaps insurmountable enforcement problems. It is also unlikely that the language of the statute can be viewed as applying physical accessibility standards to travel agents.

It is likewise doubtful that the activities of travel agents on behalf of Amtrak, tour bus companies, cruise ship lines, or European ski resorts can be covered under a statute relating to the provision of air transportation by U.S. air carriers. Also, just as carriers' employment practices are not covered by the ACAA, contractors' employment practices are not covered. The ACAA aims at nondiscrimination in the provision of services to passengers, and it simply is not an employment discrimination statute. As mentioned in the discussion under § 382.3, the Department agrees with IATA that foreign travel agents ought not be covered under the regulation, and language to this effect has been added here.

While some other civil rights regulations do include boilerplate assurance language, we do not, in contrast to ATBCB, see the need for such standard language in this section. The assurance involved is quite simple it will recite, in substance, that the contractor may not discriminate, in the performance of its functions for the carrier, on the basis of handicap, consistent with the ACAA and part 382, and that compliance with this obligation is a material term of the contract. The assurance would also reference the contractor's obligation to comply with directives of the carrier's complaints resolution officials (CROs) in matters covered by this rule.

Section 382.21—Aircraft Accessibility

NPRM—The NPRM proposed that new aircraft would have several accessibility features. There would be movable aisle armrests either on all aisle seats or, alternatively on between 2–12 aisle seats, depending on the size of the aircraft. In aircraft with lavatories, an on-board wheelchair would have to be provided on request (with 48-hour advance notice). There would have to be fully accessible lavatories in aircraft with 200 or more seats and lavatories with accessibility features in aircraft with 60–199 seats. However, carriers would not have to remove a revenue seat in order to provide accessible lavatories. Part 121 aircraft with more than 30 seats would

have on-board stowage capacity for at least one folding wheelchair.

These requirement would apply to new aircraft (i.e., those delivered more than two years after the rule's effective date). Existing aircraft would not have to be retrofitted for accessibility, although as cabins were refurbished, relevant accessibility features would be added. Aircraft delivered to the carrier within two years of the effective date of the rule would have to meet the new aircraft requirements to the extent not inconsistent with structural, configuration, or contractual limitations. Aircraft with 30 or fewer seats would have to meet the new aircraft standards to the extent not inconsistent with structural, weight and balance, operational and interior configuration limitations.

1. Movable Aisle Armrests

Comments—PVA favored having such armrests on all aisle seats, saying that it would increase opportunities for accessibility, provide for transportation in a more integrated setting, and make unnecessary a priority seating system to ensure that handicapped passengers are directed to the appropriate seats. PVA also referenced comments from carrier labor organizations who argued that having movable armrests would decrease risks of injury to carrier personnel from lifting handicapped passengers over fixed armrests. PVA also argued that movable aisle armrests were only minimally, if at all, more costly than fixed armrests.

ATA, by contrast, argued that putting accessible armrests on all aisle seats would be prohibitively expensive. The economic projections ATA furnished with its comment forecast annual costs of $7.1–9.6 million per year for all aisle seats, and $2.7–3.1 million per year for the 2–12 aisle seats option. ATS's 20-year constant dollar cost estimate was $142.3–192.5 million for all aisle seats and $54.0–61.4 million for the 2–12 aisle seats option. ATA also said that it was not cost-effective to put movable armrests on all aisle seats, since there would not be enough handicapped passengers to warrant having that many accessible rows. ATA also noted that for some types of seats (e.g., those with integrated trays in the armrests), movable armrests are not feasible. ATA considered a priority seating system to ensure that handicapped people got to use the aisles with accessible armrests to be unworkable.

A substantial number of disability community commenters favored movable aisle armrests for all aisle seats, or at least for a larger number than the 2–12 aisle seats proposed in the second NPRM option. RAA and some individual carriers supported the 2–12 aisle seats option, however. A few manufacturers suggested that costs would be small. One manufacturer suggested that movable armrests could compromise required aisle widths in some situations.

DOT Response—The Department has decided to require new aircraft to include movable armrests on half the aisle seats in an aircraft. Such armrests would not need to be installed in seats where doing so would be infeasible because of the nature of the armrest used on a particular seat (e.g., an armrest with an integrated tray, as mentioned by ATA's comment) or where a handicapped person could not use the row in question (e.g., because of an FAA safety rule concerning exist row seating).

This requirements represents a reasonable middle ground between the two alternatives proposed in the NPRM. It provides substantially more rows that are readily usable by persons with mobility impairments than the 2–12 seats alternative and thereby provides substantial seating capacity for passengers with mobility impairments. At the same time, it halves the cost to carriers of the 100 percent of rows option.

We agree with ATA that a priority seating system could be difficult to implement. The final rule does not require such a system. Because carriers could configure their aircraft in a very simple way to meet the final rule's requirement (e.g., there could be movable armrests on all the rows on the right side of the aisle), it would be easy for carriers to ensure that persons with mobility impairments would be able to take advantage of the armrests. No complex administrative or computer system would be needed for seat selection purposes. The rule provides flexibility to carriers to use an administrative system, as well as a cabin configuration approach, to ensure the availability of seats in a row with an movable aisle armrest to passengers who need or request them, however.

Having movable armrests on half the rows will ensure that a handicapped passenger can use a seat in any portion of the aircraft, permitting greater overall accessibility and enhancing the provision of services in an integrated setting. This approach also responds to carrier employees' concerns about lifting passengers during transfer to and from aircraft seats.

The Department estimates that the final rule requirement will cost around $5.6 million per year ($39.4 million in terms of present value over 21 years). In our view, this does not constitute an undue burden under case law interpreting section 504. Any regulatory compliance cost is a burden; however, the cost of movable aisle armrests may justifiably be regarded as a "due" burden that is necessary in order to ensure nondiscriminatory access to all portions of the aircraft cabin to passengers with disabilities and decrease injury risks to carrier personnel and disabled passengers, as well as reduce the potential costs of such injuries. Several million dollars per year across an industry of the magnitude of the U.S. air carrier industry would not seem to burden unreasonably the operations or financial health of the industry. Nor would it cause any fundamental alteration in the nature of the industry's "program."

We also point out that, as in other aircraft accessibility matters, the Department is not requiring retrofit. Movable armrests will be required on new aircraft or when seats are replaced with newly manufactured seats; carriers will not have to incur the cost of replacing existing seats before their time simply in order to have seats with movable armrests. This fact should help to keep costs within reasonable bounds.

2. Accessible Lavatories

Comments—PVA supports requiring accessible lavatories on aircraft, but strongly disagrees with the NPRM provision that would excuse carriers from providing accessible lavatories if doing so would entail the loss of a revenue seat. The application of this standard would inevitably be arbitrary and inconsistent with standards developed in section 504 case law, in PVA's view. Since providing an accessible lavatory in aircraft (which DOT already requires in passenger trains in its 504 regulation) would not adversely affect safety, PVA adds, DOT must impose the requirement under the ACAA. PVA estimates costs for providing accessible lavatories, including costs for the loss of revenue seats, to be $24 million in initial capital costs and $96.1 million annually for recurring costs, which PVA believes to be reasonable and to not impose an undue burden. PVA comments that the initial costs would represent about 0.07 percent of airline flight equipment assets and 0.18 percent of annual operating expenses.

ATA agrees that it is appropriate to provide accessible lavatories in new widebody aircraft, but opposes providing them in smaller (i.e., 60–199 seat) planes. ATA says that technical questions about the feasibility and costs

of accessible lavatories in the smaller aircraft remain unanswered and that costs would be extremely high for the lavatory units themselves, as well as removal of revenue seats and the possible need to reconfigure cabins and relocate galley units. In estimating costs for accessible lavatories, ATA projects that revenue seats would need to be removed in many aircraft. It concludes that average annual costs for widebody aircraft (assuming some revenue seat loss) would be $53.1 million, with an additional $44 million for smaller aircraft. On a 20 year constant dollar basis, ATA's estimates are $1061.4 million for widebodies and an additional $878.9 million for smaller aircraft.

Other disability community commenters favored requiring accessible lavatories. Some of these comments suggested that the fully accessible lavatory the NPRM proposed for 200+ seat aircraft should be required on all 60+ seat aircraft. Others suggested factoring in flight times (e.g., an accessible lavatory on any plane used for a flight of 90 minutes or more). A number of comments from disability organizations and other commenters agreed with PVA that the "no loss of a revenue seat" language should be deleted, and that seats should be removed, if needed, to accommodate the accessible lavatories. Some carrier and manufacturer comments asked that accessible lavatory requirements not be extended to small (e.g., 30 seat and below) aircraft.

DOT Response—PVA and ATA agree that it is appropriate, and, explicitly or implicitly, not an undue burden on carriers, to provide fully accessible lavatories in new widebody aircraft, regardless of the potential loss of revenue seats. The Department shares this view, and will so require. This requirement will result in new aircraft with the greatest passenger capacities, and which make the longest flights, having a lavatory that handicapped persons can readily use. Rather than using the term "widebody," which may be imprecise, or the 200 seat cutoff of the NPRM, which may include some non-widebody aircraft (e.g., some configurations of the Boeing 757), the Department will apply the accessible lavatory requirement to aircraft with more than one aisle.

The Department is deferring a decision, at this time, concerning accessible lavatories in narrowbody and smaller aircraft. Having accessible lavatories in these aircraft clearly is important for passengers; there are more narrowbody than widebody aircraft in the fleet, and they provide more flights than the larger aircraft. At the same time, the cost and feasibility concerns raised by carrier comments are worth serious consideration.

During the period between the NPRM and this final rule, DOT staff made inquiries on these matters and were unable to obtain sufficient information to make a sound decision. The Department cannot mandate technical changes related to accessibility without adequate information about technical and economic feasibility, to ensure that undue burdens are not imposed. Without additional information, the Department could have difficulty avoiding one or both of these pitfalls. The Department does not agree with PVA's argument that it must require accessibility features as long as they do not create a safety problem. The ACAA bars carrier restrictions on handicapped passengers' travel absent safety necessity. It does not require accommodations to be provided, regardless of potential burdens, if the accommodations are safe.

For this reason, the Department is issuing an advance notice of proposed rulemaking (ANPRM) to address, among other matters, the issue of accessible lavatories in narrowbody and smaller aircraft. Subsequently, the Department would convene a conference concerning all of these topics. We would intend to engage aircraft designers, lift designers, representatives of the disability groups, and the carriers, in an effort to find solutions which could provide a substantive basis for rulemaking in these areas. If necessary to provide information or develop facilities, the Department would also commit resources to a research contract or project for these purposes.

3. On-Board Wheelchairs

Comments—ATA opposes any requirement for providing on-board wheelchairs. It would be particularly unfortunate to require on-board chairs on small commuter aircraft, ATA says, because on-board chairs might be dangerously unstable and storage for them could require seat removal. In addition, this requirement would cost too much: assuming that seat loss would be incurred for storage of on-board wheelchairs in smaller aircraft, ATA's estimated cost is approximately $47 million annually and approximately $940 million over 20 years in constant dollars. ATA also urged that flight attendants not be required to assist handicapped persons in using and moving in the on-board chairs, which could get in the way of other flight attendant duties and could pose risks of injuries to the flight attendants.

PVA supports requiring on-board wheelchairs on all aircraft that have lavatories, but opposes the on-request (with 48-hour advance notice) feature of the NPRM, which it views as unworkable, unfair, and unnecessary. PVA contends that an on-board wheelchair is useful even where the lavatory is not accessible, because it could be used by someone who can stand or walk a few steps (and who thus could use a regular lavatory) but who cannot walk far enough to get from his or her seat to the lavatory. PVA also notes that aisle widths is not a problem for on-board chairs, which are designed to meet the standard 16-inch aisle width of passenger aircraft.

Approximately equal numbers of commenters said that on-board chairs either should or should not be required. Some of the latter made a particular point of saying that on-board chairs were not feasible on small aircraft. Some commenters appeared to believe that aisle widths would have to be increased substantially to accommodate on-board chairs, with cost and feasibility impacts. Finally, a few commenters suggested changes or additions to the standards for on-board chairs, such as making sure that footrests measured 6 inches front-to-back, adding requirements for occupant restraint systems and wheel locks to deal with turbulence, and adding armrests and padding for passenger comfort.

DOT Response—In the new aircraft provision of the final rule, the Department will require an on-board wheelchair to be present on those aircraft which have accessible lavatories. PVA is correct in saying that on-board wheelchairs are potentially of some use even where there is no accessible lavatory. Nevertheless, the most significant use for an on-board wheelchair is to enable persons with mobility impairments that necessitate their use of an accessible lavatory to get to that facility. In the absence of an accessible lavatory, it is likely that many users of an on-board chair would not have a usable destination.

Nevertheless, in order to serve those individuals who could use an inaccessible lavatory but need an on-board wheelchair, th erule will require carriers to honor a request to have an on-board wheelchair on a flight using an aircraft without an accessible lavatory. The carrier could require up to 48 hours' advance notice for this accommodation. In addition, the requester would have to state (either directly or in response to a carrier inquiry) that he or she: (1) Was capable of using an inaccessible

lavatory and (2) needed an on-board wheelchair to reach the lavatory.

With respect to existing aircraft, the rule requires on-board chairs to be provided on the aircraft (for aircraft with an accessible lavatory) or on request with 48 hours' advance notice (for aircraft without an accessible lavatory) within two years of the effective date of the rule.

Since this final rule requires on board chairs to be placed, even temporarily, only on aircraft with more than 60 seats, this requirement is not likely to encounter the problems commenters raised with on-board wheelchairs on small aircraft. PVA is correct in saying that on-board wheelchairs are designed to fit existing aisle widths; this is a main point distinguishing on-board wheelchairs from other wheelchairs.

Because fewer on-board wheelchairs will be involved than if all aircraft with lavatories were required to have them, and since they will not be on smaller aircraft, where seat loss is more likely to occur, the annual compliance cost of the final rule's on-board wheelchair requirement is likely to be substantially less than ATA's estimate of $47 million.

Feasibility, seat loss, and cost issues regarding on-board chairs in smaller aircraft will be considered further in the ANPRM, in connection with the research on accessible lavatories in those aircraft. The Department is adding a mention of occupant restraint systems and wheel locks to the standards for on-board chairs in the final rule. The NPRM provided for armrests and footrests; adding a specific size for the latter is out of place in a performance standard. Padding, while desirable for passenger comfort, appears not to be of sufficient safety or functional importance to be requried.

The Department will address the issue of carrier personnel assistance to persons using on-board chairs in its discussion of section 382.37, on provision of services and equipment.

4. Stowage Space

Comments—ATA objects to having stowage space for a folding wheelchair in the cabin. It would not be appropriate to use existing coat closets because, ATA says, there would not be sufficient room for other passengers' carry-on items, resulting in costly displacement of the other passengers' items. To avoid this consequence, carriers would need to create a new space just for wheelchairs, which would be expensive and possibly involve the removal of seats. Also, there is no need to stow a folding wheelchair in the cabin, since it cannot be used in the cabin. PVA essentially supports the NPRM proposal on this subject but stated that if small aircraft do not have enough cabin space, then priority storage in the cargo compartment would be acceptable.

DOT Response—The Department is not changing the requirement for there to be priority space in new aircraft for in-cabin stowage of a folding wheelchair. The purpose of this requirement is not so that the wheelchair can operate inside the cabin; the width of the aisle clearly does not permit a standard wheelchair to pass. Rather, the purpose of the requirement is to allow a wheelchair user to quickly retrieve his or her chair near the aircraft door, so that the person can use that chair immediately on exiting the aircraft. This will make independent mobility substantially easier for the person, compared to use of a boarding chair or a carrier's ground chair.

In ordering new aircraft, the carrier is free to designate either a portion of a coat closet or a separate area for this purpose. Since the former is permissible, the rule clearly does not require creating a separate area or removing seats to do so. The Regulatory Evaluation cites the results of a Transport Canada study indicating that storage of folding wheelchairs is dimensionally possible in 727, 767, and DC-9 aircraft coat closets, with minor modifications related to shelf position and recessed tie-downs. Service-related issues concerning on-board stowage of folding wheelchairs will be discussed under § 382.39, provision of services and equipment.

5. Timing

Comments—ATA objected to the phase-in proposed in the NPRM, saying that linking accessibility requirements to aircraft delivery date did not make sense, in view of the common carrier practice of ordering aircraft some years ahead of anticipated delivery. It would cause revision of contracts, delays, and cost increases to require modification of existing orders, in ATA's view. ATA recommended applying accessibility requirements to aircraft ordered more than 90 days after the effective date of the rule. The comment did not state a rationale for the additional 90-day period.

ATA also objected to what it characterized as the "retrofit" requirement; that is, the requirement that as cabin interior elements are replaced, they be replaced with accessible elements (e.g., if original seats are replaced with newly manufactured seats, the newly manufactured seats would have to have movable armrests). ATA also objected to the tone of a provision in the NPRM providing that carriers could not reduce accessibility features below the level specified in the regulation, saying that it merely expressed the obvious. ATA also opposed adding any requirement that accessibility features be kept in good working order, saying that it also expresses the obvious.

PVA noted that ATA itself had suggested the two-year delivery date phase-in period for accessibility during the regulatory negotiation and contended that any lengthier grace period was unreasonable. PVA argues that, since in the aircraft manufacturing process, carriers may make many change orders before the plane is delivered, it will not cause significant delays or extra costs to incorporate accessibility features in aircraft to be delivered after 2 years of the rule's effective date.

Several disability groups or other commenters said that it is improper under the ACAA to exempt existing aircraft from accessibility requirements (i.e., that they should be retrofitted for accessibility). Others opposed the proposed phase-in period, saying that it was too long. On the other hand, a manufacturer though the phase-in period was too short, and recommended a four-year period, since that was the manufacturer's typical lead time for responding to an aircraft order. Some disability groups recommended a provision that accessibility features must be kept in working order.

DOT Response—The Department has decided to require that all new aircraft, ordered after the effective date of the rule or delivered to the carrier more than two years after the effective date, will have to incorporate the accessibility features mentioned in this section.

The Department agrees that it is appropriate to require all aircraft in covered categories ordered after the effective date of the rule to have the required accessibility features. ATA did not provide a basis for a 90-day delay of the date on which orders must be for accessible aircraft, and this suggestion has not been adopted.

In addition, we will retain the requirement that a new aircraft delivered more than two years after the effective date of the rule have the required accessibilty features. As commenters stated, carriers typically order aircraft years in advance of the anticipated delivery date. If all aircraft on order before the effective date are exempted from accessibility requirements, it will mean that hundreds of inaccessible aircraft—with a potential life span of 15–20 years—will join carriers' fleets in the next few years. This would have the effect of

substantially, and unnecessarily, delaying fleet accessibility.

Because the ordering and manufacture of aircraft is a long process, carriers and manufacturers should have plenty of time, within two years, to provide cabin items such as accessible lavatories, movable armrests, and on-board wheelchairs, without delaying delivery. These items, obviously, do not involve modifications to the airframe and may readily be made within the last two years of the procurement process. Adding these features may require change orders in contracts. Change orders, however, are a common part of the procurement process for aircraft. Additional costs should not be markedly different from those for providing the same accessibility features in new aircraft ordered after the effective date of the rule.

Contrary to ATA's characterization, it is not a "retrofit" to require that when cabin interior elements are replaced in the normal course by the carrier, they be replaced by accessible elements. Retrofitting solely for the purpose of accessibility (e.g., requiring existing seats, not otherwise is need of replacement, to be pulled and replaced with seats with movable armrests within a year of the effective date of the rule) is specifically not required. The only provision that requires a retrofit is that concerning on-board wheelchairs in existing aircraft, and that provision relates not to any major reconstruction or reconfiguration of the aircraft or its elements but simply the provision of a portable piece of equipment.

It is standard practice, consistent with statute and case law, for regulated parties to be required to make accessible those elements of a facility that they replace. The Architectural Barriers Act, the Uniform Federal Accessibility Standards, and section 504 regulations are unanimous on the point. Unlike a true retrofit, the requirements of this rule do not impose undue burdens, since they add only a modest increment to replacement costs incurred voluntarily, rather than imposing the cost of an otherwise unnecessary replacement of the element itself. The Department will retain this requirement, but will not adopt the disability group comment that accessibility features should be installed on existing aircraft. As we understand the comment, it would require a retrofit solely for the purpose of a accessibility, which the Department does not believe is appropriate or consistent with the ACAA.

The Department does not believe that it implies any bad faith on the part of carriers to require that existing accessibility levels not be reduced. One of the purposes of a regulation is to spell out, clearly and with particularity, the obligations of regulated parties. This provision goes to that purpose, and is intended simply to leave no doubt in anyone's mind on the point.

The Department is adopting the comment made by PVA and other disability groups that a provision should be added to require that accessibility features be kept in working order. AS PVA states, the Department has become aware, in other areas, that the provision of equipment is not enough to ensure accessibility. For example, some transit authorities equipped buses with wheelchair lifts which, for lack of sufficient maintenance, broke down. In consequence, the Department's 1986 section 504 rule for mass transit required that accessibility equipment be maintained in proper operating condition.

A similar provision here should not work any hardship on carriers (indeed, keeping on-board wheelchairs, armrests, and lavatories in working order is probably easier than keeping bus lifts working). Nor is it likely to lead to "technical" violations that will not affect passengers; when a handicapped passenger's ability to use aircraft facilities is impaired by broken equipment, the violation is substantive, not merely "technical."

Section 382.23—Airport Facilities and Services

NPRM—The NPRM proposed to apply accessibility requirements to those portions of airport facilities owned, leased, or operated by the air carrier at the airport. New facilities would have to meet the requirements of the Uniform Federal Accessibility Standards (UFAS) plus six other standards drawn from the existing airport operator requirements of 49 CFR 27.71, the Department's section 504 rule. These six items pertain to terminal design, ticketing, baggage facilities, TDDs, terminal information systems, and gate-aircraft interface. Existing facilities would have to be modified to meet these standards within three years.

This proposal was intended to operate in tandem with 49 CFR 27.71, since airport operators and carriers typically share, or divide up in one way or another, responsibility for terminal facilities. The preamble to the NPRM asked for comment on how compliance responsibility between airport operators and carriers should be apportioned under the two regulations.

Comments—PVA generally supported the NPRM provision. PVA suggested adding a requirement that terminal passenger transportation systems (e.g., the electric carts that help carry passengers around the terminal, shuttles between terminals and parking areas or among terminals) be accessible. For PVA, apportioning compliance responsibility between carriers and operators was not crucial; both had responsibility, under the ACAA and section 504, respectively. PVA thought it unlikely that small carriers would have to bear disproportionately high costs, since airports, who want carriers to maintain service, have an incentive to negotiate reasonably with them concerning the allocation of responsibility. PVA also objected to the three-year phase-in period for accessibility modifications to existing facilities.

ATA recommended substantially rewriting this provision, to say simply that airport facilities and services owned, leased, or operated by carriers, when viewed in their entirety, shall be accessible. Facilities which are designed, built, or which "undergo a substantial structural change" (ATA's preferred substitute for "altered," the term used in the NPRM) after the rule is effective would have to conform to UFAS. The six additional elements, which ATA views as too vague and potentially burdensome, would be deleted. ATA says that this formulation is better because it is less likely to result in significant costs for carriers, especially small carriers (a point emphasized by the RAA as well) and because airports bear the major responsibility for accessibility under section 504.

Individual carriers who commented on this section generally took the position that airports, not carriers, should bear the responsibility for airport accessibility. One carrier's variation on this theme was that carriers should have such obligations only where they had a dedicated facility at the airport, they owned or leased the entire facility, or the carrier controls the design, construction or alteration of the facility.

The Airport Operators' Council International (AOCI) recognized that airports have significant responsibilities under section 504 concerning airport accessibility. They made several specific comments about the proposed airport provisions. They said ticketing requirements could be burdensome, especially if ticketing equipment could not readily be used at a low height counter. Like ATA, AOCI expressed concern about terms like "efficient" and "minimize" in the section concerning terminal design and flow, suggesting that they were too vague. AOCI

suggested that the three-year phase-in for accessibility requirements was too short, and that seven years was more realistic, given the long lead time for airport planning and the local government funding delays which many airports face. AOCI also expressed a concern about potential conflicts with existing carrier leases at airports. For some airport functions under the control of carriers, such as ticketing, administrative as well as physical solutions should be allowed, in AOCI's view. AOCI also expressed the concern that airports could face and undue financial burden. Finally, AOCI suggested that information to persons with various impairments be presented "aurally" rather than "orally," believing the latter implied more extensive service requirements.

Disability groups and other commenters suggested a variety of other accommodations they believed should be required at airports. These included electronic message boards to page hearing-impaired passengers, hearing-aid compatible phones as well as TDDs, additional TDDs beyond the one mentioned in the NPRM (i.e., a number of such phones proportional to all phones in the terminal, a point with which AOCI agreed), accessible electric carts, and better and more strategically placed visual information systems. With respect to the division of responsibility between carriers and airport operators, the ATBCB said that airport/carrier leases or contracts should provide for how responsibilities are apportioned.

DOT Response—49 CFR 27.71, promulgated in 1979, has required all new terminals at airports receiving Federal financial assistance since that time to meet substantially the same accessibililty requirements as set forth in the ACAA NPRM. Under the 1979 section 504 rule, federally-assisted airport facilities existing in 1979 were to have been modified for accessibility no later than 1982. Therefore, most airport facilities should already meet essentially the same requirements proposed in the ACAA NPRM. If there are federally-assisted airport facilities that do not meet these requirements, they are in noncompliance with 49 CFR part 27, and their operators need to take corrective action immediately. (The NPRM to amend § 27.71 would require transition plans for airports which have not submitted them.)

In administering 49 CFR 27.71, the FAA became aware that some of the facilities and services responsibilities as which was assigned to airport operators were often under the control of carriers, making compliance by airport operators alone difficult in some instances. In addition, there may be some situations (e.g., terminals wholly owned or controlled by carriers, airports not receiving Federal assistance) which section 504 does not cover. It is to minimize gaps in accessibility in such situations that a section of the ACAA rule parallel to 49 CFR 27.71 is needed.

It should be emphasized that carriers are responsible, under part 382, only for those facilities or services at an airport that they own, lease, operate or otherwise control. Consequently, at an airport not receiving Federal financial assistance, facilities that are not owned, leased, operated or controlled by an air carrier would not be subject to accessibility requirements under either section 504 or the ACAA.

Coverage of this kind is analogous to coverage under section 504 and the Architecture Barriers Act, both of which can apply to leased as well as owned facilities. In addition, it seems clear from case law and CAB administrative decisions that facilities under the control of the carrier, in a variety of contexts, are subject to coverage under provisions of the Federal Aviation Act, as being part of or connected with air transportation. *See for instance United States* v. *City of Montgomery,* 201 F.Supp. 590 (M.D. Ala., 1962); *Kodish* v. *United Airlines,* 465 F.Supp. 1245 (D.Colo., 1979); *Polansky* v. *TWA,* 453 F.2d 332 (3d Cir., 1975); *PVA* v. *CAB,* 752 F.2d 694 (D.C. Cir, 1985), rev'd on other grounds *sub nom DOT* v. *PVA,* 106 S.Ct. 2705 (1986); *Bergt-AIA Western-Wein Acquisition/Control Case,* 98 CAB 28 (1982); *Additional California Points, Essential Service,* 89 CAB 623 (1981); *TWA, Re German Discriminatory Practices,* 89 CAB 952 (1981); and *Oklahoma Points, Essential Service,* 89 CAB 1903 (1980).

In this context, it is useful to point out that section 404(a) of the Federal Aviation Act, which was authority for the original CAB version of part 382 and is additional authority for this final rule, requires carriers to provide safe and adequate service, equipment, *and facilities* in connection with air transportation.

The Department believes it is useful to have the airport accessibility requirements for airports and carriers parallel one another, to correct the present situation under which airports are subject to a much more detailed set of requirements under part 27 than are carriers under the existing part 382. Carriers and airports must cooperate to ensure that accessible requirements are met fully; this cooperation should be on a level playing field.

In the Department's view, making airport facilities subject to UFAS, the currently applicable standards under the Architectural Barriers Act and section 504, is sensible and consistent with the law. The additional six features, which are not mentioned in UFAS, are important to ensure that handicapped persons can readily use airports for their intended air transportation functions. Some of these standards are deliberately expressed in general, performance standard terms because the Department cannot reasonably specify the design of specific terminals or terminal features. Most of these items are closely patterned after 49 CFR 27.71, and airport operators have been subject to them for nearly eleven years. It would be as likely to add as to subtract uncertainty to modify them in the direction of greater specificity at this time.

We do not believe that these requirements will create an undue financial burden for carriers, even small carriers. First, federally-assisted airports should already meet these standards. Second, the portion of airport facilities and services which are not now accessible and which are under the carriers' control, are likely to be limited. Third, PVA makes a persuasive point that airport operators, especially those at small airports served mostly by commuter carriers, are likely to be eager to take steps to retain carrier service to the airport and therefore be willing to negotiate reasonably with carriers. We would also point to the UFAS exception for structural impracticability (which applies when the alteration would result in an increased cost of 50 percent of the value of the element, or would affect a load-bearing member) would be available to carriers through the Department, in appropriate cases involving major structural modifications.

We have added, somewhat along the lines suggested by the ATBCB, a provision calling for contracts or leases between airport operators and carriers to allocate compliance responsibilities under part 27 and part 382, respectively. We believe that this provision should help to resolve, in advance, questions of who is responsible for various services or facilities at an airport. For enforcement purposes, should a complaint about airport accessibility arise, the Department would be guided by such a contractual provision. In the absence of such a provision, the Department would proceed jointly in enforcement under parts 27 and 382 and attempt to make the determination of who is responsible for a particular feature of the airport in question.

The three-year phase-in is consistent with general section 504 regulatory practice, and was applied to federally-assisted airports under 49 CFR 27.71 as published in 1979. The Department does not believe that a seven-year phase-in is necessary to permit modifications to be made; in any case, had this longer period, suggested by AOCI, been part of the 1979 regulations, federally-assisted airports covered by the 1979 requirements would still have had to complete the modification of their existing facilities by 1986.

The term "altered," as applied to fixed facilities, comes from Architectural Barriers Act practice. The Department does not believe it would be useful to change a well-established term from the statute that is the basis for the same standards (UFAS) that will apply to airports under this rule. "Substantial structural change" is much more likely to produce uncertainty, and could be construed to narrow the requirements applicable to carriers from those of UFAS.

The Department agrees with AOCI that requiring "dropped" ticket counters may prove burdensome. Except to the extent such counters are specifically required by UFAS (see section 7.2 of UFAS), this rule will allow administrative means of making ticket facilities accessible to handicapped passengers.

We agree that telephones usable by persons wearing hearing aids, as well as TDDs, are important in airports. 49 CFR 27.71 requires them for federally-assisted airports. They are not mentioned specifically in the rule because UFAS incorporates the requirement for them. We are also clarifying the provision for TDDs (that "the terminal" shall have at least one TDD). This clarification will require at least one TDD in "each terminal" at an airport. At large airports, there are often many terminals, which seem to passengers to be miles apart from one another. By saying "each terminal," we mean that every one of these main, satellite, or multiple terminals must have its own TDD. This is important so that a hearing-impaired person who needs to make a call between flights does not need to go from Terminal C to Terminal A (where the TDD is) and back to Terminal C for his connection.

Language in the proposed rule adequately handles conveying of information to persons with hearing or vision impairments, and greater specificity is not needed. Our unabridged dictionary does not distinguish between "oral" and "aural" in any way that would imply any greater or lesser set of requirements attaching to the use of either word, so we will leave it as it is. Semantics aside, the point is that to accommodate persons with vision impairments, the carrier must provide information that such a person can hear.

The Department agrees with PVA that it is reasonable to consider making airport transportation systems (e.g., interterminal buses and vans, electric carts, moving sidewalks) accessible. However, there may be technical, cost, and timing issues with such a requirement on which public comment would be useful. In addition, this is a new requirement on which interested persons have not had the chance to comment. Therefore, we are not including such a provision in this final rule. We will instead ask for comment on this issue in the SNPRM (as well as in the NPRM to amend the airports section of 49 CFR part 27).

For unusual, infrequent situations in which making accessibility modifications may not make sense, carriers could have recourse to the exemption procedures of 49 CFR 5.11. For example, if an airport facility is about to be torn down and a new accessible facility is under construction, it would be unreasonable to require expensive, "permanent" modifications in the old facility. The exemption authority will be used sparingly by the Department. It is not intended to let carriers out of inconvenient obligations, or to be used in circumstances which are not exceptional and peculiar to a particular situation. In addition, the carrier would have to show how it would substantially comply with the rule while the waiver was in force (e.g., by operational methods). Exemptions are not intended to be a backdoor method of amending a final rule.

The Department has added, § 382.5, a new definition of "air carrier airport." This definition would exclude the smallest airports, or airports which provide only general aviation services, from coverage under this section. The definition covers airports receiving scheduled air service which enplane 2,500 or more passengers a year. The new definition is intended to be consistent with current statutory definitions in the FAA's airport financial assistance legislation. Carriers using non-air carrier airports are still subject to all other provisions of the rule.

The Department will publish an NPRM that would incorporate language parallel to this part 382 section as an amendment to 49 CFR 27.71. This amendment would ensure consistency between the two regulations.

Section 382.31—Refusal to Provide Transportation

NPRM—The NPRM prohibited carriers from refusing to provide transportation to handicapped persons on the basis of handicap, except as otherwise permitted by the regulation. Specifically, limits on the number of handicapped persons on a particular flight would be prohibited, as would refusing transportation because the handicapped person's involuntary behavior annoyed, offended, or inconvenienced others (as distinguished from behavior which adversely affected safety). Carrier personnel could continue to exercise their discretion to exclude persons from a flight on the basis of existing legal authority concerning safety. Such actions would have to be consistent with part 382; if they were not, the carrier (not individual carrier personnel) would be subject to enforcement action under the rule. When a handicapped person was exluded from a flight, the carrier would have to explain the reason, in writing, within 10 days.

Comments—PVA generally supports the NPRM provision. PVA strongly favors a ban on number limits, saying there is no evidence to support the safety necessity for such limits and that various airlines have indicated their ability and willingness to carry significant numbers of disabled passengers on a flight. PVA points out that carriers do not talk of applying number limits to other categories of people who might evacuate a plane more slowly than the average (e.g., obese or elderly people).

In support of the provision prohibiting exclusion because of the appearance or involuntary behavior of a handicapped person, PVA cites several carrier manuals which appear to provide for excluding handicapped persons on the basis of the unpleasantness that allegedly is created for other passengers by their very presence. PVA also supports the written explanation provision of the proposal, but says that the explanation should be provided immediately, so that the carrier does not have the opportunity to devise *post hoc* justifications for the exclusion.

ATA argues that this provision should be deleted and replaced by a provision authorizing carrier personnel to exclude any handicapped persons they regard as not being qualified handicapped individuals. Carriers must be able to exercise discretion, unconstrained by regulatory provisions regarding nondiscrimination, to exclude any individual from a flight on the basis of

safety. By regulating in an area affecting safety, ATA argues, the Department would exceed its authority under the ACAA. (In fact, ATA and RAA petitioned the FAA to issue rules that would effectively preempt part 382 by giving carriers the degree of discretion they seek with respect to such issues as refusals to provide transportation and requirements for attendants.) Moreover, as ATA reads the existing part 382, the CAB gave carriers all the "decisional discretion" they needed, and DOT is legally bound not to change CAB's approach without substantial and compelling reasons, which, in ATA's view, DOT does not have.

ATA objects to requiring a written explanation for refusals to provide transportation on the basis of handicap. ATA says that carriers do not provide such statements to other passengers they exclude and do not see why handicapped persons should be different. ATA also objects to carriers being subject to enforcement action under part 382 if carrier personnel exclude a handicapped person in a way that contravenes the rule. This would have a chilling effect on the ability of carrier personnel to exercise safety discretion, since they would worry about the prospect of enforcement action instead of concentrating just on safety.

ATA favors carriers having the discretion to limit the number of handicapped persons, especially those with mobility impairments, on a flight, particularly a flight using a small aircraft. ATA does not suggest any particular number limit (though it mentions that some carriers use the number of floor level exits as a basis for such limits) or what the basis for any particular number limit would be. ATA suggests that without the discretion to impose number limits, carriers could not meet the FAA regulatory requirement to evacuate aircraft within 90 seconds.

Finally, ATA calls attention to what it views as an inconsistency between the NPRM's citation of several authorities with respect to carriers' safety discretion and its exclusion of a reference to section 902(j) of the Federal Aviation Act, which prohibits interference with crewmembers in the performance of their duties.

Among other commenters, the discussion of this subject was divided along similar lines. Disability community organizations and agencies, for example, unanimously opposed number limits. Carriers and carrier labor organizations favored limits and made a variety of recommendations on number restrictions for non-ambulatory passengers. For example, one commenter suggested having no more than one unaccompanied non-ambulatory person per floor level exit and limiting unaccompanied non-ambulatory passengers to the number of flight attendants. The positions and rationales were basically the same as PVA's and ATA's, respectively. A number of disability groups wanted an immediate written explanation for an exclusion; RAA and some individual carriers wanted the period lengthened to 30 days.

Disability groups favored making the actions of carrier personnel the subject of enforcement action against the carrier where the actions violated the rule. Carriers emphasized the need for discretion to refuse service in the interest of safety, and expressed a concern similar to ATA's about the potential chilling effect of making this discretion the subject of enforcement action.

The preamble to the NPRM raised the question of whether, if a handicapped person with a valid reservation is denied transportation because of an equipment substitution (e.g., a smaller plane than usual is used for a flight, and it will not accommodate the passenger or his wheelchair), the person should receive denied boarding compensation (DBC) under the Department's oversale rule. Disability group commenters, the ATBCB, and DOJ said that like a passenger "bumped" for overbooking reasons, a handicapped person in this situation should receive DBC. Carriers did not agree.

DOT Response—Under the final rule, as under the proposal, carriers retain adequate "decisional discretion" to exclude individuals from a flight on the basis of safety. Indeed, the statutory and regulatory provisions cited in the rule ensure that, when the pilot-in-command or other carrier personnel determine that carriage of any individual would or might be inimical to safety, the individual may be excluded. This existing discretion is more than sufficient to permit carrier personnel to guard against any genuine endangerment of the flight or persons on it stemming from the presence on board the aircraft of any particular handicapped (or other) person.

The principal statute involved is section 1111 of the FA Act (49 U.S.C. 1511), which authorizes carriers to "refuse transportation to a passenger when, in the opinion of the carrier, such transportation would or might be inimical to the safety of flight." In reviewing exercises of discretion under this statute (e.g., in the context of a complaint under § 382.31), the Department will be guided by judicial interpretation of section 1111:

> The test of whether or not the airline properly exercised its power under § 1511 to refuse passage . . . rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable in light of these facts and circumstances. They are not to be tested by other facts later disclosed by hindsight. *William* v. *Trans World Airlines*, 509 F.2d 942 (2d Cir. 1975); *Cordero* v. *Mexicana Airlines*, 681 F.2d 669 (9th Cir. 1982).

Of course, carrier personnel are charged with knowledge of the requirements of this rule as they form their opinions and make their decisions. Decisions contrary to the provisions of this rule are prohibited.

The other authorities cited in this section are 14 CFR 121.533(e) (the pilot in command has "full control and authority" in the operation of the aircraft) and 14 CFR 91.8 (prohibition of interference with crewmembers).

Indeed, it is difficult to determine how the basic grant of this discretion by provisions of the Federal Aviation Act and Federal Aviation Regulations differs in substance from that described as "inevitable" by the court in *PVA* v. *CAB*. Under the CAB rule at issue in that case, a determination that an individual was not a qualified handicapped individual (and hence excludable from a flight as a threat to safety) was to be made only when the carrier had a "reasonable, specific basis" for its determination. Carriers were not to have "unbridled discretion." 752 F.2d at 721. This rule simply adds the requirement that when a carrier excludes a handicapped person from a flight for safety reasons, it must explain the reasonable, specific, safety basis for the exclusion in writing. The essence of arbitrariness in decisionmaking is that the decision need not be explained. It does not unreasonably constrain carrier safety discretion to insist that, in this most basic way, carrier decisions to exclude handicapped persons not be arbitrary. If there is a reasonable, specific, safety basis for an exclusion, then the carrier personnel who make the decision will be able to articulate it. If there is not such a basis for the decision, which the carrier can articulate, then it is a decision better left unmade.

The Department believes that the 10-day time frame for sending this explanation to the passenger makes more sense than either a shorter (e.g., immediate) or a longer (e.g., 30 day) period. When an exclusion occurs as a flight is about to leave, it could delay the

flight if a crewmember had to sit down and write a letter or memorandum to the passenger. This delay, which would inconvenience other passengers, would not do anything to get the handicapped person on the flight, since the decision to exclude had already been made.

The Department does not share PVA's concern about "*post hoc* rationalizations." The explanation of the exclusion is made on behalf of the carrier, not an individual crewmember. It is the carrier, not the individual crewmember, who is subject to enforcement action if the exclusion violates the rule. It does not violate the intent of the rule if carrier officials, other than the employees involved, consult about or prepare the response to the passenger after the event.

The Department believes that an expeditious reply is necessary, however, so that a passenger can know as soon as possible the basis on which he or she was kept off a flight. Among other things, this will allow the passenger to initiate a complaint with the carrier or the Department in a timely manner. Consequently, the Department will not extend the reply period to 30 days.

The Department also has concluded that it is appropriate for carriers to be subject to enforcement based on the actions of carrier personnel in excluding handicapped persons. ATA's objection to this provision—that it would, in effect, exert a chilling effect on the safety judgment of pilots and others—is unpersuasive. Individual carrier employees incur no liability for enforcement action or penalties under the rule. Only the carrier does. It is highly implausible that a pilot, confronted by a situation in which carrying a particular passenger would genuinely endanger his life and the lives of his passengers, plus several million dollars' worth of carrier property, would be deterred from denying transportation to the passenger because, some time hence, his employer might face administrative enforcement action.

The carrier will presumably train its employees well so that they exercise their discretion consistently with the rule. But should an error occur (e.g., carrier personnel exclude a person with a severe disfigurement from a flight because they believe other passengers would find the person unpleasant to look at), the carrier should not be immune from enforcement action. Otherwise, there would be no way to vindicate the most basic right protected by the ACAA, that of receiving air transportation without discrimination on the basis of handicap.

The prohibition on denying transportation because the appearance or involuntary behavior of a handicapped passenger may offend, annoy, or inconvenience other passengers or crew is unfortunate necessity. It is unfortunate because it is an regretable fact in our society that some people, focusing on the manifestations of a disability rather than on the human being who has the disability, may find proximity to a disabled person uncongenial. They may not want to look at a person with a severe disfigurement or sit next to a person whose muscular control is impaired by cerebral palsy. It is necessary because, as PVA points out in its comment, carrier policies have sometimes catered to passenger squeamishness or the desire of crewmembers to avoid what they view as additional inconvenience (e.g., PVA quotes recent carrier policies that bar persons who have "a malodorous condition, gross disfigurement, or other characteristics so unusual as to be unpleasant" or "whose habits or appearance [would be] objectionable to other passengers"). Exclusions for safety reasons are permitted under the ACAA; exclusions on grounds of pleasantness or convenience are not. The regulation must make this point unequivocally.

The Department recognizes that there may be some situations in which carrier personnel will have to exercise their judgment to distinguish between involuntary behavior by a handicapped person that poses a real safety problem and behavior that is only annoying. There was much discussion during the regulatory negotiation about persons with Tourette's syndrome. This disability affects about 100,000 persons in the U.S. and is manifested by episodes of shaking, muscle tics and/or spasms and uncontrolled shouting, barking, screaming, cursing and/or abusive language. The latter is present in about 30 percent of the cases. Tension and pressure tend to stimulate outbursts. Medication may help a substantial number of persons with Tourette's to reduce or suppress symptoms. Many persons with Tourette's carry cards or brochures explaining the disability.

Sitting near such a person in an aircraft cabin, like sitting near a crying baby, may be a very uncomfortable experience for other passengers, but manifestations of Tourette's in the cabin of a large aircraft may create only a high level of annoyance, and not a genuine safety problem. Some manifestations of Tourette's in the cabin of a small air taxi, in which the passenger in question is sitting a few feet from the pilot, may well create a safety problem if the individual's exclamations would distract the pilot. This issue is discussed further under § 382.37, concerning seat assignments.

It should be emphasized that this provision does not give handicapped persons *carte blanche* to act voluntarily in a disruptive fashion. On occasion, a passenger, whether or not disabled, through frustration, ill temper, or a belief that the rules apply to everybody but him, may deliberately act to violate a rule that applies to all passengers, violate generally applicable standards of behavior, or act so as to interfere with the duties of crewmembers. Such behavior is no more tolerable from a disabled passenger than anyone else. If a disabled passenger insists on smoking on a no-smoking flight, for example, or strikes or grabs a flight attendant in anger, the disabled passenger is subject to the same sanctions as any other disruptive passenger.

With respect to the issue of number limits, the Department recognizes that handicapped passengers, especially persons with mobility impairments, are likely to move out of an aircraft in an emergency situation more slowly than many other passengers. This is a common-sense observation, which various FAA studies have confirmed. It is a substantial leap from this proposition, however, to the conclusion that it is permissible, under the ACAA, for a carrier to impose a limit on the number of handicapped passengers who may travel on a particular flight.

Under the ACAA, a carrier may not discriminate against a qualified handicapped individual by, among other things, denying transportation to that person. If person X is a qualified handicapped individual in his own right, X does not cease being a qualified handicapped individual because persons A, B, C, D, and E, likewise qualified handicapped individuals, have already boarded the aircraft. By keeping X off the plane because he makes "one too many" qualified handicapped individuals on that flight, a carrier engages in a facial violation of the Act.

If a clear case had been made that the second, or fifth, or eleventh qualified handicapped individual on a flight, or the handicapped person that exceeds the number of floor level exits or flight attendants, is "one too many," such that he or she may be excluded for that reason alone, the Department may have been able to permit a certain number limit to be imposed. In the preamble to the NPRM, the Department explicitly requested information on which a specific number limit could be based. None was presented. None of the comments, including those that

supported number limits, provided a basis on which the Department could conclude that any particular number limit was essential on safety grounds. Nor was there any discussion of number limits not focused exclusively on persons with disabilities (e.g., on elderly or obese persons or others who may leave a plane more slowly than others). We must conclude that there is insufficient evidence in the record of this rulemaking to warrant permitting number limits.

Instead, commenters favoring number limits simply asserted that carriers needed discretion to limit the numbers of handicapped passengers on various flights. (Indeed, ATA's proposed regulatory language on this point would not call on FAA to set any particular limit as essential to safety, or provide any basis on which FAA could do so, but would specifically permit carriers to set such limits for themselves, in carrier procedures.) To limit handicapped passengers on a given flight to some number or other, without standards, and without articulating a reasonable, specific safety basis, is to engage in classically arbitrary behavior inconsistent with a nondiscrimination statute like the ACAA. (Interestingly, the imposition of a number limit was among the "numerous incidents of arbitrary refusals of service and irrational decisions by airline personnel" cited by the court in *PVA* v. *CAB*. 752 F.2d at 720, nt. 185.)

Contrary to ATA's assertion, there is no relationship between the ability to impose number limits and compliance with 14 CFR 25.803(c). This FAA regulation requires that, as part of aircraft certification, a demonstration must be conducted, under specified conditions (including specifications as to the age and sex of passengers), showing that a fully loaded plane can be evacuated within 90 seconds. This is not an operational requirement. The mix of passengers on any particular real flight has no effect on the ability of a carrier, or an aircraft, to comply with the 90-second evacuation demonstration requirement for certification.

The issue of denial of boarding because of the substitution of a smaller, inaccessible aircraft would arise only in those situations when an aircraft with less than 30 seats was used, and hand-carrying was the only way of getting the passenger into the aircraft. In the SNPRM accompanying this rule, the Department raises for comment the question of whether substitute transportation should be provided when this occurs. The Department will consider the issue of denied boarding compensation in the overall context of further rulemaking concerning small, inaccessible aircraft.

Section 382.33—Advance Notice Requirements

NPRM—The NPRM section would prohibit any requirement for advance notice from a handicapped person in order to receive transportation or to receive most services or accommodations required by the rule, with six exceptions. Persons who wanted medical oxygen, incubator or stretcher service or a respirator hook-up, an on-board wheelchair, or hazardous materials packaging for a battery could be required to provide up to 48 hours notice by the carrier. If this notice is provided, the carrier would be required to provide the service or accommodation. If not, the carrier would still be required to provide the service or accommodation, if the carrier could make it available through a reasonable effort, without delaying the flight.

Comments—PVA agreed that requiring advance notice for incubators, stretchers, medical oxygen for on-board use, and respirator hook-ups was reasonable. PVA opposed requiring advance notice for on-board chairs and hazardous materials packaging for batteries. Requiring advance notice for these two items would work a hardship on handicapped travelers, especially business travelers and others who must fly on short notice. Having on-board chairs and battery packages available on every aircraft or every terminal would not be unduly burdensome on carriers, in PVA's view. Also, advance notice systems often have not worked, making this provision of questionable worth. PVA pointed to language in *PVA* v. *CAB* suggesting that, outside the context of the small EAS carriers to which CAB expected the advance notice provision to pertain, the court might view an advance notice requirement differently than it did in upholding that provision of the CAB rule.

ATA emphasized that the purpose of advance notice requirements was to allow carriers to get the personnel and other resources needed for special accommodations for handicapped passengers in place in time. Advance check-in of two hours is advisable for the same reason. These provisions simply make for smoother arrangements, ATA says. ATA would add provision of boarding and deplaning assistance using mechanical lifts or aisle chairs, or more than the usual complement of personnel and ground wheelchairs at facilities where they are not normally available to the list of accommodations for which advance notice and check-in could be required.

Other carrier comments suggested advance notice for any passenger requiring some form of assistance, for non-ambulatory passengers (for purposes of preboarding), for hearing impaired passengers, or for wheelchairs as well as batteries. One carrier wanted an advance notice period longer than 48 hours. RAA said that, if a passenger gave advance notice to one carrier, and that carrier cancelled the flight or bumped the passenger because of overbooking, a second carrier who carries the passenger on short notice should not be expected to provide the accommodation for which advance notice was given to the first carrier. RAA also supported a one-hour advance check-in. Some carriers also mentioned support for advance notice requirements for on-board wheelchairs and battery packages.

Disability community commenters said that airlines should be prohibited from requiring advance notice or that, if advance notice were permitted, that it should be for a shorter period (e.g., 24 hours). A larger number of disability community commenters opposed advance notice for accommodating wheelchairs or providing battery packages.

In discussing advance notice, it is important to distinguish between advance notice for persons and advance notice for accommodations. The rule, like the NPRM, clearly prohibits the former. There are no circumstances in which it is proper for a carrier to require, as a condition for providing transportation, that a handicapped person provide advance notice that he or she is coming and that he or she has a disability.

On the other hand, there are circumstances in which it may be appropriate for a carrier to say that if it is going to provide special services or accommodations, it needs to have advance notice so that the equipment or personnel needed to provide the accommodations can be directed to the right place at the right time. We agree with ATA that if certain accommodations are required to be provided, the carrier should have enough time to prepare to do the job right.

For this reason, we are retaining the provision allowing carriers to require advance notice for packaging a battery for a wheelchair or other assistive device. The reason for doing so is less that of reducing carrier costs for battery packages (which should not be high in any case) than it is to ensure that both

materials and personnel are available for the task. The task, in this case, would involve not only putting the battery into a package but also disassembling and reassembling the wheelchair or other device. This involves a commitment of personnel time and training by the carrier, and it is reasonable to let the carrier know in advance that it will have to perform this task.

A similar point applies to electric wheelchairs, with respect to flights scheduled to be made with aircraft with 60 or fewer seats. Handling of large pieces of equipment for stowage aboard smaller aircraft is likely to pose special problems. In this situation, we believe that advance notice will make it more likely that this accommodation can be provided smoothly and in a timely manner.

A carrier may also require advance notice for on-board wheelchairs in aircraft with inaccessible lavatories. On-board wheelchairs are not required to be carried on these aircraft at all times. In order to give the carrier a chance to get an on-board wheelchair to the proper station for the flight in question, it is reasonable for the user of the equipment to provide advance notice. Otherwise, it is not realistic to believe that the service can be provided reliably. Since on-board wheelchairs will be provided in aircraft with accessible lavatories, this provision will not pertain to such aircraft.

The advance notice requirements for medical oxygen, stretcher accommodations, incubator accommodations, and respirator hook-ups were not controversial, and they have been retained.

We agree with carrier comments that advance check-in, as well as advance notice, may be necessary if proper accommodations are to be provided. As a practical matter, for example, it takes time to disassemble an electric wheelchair, pack the battery, and stow the wheelchair aboard the aircraft. It is not reasonable to ask carrier personnel to perform this work at the last minute, when many tasks must be accomplished, or to delay the flight. A one-hour advance check-in, as suggested by RAA, is not an unreasonable burden on passengers, in any case.

PVA and other commenters expressed concern about whether advance notice really works, suggesting that operating personnel may never get the word from reservation agents that advance notice has been provided. Obviously, if this internal carrier communication does not happen, advance notice is futile. Consequently, the rule will require that reservation systems and other carrier administrative systems provide for this communication to occur properly. When advance notice has been given, the carrier is required to provide the accommodation in question, assuming the service is one which the carrier makes available on the flight. Even if a passenger does not comply with a carrier's advance notice and advance check-in requirements, the carrier must provide an accommodation as long as it can do so with a reasonable effort and without delaying the flight. This latter provision should mitigate any adverse effect of the advance notice requirements on business and other short-notice travelers.

We regard such things as equipment used for boarding assistance and ground wheelchairs as so much a part of the normal, day-to-day business of getting people onto and off of airplanes that it is not appropriate to think of them as the kind of special, time-consuming assistance that would call for advance notice. As the Department commented in 1979 to the CAB on this issue, "provision of wheelchairs would not appear to require any unusual effort or training on the part of airline employees; and many airlines already provide wheelchairs for handicapped passengers during boarding of aircraft, without advance notice * * *." 752 F.2d at 723, nt. 211. In addition, the traveler making a telephone reservation is likely to have no way of knowing whether a carrier will view a particular service as requiring more than the usual complement of personnel or whether ground wheelchairs are usually not available at a particular facility. It is not reasonable to make passengers guess about such matters, with the penalty for a wrong guess being the unavailability of a needed accommodation.

As PVA noted, the court in *PVA* v. *CAB* suggested that it viewed the 48-hour advance notice provision of the CAB rule as intended to assist the small EAS carriers to which the rule principally applied. The Department does not view this discussion in the decision (which consists, in any event, merely of dicta) as a mandate to limit advance notice requirements to a shorter period. Given the administrative complexities of providing accommodations in large as well as small carriers, we believe that the 48-hour period is a reasonable one for the purpose of ensuring that requested services are actually provided. A longer period (e.g., 72 hours) could unreasonably burden travelers; a shorter period (e.g., 24 hours or less) might provide handicapped passengers a pyrrhic victory, if it resulted in carriers being unprepared to provide needed accommodations.

In the commenters' discussion of the number limits issue under § 382.31, disability group commenters mentioned that carriers are often able to carry rather large groups of disabled persons, and carrier commenters countered that this was because carriers were able to make arrangements well in advance of the flight. This discussion suggested to the Department a useful addition to the list of accommodations for which advance notice is appropriate. That is, carriers may require 48 hours' advance notice for a group of ten or more handicapped persons who will be traveling together as a group on a flight. As for the other items for which advance notice may be required, this provision is intended to allow carriers sufficient time to prepare to make whatever special arrangements may be needed to accommodate a group of this size.

This provision is not intended to cover all situations, or to be a surrogate for a number limit provision. It does not apply to situations where a number of handicapped passengers independently wind up taking the same flight. Nor does it apply to a situation where a number of handicapped passengers are traveling to a common destination (e.g., a conference) on the same flight, but not as a formal group. It is intended to be helpful in situations where an organized group is making a collective reservation to travel together.

The rule will not impute to a second carrier advance notice provided to a carrier whose flight was cancelled. However, since the first carrier will have had the chance to prepare for the accommodation, the Department believes the first carrier should be obligated to assist the second carrier to the maximum extent feasible to ensure that it can provide the accommodation. For example, if carrier X designates a ground staff person to disassemble a wheelchair, but carrier X's flight is cancelled and the passenger has to travel on carrier Y, carrier X must, to the maximum extent feasible, have its ground staff person assist carrier Y's personnel in preparing to carry the wheelchair.

Section 382.35—Attendants

NPRM—With the exception of persons in certain specified categories the NPRM would prohibit carriers from requiring handicapped persons to travel with an attendant. These categories included persons with a mental disability who either could not comprehend or respond appropriately to

safety-related instructions of carrier personnel or who were brought to the airport under the supervision of an agent of an institution which had custody of the individual. Persons traveling in a stretcher could be required to have an attendant capable of providing whatever medical care they needed during the flight. Quadriplegics and deaf/blind persons could self-assess with respect to the need for an attendant. If the carrier decided persons needed an attendant, the first person in each category on a particular flight could travel unaccompanied anyway, though in a seat designated by the carrier. Subsequent members of each category on the flight would have to have an attendant if the carrier decided that it was necessary.

Comments—ATA would replace the NPRM provision with a statement that the carrier may require an attendant if the person needs extraordinary personal care during the flight or if reasonably necessary for safety in accordance with FAA rules or policies, or in order to meet the definition of a qualified handicapped person. The NPRM proposal, ATA said, did not ensure that carriers had adequate "decisional discretion" to make decisions in the interest of safety. In particular, by allowing passengers' self-assessments to control in some situations, the NPRM would prevent carriers from meeting their legal responsibilities for flight safety. ATA also objected to the "first passenger" provision as administratively unworkable.

ATA added that carrier personnel cannot know when a handicapped person might impede a rapid evacuation. Consequently, when carrier personnel have doubts about a handicapped person's ability to evacuate safely, or otherwise about their being a qualified handicapped individual, then the carrier should be able to require an attendant. Self-assessments should not override this discretion on the part of carrier personnel, which is needed to ensure safety, even if it may result in unfairness and hardship to passengers.

PVA objects to the NPRM's use of categories of disabled persons who could be subjected to attendant requirements, which PVA views as discriminatory. The categories are so broad as to be unworkable (particularly "quadriplegics"), PVA says, and they also give carrier personnel too much discretion to decide who needs an attendant. PVA says that carrier personnel have no basis on which to second-guess the self-assessments of handicapped persons, arguing that ATA's own comment concedes the point (see previous paragraph).

PVA also disagrees with the "person under the supervision of an agent of a custodial institution" category, saying that it is overbroad, difficult to apply reasonably, and discriminatory against a number of individuals. Like ATA, PVA believes that the "first passenger" scheme is unworkable.

PVA believes that the rule should call on carriers to follow disabled persons' self-assessment with respect to the need for an attendant. No one knows better than the handicapped individual what his or her abilities and needs actually are, and handicapped individuals are neither so unintelligent nor so stubborn as to insist on flying alone when they know they need an attendant. If a carrier may overturn a handicapped passenger's self-assessment, PVA suggests, the carrier should bear the cost of any attendant requirement it imposes.

A substantial number of other disability community commenters agreed with PVA that passengers' self-assessments should control, and that the rule should prohibit carriers from requiring attendants when passengers did not believe attendants were needed. Some of these comments pointed out that the extra cost of an attendant could prevent handicapped people from flying. DOJ and another commenter suggested that if the carrier required an attendant, the carrier should provide the attendant at no cost to the passenger.

Some organizations representing deaf/blind persons objected to attendant requirements; others suggested that anyone making determinations about such passengers for the carriers be well trained. Likewise, organizations representing persons with mobility impairments objected to attendant requirements for quadriplegics or, like PVA, called attention to the difficulty of using this category reasonably. Similar comments disagreed with the "mental disability" category. A number of comments from various parties joined the chorus of disapproval for the "first passenger" mechanism.

Comments from carriers and carrier labor organizations suggested that all "totally handicapped" persons, or non-ambulatory persons, or persons who could not completely understand safety-related instructions, should have attendants. RAA suggested that the entire provision should be deleted, to be replaced by an FAA rule (part of the ATA/RAA petition alluded to above) giving carriers discretion conerning attendants.

DOT Response—Both carriers and disability groups have valid concerns relating to attendant requirements. On one hand, passengers know far better than carrier personnel what their own capabilities are. As both PVA and ATA state, carrier personnel are not well equipped to evaluate these capabilities. Moreover, an attendant requirement is not only galling for a handicapped person who does not feel an attendant is needed, it is very costly. ATA points out, justifiably, that this rule should not impose undue burdens on carriers. Disability groups could respond, equally justifiably, that the rule should not permit carriers to impose undue financial burdens on passengers through unnecessary attendant requirements. Disability groups can point to numerous situations in which disabled passengers have been arbitrarily required to have an attendant, or denied passage for lack of one. Attendant requirements were also among the list of "arbitrary refusals of service and * * * irrational decisions" noted by the court in *PVA* v. *CAB*, 752 F.2d at 720, nt. 185.

On the other hand, carriers do have a responsibility to ensure the safety of all passengers, a responsibility explicitly recognized by the ACAA. This safety responsibility must be exercised even if, on occasion, in a way contrary to passenger preferences. While handicapped individuals are probably the best judges of their own capabilities, carrier personnel are likely to have more information concerning the aircraft and evacuation procedures. Handicapped passengers, no less than other passengers, may have their judgment affected by economic factors or an "it can't happen to me" attitude. All this suggests an appropriate role for carrier judgment.

In framing a final rule provision, the Department has tried to balance all these factors. The Department recognizes, first of all, that for most handicapped individuals, it is never appropriate for a carrier to require an attendant. For example, blind individuals, deaf individuals, and persons with relatively less severe mobility impairments (e.g., most paraplegics or persons who have lost one or two limbs) are likely never to need an attendant for safety or evacuation-related reasons. Also, there are some grounds, under the ACAA, that are never legitimate for requiring an attendant (e.g., a perception by carrier personnel that the individual will need substantial personal services during the flight, which carrier personnel are not obligated to provide). That a person may, in a carrier employee's judgment,

need to use a restroom on a flight not using an aircraft with accessible restrooms is not a safety-related basis for requiring an attendant, and hence the rule does not permit an attendant requirement for such a reason.

The rule, then, says that a carrier is permitted to require an attendant only for safety reasons (not presumed requirements for personal services or inconvenience or additional work for crewmembers) and only for persons meeting one of four criteria. The first of these criteria concerns persons traveling in an incubator or stretcher. No carrier judgment is required here; the person either is or is not in an incubator or stretcher. In this case, which was not controversial under the NPRM, the attendant must be capable of attending to in-flight medical needs of the passenger.

The second criterion concerns a person who, because of a mental disability, is unable to comprehend or respond appropriately to safety-related instructions of carrier personnel, including the safety briefings required by FAA safety rules. (The Department has decided to drop the "person coming to the airport under the supervision of agent of a custodial institution" category, both in response to adverse comment on that category and because persons in that category who would create a safety concern would probably be subsumed in this mental disability category.) While people with a variety of disabilities (e.g., developmental disabilities, cognitive disabilities, brain damage, mental illness, Alzheimer's syndrome) may be affected, this criterion, in its application, is intended to be defined in functional rather than diagnostic terms. That is, the ability of the individual to actually understand and respond appropriately to the instructions is the key. Some individuals with mental disabilities may be able to do so, while others may not.

The Department recognizes the problems, pointed out by commenters, with the "quadriplegics" category of the NPRM, and is substituting a more functional criterion. An attendant may be required for a person with a mobility impairment so severe that the person is unable to assist in his or her own evacuation. The rationale for this functional criterion is that if a person can assist in his or her evacuation, the need for the assistance of others is reduced.

For example, if an individual cannot move his arms or legs independently at all, that individual is unlikely to be able to assist in his or her own evacuation. The individual would need someone else to help if he or she is to make any progress toward an exit during an evacuation. On the other hand, a paraplegic may often be able to use his or her arms and hands to assist in an evacuation by crawling or pulling him or herself along by grasping seat backs. Again, the key is the individual's functional ability, not a diagnostic category.

The fourth criterion derives from the Department's 1987 *Southwest Airlines* enforcement case, and concerns a person who has both severe hearing and vision impairments. If such an individual can establish some means of communication with carrier personnel, sufficient to permit the passenger to receive the carrier's safety briefing, the carrier could not require an attendant. Otherwise, the carrier could require an attendant. This criterion is also intended to be a functional criterion relating to an individual's particular abilities, and the Department intends the provision to be implemented in a manner consistent with the *Southwest Airlines* decision. Burdensome administrative requirements making it difficult for the passenger to establish that he or she can communicate or otherwise making independent travel difficult are not consistent with this portion of the rule.

These criteria encompass the situations in which, based on discussions in the regulatory negotiation, comments, and the Department's experience, it is fair to expect that a genuine safety rationale for requiring an attendant could exist. More inclusive criteria would go beyond safety into the realm of carrier convenience and concerns about providing personal services, which are not sufficient rationales for imposing requirements on handicapped passengers under the ACAA.

The Department agrees with commenters that the "first person" mechanism, developed by the parties during the regulatory negotiation, is probably unworkable. In its place, as a means of accommodating both the safety discretion concerns of carriers and the concerns of disability group commenters about arbitrariness and cost burdens of attendant requirements, the Department is adopting a suggestion made in a number of comments.

Under this provision, if the carrier determines that safety requires a person arguably meeting one of the last three criteria to have an attendant, then the person will have to travel with an attendant, even if his or her self-assessment is that he or she can travel independently. In this case, however, the carrier will bear the cost of the attendant's transportation.

The carrier could do so in a number of ways. The carrier could provide a free ticket to an attendant of the handicapped passenger's choice. The carrier could designate an off-duty employee who happened to be traveling on the same flight to act as the attendant. Either the carrier or the handicapped passenger could seek a volunteer from among other passengers on the flight (a search which would probably be facilitated by the incentive of free passage). It should be emphasized that the only purpose of the attendant in these circumstances is to assist the handicapped person in an emergency evacuation. Personal service duties (e.g., with respect to eating or going to the lavatory) are not expected.

This approach has several advantages. It gives the carrier the "decisional discretion" to require an attendant when it really believes an attendant is required for safety purposes. The handicapped person's self-assessment cannot override the carrier's safety judgment in this regard. Because it requires the carrier to stand behind its safety judgment with a financial commitment, it reduces the likelihood of arbitrary decisions by carriers to require attendants. While the handicapped person may have to accept traveling with an attendant, the extra monetary burden on the passenger is largely removed. The possibility that the carrier will respond to a situation by designating an off-duty employee or another passenger as the attendant (or by determining that the passenger, indeed, can travel independently) minimizes the likelihood that handicapped persons would use this provision as a "free rider" opportunity for friends or relatives. Because disabled persons who genuinely need attendants tend to travel with them anyway (there is no reason to doubt the representations of disability groups on this point, and it is consistent with the experience of DOT staff), the overall cost to carriers is not likely to be great.

Two administrative provisions have been added to help this provision work in the situation of a sold-out flight. When the carrier determines that an attendant is needed, the attendant will be deemed to have checked in at the handicapped person's original check-in time. For example, on a sold-out flight, a handicapped person with a confirmed reservation checks in at the gate an hour before the scheduled departure time. Forty minutes later, after discussion with the handicapped person and the complaints resolution official, carrier personnel determine that the passenger must have an attendant. No one with a

confirmed reservation volunteers, but a standby passenger or an off-duty carrier employee is found to act in this capacity. For purposes of determining who gets bumped from the flight, the attendant is regarded as having checked in an hour before departure. The attendant and the handicapped person would both have priority over other passengers who arrived less than an hour before the scheduled departure time. For example, a passenger who arrived 30 minutes before scheduled departure time would be bumped before the handicapped person or the attendant, even though the passenger had checked in before the attendant was actually selected.

On the other hand, if the handicapped person arrived 15 minutes before scheduled departure time, and the carrier determined that an attendant was necessary, the handicapped person and the attendant would not have bumping priority over passengers who had arrived earlier. If there were not room for both, and the handicapped person consequently could not travel, the handicapped person would be eligible for DBC, just as if he or she had been a victim of overbooking. This is because the handicapped person had a confirmed reservation and, but for the carrier's decision and the inability of the carrier to find someone already on the aircraft to act as an attendant, would have flown on the flight.

Section 382.37—Seat Assignments

NPRM—The NPRM provided that carriers could not exclude any person from an exit row or other seat location, or require any person to use a particular seat, on the basis of handicap, except in order to comply with an FAA safety regulation. FAA subsequently published a separate NPRM proposing to require carriers to seat in exit rows only those persons who could perform a series of functions in an emergency evacuation. The FAA NPRM would have the effect of excluding many handicapped passengers from exit rows.

Comments—RAA suggested deleting this section. ATA would replace the NPRM provision with language granting carriers discretion to restrict the assignment of any seat if, in the carrier's reasonable expectation, a passenger may impede or interfere with an emergency evacuation or with the crew's performance of duties in an emergency. ATA says that this formulation better accommodates the fact that FAA standards are minimum standards which carriers are encouraged to exceed, in the interest of achieving the highest possible degree of safety. Moreover, ATA says, the NPRM does not take proper account of the role of FAA orders, advisory circulars etc. concerning safety, since it focuses on what an FAA regulation says. ATA makes specific reference to a 1977 FAA Advisory Circular suggesting that carriers seat non-ambulatory persons near floor level, non-overwing exits.

PVA argued that in the absence of an FAA safety regulation, carriers should be prohibited from imposing seating restrictions on the basis of handicap. PVA said, however, that any carrier procedures adopted to implement an FAA regulation in this area must themselves conform with the general nondiscrimination requirements of part 382. PVA disagrees with ATA's assertions that carriers' general discretion to exceed minimum FAA requirements authorizes carriers to take action contrary to a Federal statute like the ACAA.

The NFB commented extensively on this section. NFB strongly advocates the position that there is no valid or persuasive evidence that blind persons present a safety problem as passengers in air transportation. Genuine safety justifications for different treatment of blind passengers (e.g., airline policies barring blind passengers from exit rows) do not exist, in NFB's view. NFB warns against making blind passengers the victim of a discriminatory "safety hoax," and expresses concern that safety reasons advanced for restricting exit row seating are pretexts for discrimination and prejudice.

Indeed, NFB contends, there are far more serious cabin safety problems which FAA and the industry have thus far failed to address. The NFB comment discusses several matters raised at a recent cabin safety conference which, in NFB's view, were far more deserving of regulatory attention by FAA than exit row seating. NFB points to FAA's acceptance, under current FAA rules, of some carrier policies which do not bar blind passengers from exit rows as evidence that FAA has not, until recently, believed that exit row seating is a significant safety issue.

NFB urges that this section of the rule prohibit discrimination in seat assignments and require carriers to apply the same standards and restrictions concerning exit row seating to handicapped and nonhandicapped persons alike.

The American Council of the Blind (ACB) said that any restrictions on exit row seating should be based on empirical evidence. Other disability community comments generally favored a prohibition on seating restrictions, though one comment suggested that restrictions could apply to the seat next to the exit (but not the whole exit row). Carrier comments favored provisions that would either preserve carrier discretion in seating matters or expressly authorize seating restrictions for handicapped persons where restricted seating would contribute to speeding an evacuation. Carrier labor organizations generally agreed with carrier comments on this issue.

DOT Response—Many comments on this section of the NPRM, including a substantial portion of NFB's comments, concerned the substance of what restrictions, if any, on exit row seating should be imposed by an FAA safety rule. These comments are not on point for this NPRM. Rather, they relate to the FAA rulemaking concerning exit row seating.

As a general matter, ATA is correct in pointing out that carriers have discretion to exceed requirements of FAA safety rules. This discretion cannot be taken to override the mandate of a Federal statute, however. As discussed above, the ACAA prohibits discrimination against qualified handicapped individuals on the basis of handicap, including the imposition on handicapped passengers of restrictions not imposed on other passengers, except for safety reasons found necessary by the FAA. Where the exercise of discretion by a carrier imposes restrictions on handicapped passengers not imposed on other passengers, and the restriction has not been found necessary by the FAA, the carrier's discretion is constrained.

For example, some carriers have followed policies of requiring persons using service animals to sit in bulkhead rows. Absent the ACAA, this exercise of discretion, which is not inconsistent with FAA safety requirements, is legally permissible. But imposing this seating restriction on handicapped persons who use service animals in the absence of an FAA safety requirement for seating service dog users in bulkhead seats, is prohibited under the ACAA and this rule.

Likewise, an FAA Advisory Circular suggesting that it may be useful to sit non-ambulatory persons in a location that would place them at the end of an exit queue is advice or suggestion. It is not a legal requirement. It is not a finding by the FAA that this seating pattern is necessary for safety. FAA's administration of its safety rules (14 CFR § 121.586) has not required this suggestion to be adopted. So while, under the ACAA, it is perfectly appropriate for a carrier to recommend seating locations to non-ambulatory persons, it is not correct to say that

carriers have discretion to require these passengers to sit in these locations. Under the ACAA, carriers are not intended to have this discretion, and this regulation will not grant discretion which the statute intends to be withheld.

At the same time, the Department would not, consistent with the ACAA, purport to limit through this rule the discretion of the FAA to issue a specific safety regulatory requirement such as it has proposed in the exit row seating area. Consequently, were are not adopting comments which urged a regulatory ban on exit row seating restrictions.

We agree with PVA and NFB that in implementing any FAA rule in this area, carriers are obligated to do so in a nondiscriminatory manner. The Department does not believe that any special language to this effect is needed in this section, however; the general nondiscrimination requirements of section 382.7 should be sufficient.

The Department is adding two provisions to this section. The first is a response to a comment concerning the denial of transportation, consistent with § 382.31, of a person whose involuntary active behavior would endanger flight safety. If such an individual could be transported safely in a particular seat location on a particular flight, the carrier would be required to offer such a seat location for the person as an alternative to denying transportation.

It should be emphasized that this provision applies only with respect to a passenger's involuntary active behavior (e.g., the loud exclamations of someone with Tourette's syndrome). This provision is not intended to allow carriers to isolate a handicapped person because the person might look or seem strange to other passengers.

The second responds to comments concerning service animals (see discussion of § 382.53). If a service animal cannot be accommodated at the seat originally assigned to its user (e.g., because it blocks an aisle), the carrier may move the animal and its user to another seat at which it may be properly accommodated.

Section 382.39—Provision of Services and Equipment

NPRM—This provision would require carriers to assist handicapped persons in enplaning and deplaning, making connections, etc. However, where the physical limitations of 19-seat or smaller aircraft precluded the use of existing boarding devices, carrier personnel would not have to hand-carry a handicapped person onto an aircraft. Carriers would have to provide assistance (including help with the use of an on-board wheelchair) in getting handicapped persons to lavatories, but would not have to assist handicapped persons in a bathroom or otherwise with elimination functions. Carrier personnel would have to assist handicapped persons with preparation for eating but not with eating itself. Assistance would be required for retrieving carry-on items. Carrier personnel would not be required to provide medical services for handicapped persons.

1. Enplaning and Deplaning of Handicapped Passengers

Comments—PVA argued that the ACAA requires access to air travel, and that carriers have the obligation to make sure that handicapped passengers are able to get onto aircraft, by whatever means are available and necessary. It is undesirable to carry passengers on board by hand, but if no other method is available, then it must be done, even on the smallest of aircraft. If a carrier refuses to do so, then the passenger should receive denied boarding compensation.

ATA believes that it is never proper to require carrier personnel to carry passengers on board. The danger of injury to personnel is too great, and such a requirement would involve the provision of extensive affirmative assistance which is beyond the scope of the ACAA. If carrying passengers aboard is the only way to enplane them, then they won't get to travel. Airports should be required to provide lifts for carriers to use, in order to facilitate enplaning handicapped passengers. RAA emphasizes the point that it is often very difficult to enplane handicapped persons on small aircraft and that requiring hand-carrying would involve serious risk of injury to carrier personnel and passengers alike.

Disability group comments emphasized that the exception to boarding assistance requirements for small aircraft would close many flights to handicapped passengers. Some of these commenters suggested that lifts should be required for all flights not served by a level-entry boarding ramp. ATBCB suggested that lifts should be required even for small aircraft within three years. Carrier commenters opposed requirements for carrying handicapped persons on board and consequently supported the small aircraft exception. Carrier labor organizations also opposed any requirements for carrying of passengers, for the same reasons stated by carriers. Carrier comments also expressed concerns about the potential costs of lifts, although comments did not quantify these costs.

DOT Response—The Department agrees with commenters that hand-carrying a handicapped passenger onto or off of a plane is the least desirable method of enplaning and deplaning that passenger. This is true because of concerns about injuries to carrier personnel as well as concerns about the dignity and safety of the passenger. For this reason, the Department has made several changes and clarifications to this section.

The basic requirement remains intact: carriers must provide assistance to handicapped passengers in enplaning and deplaning. This assistance includes the services of personnel and the use of ground wheelchairs, boarding wheelchairs, on-board chairs (where provided in accordance with the rule), and ramps or mechanical lifts. The Department has added language, adapted from 49 CFR § 27.71, requiring that level-entry boarding platforms or accessible passenger lounges be used for this purpose when these devices are available. Otherwise, carriers shall use ramps, lifts, or other devices for enplaning or deplaning handicapped persons who need this kind of assistance. The rule requires that devices not normally used for freight be used for boarding assistance, for reasons pertaining to the dignity of passengers. However, if a passenger would prefer to use a lift—even one normally used for freight—in preference to a boarding chair, the carrier may honor the passenger's preference without conflict with this rule.

This provision does not mean, necessarily, that each airline must own its own lift at each airport. Airport operations have an existing responsibility under 49 CFR 27.71(a)(ii)(v) to ensure that such devices are available. Carriers may also jointly own or lease such devices at a given airport, or borrow devices from one another. These means should enable carriers to mitigate the costs of providing boarding assistance.

Carriers are required to use these devices where level entry boarding platforms are not available for a flight (i.e., a carrier cannot decline to use an available lift). The requirement to use such devices carries with it the obligation to maintain them in proper working order.

In small aircraft (less than 30 seats), the Department will exempt from boarding assistance requirements situations in which existing lifts, boarding chairs or other devices are unfeasible, leaving hand-carrying as the only means for boarding a passenger. (The 30-seat aircraft cutoff for this

exception is based on discussions during the regulatory negotiation which indicated that small aircraft often have in-door stairs that can accommodate safely only one person at a time. Information coming to the Department after the regulatory negotiation suggested such stairs are common in less than 30, as well as in 19-seat or less, aircraft.) This provision was included on the basis of the concerns about potential injuries to passengers and crew alike.

In the ANPRM being issued in connection with this rule, the Department is seeking further information on the development of lifts for small aircraft. While one Canadian manufacturer has developed a lift, and other development work is under way, it is not clear at this time when a working lift will be commercially available that will fully achieve the objective of being able to help handicapped persons enplane in all or most small commuter aircraft. The Department is hopeful that, through the ANPRM, that we will obtain information concerning the feasibility, cost, and time of availability of these devices, so that we can determine whether and when to mandate their use. Also, the ANPRM, seeks comment on substitute service for persons who cannot use a small inaccessible aircraft in this situation.

The Department emphasizes that enplaning or deplaning assistance is not extraordinary or extensive special assistance; it is a key, regular part of everyday operations. There is little point in pretending that the Air Carrier *Access* Act has meaning if carriers can refuse to take steps essential to enabling handicapped passengers to get onto airplanes. Carriers' concerns about potential injuries to their personnel can be directly addressed by the carriers' assuring that lifts or similar devices are always available and used in the absence of level entry boarding platforms.

If a carrier fails or refuses to provide boarding assistance at an airport, the carrier has violated this regulation (except with respect to the small aircraft exception discussed above). The carrier would be subject to enforcement action; DBC would not apply, however, since that is not intended as an enforcement tool under the final regulation.

2. Assistance within the cabin

Comments—ATA opposed any requirement for carrier personnel to assist handicapped persons with moving to the bathroom, or with the use of an on-board chair. This would expose flight attendants to the risk of injury and would interfere with other flight attendant duties, and would force flight attendants to play the inappropriate role of personal attendant for the passenger. RAA and carrier labor organizations again were in basic agreement with the ATA position. RAA was particularly concerned about the operation of boarding chairs in small aircraft. One labor organization suggested that a crewmember should be able to opt out of lifting or carrying a handicapped person if he or she believed that doing so would result in injury.

PVA generally indicates a contrary position, but did not address this point specifically. Other disability groups did specify that carriers should provide assistance in transfers between aircraft seats and boarding or on-board chairs.

DOT Response—RAA's concerns about the use of on-board chairs in small aircraft are moot, since the rule will require on-board chairs only in aircraft with accessible lavatories, which small commuter aircraft typically do not have.

An on-board chair is not a device in which a handicapped individual can be independently mobile; because of size limitations (i.e., to fit down the aisle), the user cannot roll the chair on his or her own. Someone must push. Carriers already require flight attendants to push large, heavy beverage and meal carts up and down the aisles. Flight attendants therefore have experience in maneuvering substantial wheeled devices in the narrow spaces involved, and are best situated (compared, for example, to other passengers) to avoid conflicts with other people and devices using the aisles as they do so. In the multiple-aisle environment of widebody aircraft in which accessible lavatories, and hence on-board chairs, are required, flight attendant crews are larger than in other aircraft and conflicts with other flight attendant functions (e.g., meal and beverage service) are less likely to occur.

Use of crewmembers to push on-board chairs does not convert the crewmembers into personal attendants for disabled persons. Carriers are obligated to provide certain accommodations under the ACAA and part 382; the carrier inevitably implements these obligations by directing the employees in a position to carry them out to do so. The likelihood of injury from pushing a person in an on-board chair does not seem markedly greater than that resulting from pushing a meal or beverage cart. Carriers' concern about the former might be more persuasive if they did not require the latter.

The requirement for movable aisle armrests should mitigate, in new aircraft and in existing aircraft in which seats are replaced with newly manufactured seats, the concern relating to assistance with transfers. A lateral transfer is clearly much easier to accomplish than a transfer which involves someone being lifted over a fixed armrest. Since, with a few exceptions, accessible lavatories and on-board chairs will be found on new aircraft, which also will have movable armrests, flight attendants will have to deal with few situations in which assistance in the use of an on-board chair involves lifting a passenger over a fixed armrest.

Carriers could address even these situations (e.g., an existing aircraft with an accessible lavatory) by retrofitting a number of seats with movable armrests. While the regulation does not require this to be done, doing so would reduce concerns about potential lifting injuries. For transfers involved in enplaning and deplaning, ground personnel can come on board to assist crewmembers with transfers, where this is necessary.

The requirement to provide assistance with use of the on-board wheelchair is not necessarily intended to involve instant compliance by flight attendants with passenger wishes. For example, during some periods of a flight, a passenger's seat may be bracketed by both a beverage cart and a meal cart in the aisle, preventing the passage of an on-board chair. The crew would not be required to stop food and beverage service operations and displace one or both of the carts to employ the on-board chair. However, when the obstacles were gone, the assistance with the chair would be provided.

There may be occasional extreme situations in which it is physically impossible for particular carrier personnel, without obvious, inarguable risk of injury, to provide assistance to a particular passenger with the use of an on-board chair. For example, it may be physically impossible for a pair of 100-pound female flight attendants to assist a 350-pound wheelchair user in a transfer into or out of an on-board chair, or to maneuver the chair down the aisle carrying such an individual. The Department does not think it necessary to write a provision into this section of the rule to cover such unusual situations. However, the Department would apply a rule of reasonableness in responding to any complaint resulting from such a situation.

3. Other Issues

Comments—PVA supported the incorporation of standards for boarding chairs in the regulation, and the ATBCB supplied draft standards for this purpose. RAA said that handicapped

persons should not be permitted to crawl aboard aircraft. Several disability groups said that handicapped persons should not be left stranded in wheelchairs not permitting independent mobility for unreasonable periods of time. When a deaf/blind person is traveling, one commenter suggested, the carrier should provide a flight attendant trained in fingerspelling if advance notice is provided. Another commenter suggested requiring male flight attendants on a flight where lifting a handicapped person is required. One commenter suggested that services should be provided to developmentally disabled passengers on the model of services provided to young children traveling alone. Another recommended clip-on trays for meals.

DOT Response—DOT will defer the suggestion of the draft ATBCB standards for boarding chairs to the SNPRM for further comment. We are not sure, at this time, whether the proposed standards are workable. It is possible, for example, that current boarding chairs would not meet these standards and that manufacturers would have to modify existing designs. Information from manufacturers would be useful on this point.

The Department will not require carriers to permit handicapped persons to crawl aboard aircraft, which, dignity issues aside, is potentially dangerous. The Department does believe that carriers should not strand handicapped passengers in wheelchairs in which the passengers are not independently mobile (e.g., by putting a person who uses an electric wheelchair into a manual ground chair for long periods in the terminal in between flights). This can have adverse health consequences for some passengers, as well as creating inconvenience. The rule will prohibit leaving a handicapped person in this predicament for more than 30 minutes. After that time, the carrier would have to provide the person's own wheelchair, another wheelchair in which the individual could be independently mobile, or, on request, a person to assist with mobility (e.g., if the person asks to have the ground wheelchair pushed to a concession stand, the carrier would find someone to push).

The Department is not adopting the other comments requesting specific accommodations. These are very detailed suggestions, which appear to apply only to very small subsets of the handicapped passenger population, or which could be burdensome or inappropriate to require.

Section 382.41—Stowage of Personal Equipment

NPRM—In-cabin stowage of wheelchairs and other equipment would be governed by FAA rules concerning carry-on baggage. This general rule applies to such items as respirators and canes as well as other assistive devices.

Wheelchairs or components could be stored under seats or in overhead compartments, assuming they fit in those spaces consistent with FAA carry-on baggage rules. Carriers would have to allow stowage of at least one folding wheelchair in the cabin, if there was an area (e.g., a coat closet) that would accommodate it. In a smaller aircraft, there would need to be a dedicated storage area in the baggage compartment for such a wheelchair if there were no in-cabin storage space available.

Wheelchairs and other mobility aids would be stowed in the baggage compartment with priority over other cargo and baggage, except baggage brought by passengers who made their reservation before the disabled person did so. Wheelchairs carried as checked baggage would have to be returned as close as possible to the gate, and would be among the first items removed from the baggage compartment.

Carriers would have to accept electric wheelchairs as baggage, except where baggage compartment size or airworthiness/operational conditions prevented doing so. Carriers would also have to transport batteries containing hazardous materials, and would have to provide and package such batteries in appropriate hazardous materials packaging. Handicapped persons would have the opportunity to provide written instructions for or assist in the disassembly and reassembly of their equipment.

1. In-cabin wheelchair storage

Comments—Stowing a wheelchair in the cabin, such as in a coat closet, is unnecessary because airlines have procedures for the checking and quick return of such equipment, ATA comments. ATA adds that carriers have a good record concerning loss of or damage to wheelchairs. If wheelchairs were given priority for coat closets, other passengers' garment bags would be displaced, and would have to be stored elsewhere in the cabin, checked, or even sent on a later flight, with attendant problems of inconvenience, possible loss or damage, delay and extra cost. ATA would permit wheelchairs or components to be stored only in overhead bins or under seats, and would bar them from closets.

PVA believes that, since wheelchairs are more important for disabled passengers than garment bags are for other travelers, in-cabin stowage space should be provided for wheelchairs on a priority basis, even at the cost of inconvenience to other passengers. For example, if a closet has room for two wheelchairs, the rule should require the carrier to store two chairs there, even if this displaces all other bags from the space. It is desirable to stow wheelchairs in the cabin, PVA explains, to forestall the possibility of loss or damage to checked equipment and to permit easier retrieval at the aircraft door, which will facilitate mobility in the terminal.

Other disability group commenters said that carriers should be exempt from stowing wheelchairs only if the physical space to do so did not exist. Even aircraft with fewer than 30 seats should have a wheelchair storage space, some of these commenters said. Some carriers, on the other hand, said that in-cabin stowage was not feasible on small aircraft.

DOT Response—There appears to be a general perception among airline passengers that for reasons of convenience, speed, and concern (whether or not well justified) about loss or damage, it is preferable to carry on as much as possible of one's effects and check as little as possible. This behavioral pattern by passengers is one of the most significant reasons for recent FAA rulemaking action to limit more strictly carry-on baggage in the interest of cabin safety. It is a pattern that appears to characterize handicapped passengers as well as the general passenger population. Indeed, given that the consequences of loss of or damage to a wheelchair are greater to its user than the consequences to other passengers of the loss of or damage to a garment bag, and that there is a real benefit to being able to use one's own wheelchair as soon as possible after a flight concludes, handicapped passengers probably have better reason than most for wanting in-cabin storage.

For this reason, the Department is retaining a requirement that in aircraft where there is an in-cabin storage area that will physically accommodate a folding wheelchair, the carrier must designate a priority stowage area for at least one folding wheelchair. At the same time, the Department believes that ATA has a reasonable point in saying that it will create substantial inconvenience for other passengers and administrative problems if garment bags and other items already in the closet have to be removed and checked

because of the subsequent arrival of a wheelchair.

Consequently, the priority for stowage of a folding wheelchair will work as follows. When a handicapped person takes advantage of a carrier offer of an opportunity to preboard, that passenger may stow his or her wheelchair in the priority storage area, with priority over the items of other passengers who board at the same airport. This means that, if bags of passengers who have gotten on the flight at a previous stop so fill the area that there isn't room for the wheelchair, the wheelchair would have to be checked. Items that have been carried on by passengers who boarded the aircraft at a previous airport do not have to be checked to accommodate the wheelchair (though we would urge carriers and passengers to cooperate in moving such items to overhead or under-seat storage if this would make room for a wheelchair).

On the other hand, once the preboarded handicapped person has stowed the wheelchair in the closet or other area, other passengers who do not find sufficient room in that area for their items must stow them in an overhead compartment or under a seat, or give them to the airline to be checked. If the handicapped person does not preboard, he takes his chances, with all other passengers enplaning at the airport, of finding in-cabin storage space for his wheelchair or other items.

2. Stowage of Wheelchairs and Batteries

Comments—ATA had three general comments concerning stowage of wheelchairs. First, like surfboards, guns, bicycles, and fishing tackle, especially electric wheelchairs are an item requiring special packaging and handling, for which carriers ought to be able to charge a reasonable fee. Second, the reservation priority system for determining whether a wheelchair gets into the baggage compartment was unworkable. (RAA concurs with this point.) Third, with respect to spillage batteries, which are subject to DOT hazardous materials rules, carriers should be able to use their own DOT-approved packages and need not use packages (even if approved by DOT) that they do not normally use. ATA also says that a carrier which as a normal matter accepts no hazardous materials of any kind should not have to carry hazardous wheelchair batteries.

PVA generally concurs with the NPRM provison. With respect to carriage of wheelchairs, PVA would eliminate the provision that allows carriers to decline to do so on the basis of "operational" considerations. PVA agrees with ATA and RAA that the reservation priority system for wheelchairs on small aircraft is unworkable. PVA's solution would be to give an absolute priority to wheelchairs, since they are essential personal equipment for their users. Other baggage would be "bumped" from the plane, if necessary. All carriers should transport wheelchair batteries, even if they do not otherwise transport hazardous materials. As an alternative, a carrier that did not transport hazardous materials could provide "loaner" batteries (presumably at the destination point) and/or provide an equally effective way of getting the battery to its destination.

Southwest Airlines, which does not accept any hazardous materials, strongly contended that it should not be required to carry wheelchair batteries. Doing so, it said, would result in very expensive ($825,000 the first year; $425,000 in subsequent years) training requirements for its ground personnel under DOT hazardous materials rules. Southwest said that this expense would be unduly burdensome in light of the fact that it expects to carry only about 48 persons using electric wheelchairs in a year. Other carrier commenters objected to the cost of providing battery packages, or suggested that passengers should bring their own. One disability group seconded PVA's suggestion for "loaner" batteries.

DOT Response—Contrary to ATA's view, we do not believe that it is reasonable or appropriate to analogize a passenger's wheelchair—a piece of essential personal equipment without which the person has no independent mobility and cannot obtain access to other necessary items like food, lodging, and remunerative work—to optional recreational accessories like surfboard, guns, fishing tackle, or bikes. The two sets of items are not similarly situated. The first is virtually an extension of one's person. The second consists of nice-to-have, not need-to-have, things you use for fun.

In a regulation implementing a statute requiring nondiscriminatory access to air transportation, it is appropriate to treat different sets of items differently, when doing so is necessary to ensure that the purpose of the statute is achieved. This is such a situation. Essential personal equipment must go along with the person, its handling included in the price of the person's ticket. Extra charges would not be consistent with the nondiscrimination purpose of the ACAA. In this context, it appears, based on information in PVA's comment, uncontroverted by other commenters, that battery packages are quite inexpensive.

In response to the unanimous comment on the issue, we are dropping the "reservation priority" system for wheelchairs in checked baggage. Rather, to simplify the rule and to ensure that handicapped persons and their essential personal equipment are not denied transportation, the final rule makes the priority for wheelchairs and other assistive devices absolute. That is, the carrier must make room for the wheelchair or assistive device even if it means bumping cargo or other passengers' luggage.

The Department is aware that this provision may, on occasion, inconvenience other passengers. We regret this inconvenience. It is necessary, however, to balance the inconvenience of passengers whose luggage arrives late with the fact that without his or her wheelchair, the disabled passenger is unable to be independently mobile at the destination. In the Department's view, given the intent of the ACAA, the absolute necessity for a disabled passenger of bringing a wheelchair on a trip, if the trip is to take place at all, outweighs the inconvenience of a passenger who can make the trip without his or her luggage, but will be inconvenienced by its late arrival. (In situations where regular luggage must be bumped, this provision is not intended to give the handicapped person's regular luggage priority over other passengers' regular luggage.)

The rule requires that, where baggage has to be bumped for this reason, that the carrier make its best efforts to have the bumped baggage to the destination of the flight (either the various passengers' final destinations or the next hub where the baggage can be loaded on a flight for carriage to the final destination) within four hours of the scheduled arrival time of the flight from which the baggage was bumped. As its phrasing indicates, this is not an absolute requirement: the requirement is for good faith efforts.

The Department makes two suggestions for ways in which carriers can reduce potential inconvenience to other passengers and meet this best efforts requirement. First, section 382.33(b)(5) permits carriers to require up to 48 hours advance notice for transportation of an electric wheelchair on a flight scheduled to be made on an aircraft with fewer than 60 seats. This means that carriers will have the opportunity to know, two days ahead of time, that a large piece of equipment is going to be presented for transportation on a small aircraft at a given station. This is the situation most likely to produce bumping of baggage.

The carrier could then take steps (e.g., contacting other passengers with confirmed reservations to make alternate arrangements, making alternative arrangements for the transportation of other cargo or baggage, substituting equipment) to minimize inconvenience. A carrier could also offer incentives to other passengers to voluntarily have their luggage delayed, where baggage bumping proved to be necessary, much as is now done to obtain volunteers for bumping in overbooking situations.

With respect to carriage of hazardous materials batteries, the Department believes that comments (e.g., that of Southwest Airlines) overestimated the cost of training that would be involved in handling the batteries. According to FAA and RSPA staff who implement hazardous materials rules, only those personnel who would have to handle the batteries (not all ground personnel) would have to receive training, and the training would have to cover only the types of batteries used to power wheelchairs or other assistive devices.

All carriers are required to transport handicapped passengers, without discrimination. If, by refusing to carry hazardous materials, the carrier makes it impracticable for users of electric wheelchairs to use the carrier's flights, the carrier would not be complying with the ACAA. While it might be possible to surmount this problem by adopting PVA's suggestion concerning "loaner" batteries, (i.e., a carrier which does not carry any hazardous materials would not have to carry a hazardous material wheelchair battery, but it would ensure that a battery capable of operating the wheelchair is available for the passenger to use at his destination), it is doubtful that this alternative is practicable, given the different types of batteries involved and the logistical problems in getting the right battery to the right place at the right time.

DOT does not, as much, "approve" hazardous materials packages for batteries, so there is no such thing as a "DOT-approved" package. With this qualification, DOT agrees with ATA's suggestion that carriers may use only hazardous materials packages meeting the requirements of DOT regulations and may insist on the use of their own packages. Words to this effect have been added to the regulation.

The NPRM in effect excused carriers from transporting electric wheelchairs where baggage compartment size, airworthiness, or "operational" considerations prohibited doing so. PVA commented that "operational" was vague and a potential loophole in the requirement. The use of this term derived from discussions in the regulatory negotiation that referred to the fact that small carriers, at some stations, might not have enough personnel to prepare and load an electric wheelchair. Carrier and other parties did not describe further in their comments what "operational" considerations might be, as distinguished from airworthiness considerations. This concern is mitigated, under the final rule, by the fact that a carrier may require 48 hours' advance notice to transport an electric wheelchair on a small aircraft. The final rule will delete "operational" since it does not seem to have any other meaning in this context.

3. Other Issues

Comments—PVA said that the NPRM, which discussed stowage of wheelchairs and mobility aids, should be expanded to include other "assistive devices" used by disabled passengers (e.g., walkers, crutches, respirators, reading aids). PVA also suggests that carriers should not be permitted to limit disabled passengers' bringing of assistive devices on board by reference to carry-on baggage policies more restrictive than mandated by FAA rules. The ATBCB also takes this position.

ATA responds that since the FAA carry-on baggage rules set minimum standards, carriers' carry-on policies may be more stringent than FAA requires. RAA adds that regional carriers using small aircraft often have policies limiting passengers to one carry-on item (e.g., a briefcase), and advocates referencing compliance with these policies in the regulation. A carrier labor organization concurs that additional carry-on items should not be permitted in the cabin.

ATA suggests language permitting the carrier to return a wheelchair to the passenger at the baggage claim area rather than at the gate, if the passenger so requested or if doing so is necessary in order to comply with security requirements. The ATBCB and a number of disability groups, to the contrary, say that airlines should not be permitted to return wheelchairs at the baggage claim area rather than the gate or aircraft door.

ATA also suggested that the reference to a handicapped person "assisting" in the disassembly of a wheelchair be deleted and that an advance check-in requirement be permitted for persons checking electric wheelchairs.

Other disability groups asked that such devices as respirators, small personal oxygen tanks, and equipment to assist communications for deaf/blind persons be able to be taken into the cabin with their users.

DOT Response—The Department has incorporated the "assistive devices" language, in order not to restrict the kind of equipment with which handicapped passengers can travel. Any device can be brought on board the aircraft as long as doing so is consistent with rules of DOT administrations for hazardous materials and carry-on baggage.

The FAA rule about carry-on baggage has a bottom line: carry-on items must be stowed only in approved stowage areas. The FAA rule directs carriers to devise a program for implementing this basic requirement. The FAA then approves the program. One widely-used program, drafted by the ATA, limits carry-on items to two per person. As RAA mentions, some carriers may limit passenger to one carry-on item. The FAA advisory circular concerning the carry-on baggage rule does not address how assistive devices for handicapped persons should be treated under carrier programs.

The problem faced by handicapped persons is that, like other travelers, they have briefcases and garment bags that they want to bring into the cabin. Unlike other passengers, they sometimes must use mobility aids or other assistive devices. Such a device may be necessary, in light of an individual's disability, to allow the individual to perform a major life function. If the device is counted against the one-item or two-item carry-on limit established in a carrier's program, then the individual, because he or she needs the device to help deal with a disability, is permitted fewer "regular" carry-on items than other passengers. For example, on a commuter carrier with a one-item limit, a person with a vision impairment could face a choice between carrying on her briefcase, with papers to read for work purposes, or her reader/magnifier device, which enables her to read the papers. Whichever choice she made, she would not get her reading done.

We do not believe this kind of dilemma should be forced upon handicapped passengers; indeed, a good argument can be made that allowing a handicapped person fewer briefcases, garment bags etc. than other passengers are allowed because the handicapped person must use an assistive device would constitute a discriminatory application of a carrier's carry-on baggage program, not contemplated by the FAA's rule or consistent with the ACAA. Therefore, this rule will provide that assistive devices for a handicapped passenger, which can be stowed in approved stowage areas, will not count

against the number of carry-on items to which a passenger is limited by a carrier's carry-on baggage policy.

We see no reason to prevent a carrier from returning a wheelchair to a passenger at the baggage claim area if the passenger requests it. Language to this effect has been added to the rule. ATA's comment about "if necessary to comply with security requirements" is unclear. While a chair may have to go back to a gate through the security screening checkpoint, this does not mean that security considerations prevent the return of the chair at the gate. Addition of this language would be unnecessary and confusing.

In response to an ATA comment, we have added to this section a provision allowing carriers to require passengers with electric wheelchairs to check in an hour prior to the scheduled departure time of the flight. This advance check-in may be required even where a 48-hour advance notice requirement is not permitted by section 382.33 (i.e., for aircraft with 60 or more seats). If the passenger checks in later than this, the carrier must still transport the wheelchair if it can do so by making reasonable efforts, without delaying the flight.

Also in response to an ATA comment, we have deleted the reference to a handicapped passenger being able to "assist" in, as well as to provide written instruction for, the disassembly of a wheelchair. This work may often take place in an area of the airport which is off limits to passengers generally, and which in any case is not required to be accessible to handicapped passengers by this rule. We do not think it advisable to require carriers to allow passengers to enter these areas.

Section 382.43—Treatment of Mobility Aids and Assistive Devices

NPRM—This provision (then titled "Reimbursement for lost or damaged mobility aids") proposed that wheelchairs and other mobility aids shall be returned to the passenger functioning as delivered to the carrier. Carriers' liability could not be limited to less than twice the lost baggage compensation amount under DOT baggage rules (i.e., $2500). Carriers could not require handicapped persons to sign waivers of liability regarding wheelchairs and other mobility aids.

Comments—ATA would change "functioning as delivered to the carrier" to "in the same condition as received by the carrier." They would also permit waivers of liability for electric wheelchairs or other assistive devices which have controls subject to being damaged in transport and which are not delivered to the carrier adequately protected. RAA objects to increasing the baggage liability increase for wheelchairs and other assistive devices, saying that passengers should purchase insurance for additional value of such items.

As in the previous section, PVA says that coverage should be expanded to all "assistive devices." PVA also says that carrier liability for loss of or damage to assistive devices should not be limited to $2500, but should be full replacement value, given the key role that these devices play in the lives of their users. PVA urges the application of this principle to international flights of U.S. carriers as well as domestic flights. The carrier who loses or damages an assistive device should repair or replace it at the carrier's cost and provide a "loaner" replacement while the repair or replacement is pending. PVA does not object to ATA's word change concerning "in the condition received by the carrier" but does disagree with ATA's proposal to permit waivers of liability for wheelchair controls.

A large majority of disability community commenters stated that carriers should be responsible for the full replacement value of items they lose or damage, and, many said, for any consequential damages as well. Several of these comments also suggested that carriers promptly buy or rent a replacement. Among carriers, comments either supported the liability limit mentioned in the NPRM or said that liability should be the same as for other passengers' items, since handicapped passengers could buy insurance for the additional value of expensive items.

Some disability groups agreed with PVA that the section should cover all "assistive devices." A carrier and the ATBCB said that the "loaner" idea was unworkable; the ATBCB suggested that carriers should have liaison with local centers for independent living as a place to refer disabled travelers who needed equipment quickly.

DOT Response—DOT will make the change to "assistive devices" and the change to "in the condition received." Recognizing the often high cost of assistive devices and their importance to users, the Department will retain the liability limit at twice the normal liability limit for passengers' baggage (i.e., $2500). This is preferable to both leaving the liability limit at the $1250 applicable to other baggage (which does not recognize the cost and importance factors sufficiently) or making the carrier responsible for the full replacement value of assistive devices (which does not recognize sufficiently the ability of passengers to purchase insurance for expensive items).

Baggage liability for international flights is governed by the Warsaw Convention, and this provision would therefore not apply to international flights, even for U.S. carriers. It is correct, as PVA points out, that persons may declare the value of a item and receive actual value compensation if it is lost or damaged. This mechanism is available for passengers checking assistive devices on international flights. Carriers may impose a supplementary charge for carrying items in this situation, as provided in the Warsaw Convention.

For practicability and cost reasons, the Department does not believe that it would be reasonable in this rule to require carriers to rent or purchase replacement assistive devices for handicapped persons or to provide them as "loaners" when the carrier lost or damaged a device. We think that ATBCB's suggestion of carrier liaison with centers for independent living and other local disability groups, as a means of providing assistance to disabled passengers whose assistive devices are lost or damaged, is a good one, and we urge carriers to establish such relationships.

The Department will leave in place the prohibition of waivers of liability. It is not realistic to suggest that users of electric wheelchairs, for example, deliver their chairs to the carrier with protection attached to the controls. The person usually has to arrive at the airport using the wheelchair, for one thing; for another, the disabilities of many users of electric wheelchairs may prevent them from doing the work necessary to protectively package the controls. Carrier personnel, in any event, are likely to have a better notion than passengers of what sort of protection is needed for a device in the baggage handling environment. Handicapped passengers sometimes carry controls on board with them, or sometimes may come with packaging materials they ask carrier personnel to use. While this may be a prudent step, its absence is not a reason for a mandatory waiver of liability.

The Department has added a new paragraph to this section emphasizing that when carriers take a wheelchair or other assistive device apart for stowage, they have to put it back together promptly at the end of the flight.

Section 382.45—Passenger Information

NPRM—A carrier would have to make information available of interest to handicapped passengers, including

the location of seats on an aircraft with movable armrests, limitations of the aircraft with respect to accommodating handicapped persons or their wheelchairs or other equipment, and whether the aircraft has an accessible restroom. With respect to FAA-required safety briefings, carriers could conduct them for persons who preboard. With respect to other passengers, carriers could offer briefings but not require their acceptance. Carriers could not "quiz" disabled passengers to make sure they had absorbed the content of the briefing. Carriers also would have to ensure that handicapped passengers (including those with vision and hearing impairments) had access to information on ticketing, schedules, flight delays, etc.

Comments—PVA agreed with the NPRM provision, but suggested an addition. Carriers would report data about Part 382 complaints to DOT, which would publish a report periodically. The report, analogous to the "on-time" report, would give consumers an idea of what carriers were or were not doing a good job of serving handicapped passengers. DOT should require carriers to use their best efforts to make information available, even though PVA recognizes that in some instances (e.g., information on specific aircraft, information provided through foreign travel agents) it might be difficult to do.

ATA says that it typically is not feasible for a carrier to provide information about a specific aircraft to be used on a given flight; only about the aircraft type to be used. Information requirements should therefore relate to aircraft type. ATA also asked for clarification that carriers could, consistent with Part 382, provide safety briefings to all persons required to have them by FAA rules, a point echoed by RAA. ATA has no objection to providing various sorts of information, but asks that disabled passengers self-identify so the information can be provided readily. ATA opposes a complaint report of the sort suggested by PVA, saying it would be of little use and that other factors (e.g., personal experiences) play a more important role in choice of carriers than consolidated statistics.

A number of other comments, from various parties, endorsed the idea of a section like this one. Modest numbers of carriers and disability groups agreed with the positions of ATA and PVA, respectively, with regard to a number of the section's provisions. With respect to individual safety briefings, the American Council of the Blind (ACB) suggested they be given "inconspicuously and discreetly," to avoid embarrassment of the passenger. IATA repeated its point about foreign travel agents. Disability organizations suggested such accommodations as braille or large print information or tapping hearing-impaired persons on the shoulder to alert them to flight information.

DOT Response—The Department agrees that, since flight information is typically available in terms of aircraft type, the regulatory requirement for information should be phrased accordingly. However, since in some circumstances information about a specific aircraft may be available, we have retained the requirement to provide information about the specific aircraft, where doing so is feasible.

ATA and RAA are also correct in saying that FAA rules require providing individual safety briefings to certain passengers. The rule explicitly recognizes this fact, though it also permits the carrier to offer such a briefing to other passengers. (In the latter case, the carrier should desist if the passenger declines the offer.) We have adopted ACB's comment that such briefings should be conducted as discreetly and inconspicuously as possible. Obviously, it will be more practical to conduct briefings this way if disabled passengers preboard; those who do not preboard will have to put up with somewhat more public special briefings.

The Department is retaining the "no quizzes" provision, to which there was no objection in the comments. We are adding a sentence prohibiting the carrier from taking any action adverse to a passenger on the basis that the passenger has not "accepted" the briefing. (Carriers have sometimes used this concept as a reason for taking action against passengers.) It is unclear what "acceptance" of a briefing means. Disclaiming interest, staring straight ahead, reading a newspaper, or knitting while the special briefing is going on is not an appropriate basis for action against the passenger; while close attention to safety briefings is always recommended for passengers, carriers do not take action against members of the general passenger population who similarly ignore the general safety briefing. None of these behaviors prevents the crew from complying with their duty under the FAA rule, which simply is to provide the briefing.

The Department agrees with ATA's suggestion that persons who are unable to obtain needed information from terminal and aircraft sources should ask for the information from carrier personnel, who are obligated to provide it. Self-identification is a useful way to draw carrier personnel's attention to a need for information, althought the regulation will not require it. The rule will not specify particular ways of accommodating the needs of persons with vision and hearing impairments; a general requirement to accommodate is sufficient, and carriers can find the most appropriate way of doing so in the variety of situations they face.

The Department is not adopting the suggestion for a data reporting requirement on airlines' complaint experience. This would be an additional paperwork burden. Whether or not ATA's point about statistical data being less persuasive than personal experience or anecdote is valid, the Department does not see an equivalent of the "on-time" report as being a sufficiently useful tool that the resources to be used in preparing and compiling the data would be justified. Persons with an interest in the complaint experience of various airlines can call the Department's Consumer Affairs office (202–366–2220). The complaints received by this office may be of greater interest to consumers than the total universe of complaints, since the Consumer Affairs Office is likely to receive those complaints which passengers have been able to resolve satisfactorily with carriers.

Section 382.47—Accommodations for Persons with Hearing Impairments

NPRM—Carriers providing scheduled service would have to have telecommunications devices for the deaf (TDDs) for reservation and information service. Aircraft using video safety briefings would have to open caption the briefing tapes, phasing in captioned tapes as old tapes were replaced.

Comments—PVA generally agreed with this section, suggesting that non-scheduled as well as scheduled carriers should have TDDs and mentioning that sign language interpreter insets in a tape could be a reasonable alternative to captioning. ATA and RAA also generally agreed with the section, with ATA suggesting that if captioning were too small to be readable, carriers could substitute a non-video equivalent (e.g., written materials). ATA and RAA opposed the idea, mentioned in the NPRM preamble, of audio loops in the aircraft, on both cost and technical grounds.

Disability groups supported requiring TDDs for carriers not providing scheduled service as well as for those providing scheduled service, concurring with PVA that TDDs are a low cost item.

There was also support for captioning of safety briefing videos, and assurances that captions would not obscure the visuals. Some comments suggested retrofitting videos for this purpose, and one suggested that in-flight movies receive the same treatment. One carrier suggested not requiring captioning, and allowing as an alternative a video that used symbols. A few commenters recommended audio loops (in airports as well as in aircraft), and another called for a TDD in any on-board telephone bank.

DOT Response—DOT is partially adopting the comment that TDDs should be required for reservation and information purposes for carriers other than those providing scheduled service. Charter services under Section 401 of the FA Act will also be covered, but Part 298 air taxis (which include some very small operations) will not. As commenters pointed out, TDDs are inexpensive (about $200 per copy) and easy to use. They make communication possible for deaf persons that otherwise would be difficult to arrange. But we still do not think it is advisable to place even a modest burden for this purpose on the smallest of carriers.

We will also adopt both PVA's comment about sign language interpreter insets and ATA's comment about allowing non-video alternatives if captioning or sign language interpreter insets either obscured the visual message of the tape or were too small to be readable. The cost and technical feasibility of audio loops in the aviation environment (e.g., potential adverse effect on the operation of avionics) are so uncertain as to make a regulatory requirement inadvisable.

Section 382.47—Security Screening of Passengers

NPRM—This provision would require security screenings of handicapped passengers to be conducted in the same manner as for other passengers. Passengers whose mobility aids or assistive devices set off the alarm would receive an additional search just as would other passengers who set off the alarm. Private screenings could be requested by handicapped passengers (e.g., to avoid a public pat-down search where needed), if it could be provided in a timely manner without delaying the flight. A carrier would not have to provide a private screening if it used technology that could screen the passenger without necessitating a physical pat-down search.

Comments—ATA, RAA and PVA all approved this section as written. NFB objected to a sentence which would allow security personnel to inspect a wheelchair or other mobility aid, which, in their judgment, could conceal a weapon or other prohibited item. In NFB's view, if the wheelchair or assistive device otherwise passes security, there should not be allowance of judgment for additional inspection.

DOT Response—The section, subject of rare agreement, will remain intact. Security is a matter of the highest concern to everyone connected with aviation; taking precautions against terrorism is in everyone's interest. A terrorist who would pack a bomb in the luggage of his pregnant girlfriend would not scruple to try to conceal a weapon or explosive device in a wheelchair. If a security screener believes that it is necessary to take a closer look at a piece of equipment that could conceal something dangerous, this rule should not stand in the way.

Section 382.49—Communicable Diseases

Section 382.51—Medical Certificates

NPRM—These related sections are considered together. The NPRM said that a person who was handicapped, or regarded as such, on the basis of a communicable disease or infection could not be denied transportation, required to have a medical certificate, be subjected to any other restriction or condition, or otherwise discriminated against unless there was a reasonable medical judgment by appropriate U.S. public health authorities that the disease could be transmitted to other persons in the normal course of flight. Nor could a carrier require a medical certificate of anyone else except with respect to someone traveling in a stretcher or incubator, a person who needs medical oxygen on the flight, or a person with a communicable disease which had been determined by appropriate U.S. public health authorities to be transmissible to others during the normal course of flight.

Comments—PVA generally agreed with these proposals, though it found confusing the reference to communicable diseases in the section dealing with medical certificates. PVA was uncertain about when a person with a communicable disease transmissible in the normal course of flight could fly at all, or what a medical certificate could add to the process. Carrier personnel could not be expected to make an informed decision in such a case. PVA suggested a clarification that would provide that if a person had a disease transmissible in the normal course of flight, the person could fly if there was a medical certificate saying that, with certain precautions, or under certain conditions, the disease would not be transmitted by this particular passenger.

ATA suggested a modification to permit carriers to deny transportation to an individual, whether or not suffering from a communicable disease, who is so ill that the carrier has a legitimate concern that the person might not survive the flight or might require extraordinary medical attention. RAA agreed on this point. ATA also asked for clarification that such services as medical oxygen, stretcher and incubator accommodations are not required to be provided on a flight.

Three carriers pointed out that carrier personnel are not trained to make medical determinations, and one carrier labor organization suggested that carriers' discretion with respect to medical certificates should not be restricted. One disability group suggested having more specific references to the U.S. public health authorities (e.g., the Surgeon General or the Centers for Disease Control), and another suggested that the content of a medical certificate be spelled out. A third opposed all requirements for medical certificates.

DOT Response—The Department has retained the basic substance of these sections, but has reorganized them and clarified the relationship between them. Section 382.51(a) prohibits a carrier from taking certain actions against an individual on the basis of a communicable disease or infection, except as provided in paragraph (b) of the section. These actions include refusal of transportation, requirement of a medical certificate, or imposition of other conditions, restrictions, or requirements. The fourth item in the parallel NPRM section, "otherwise discriminate," has been eliminated as redundant with the general nondiscrimination provision of section 382.7.

Paragraph (b) then provides that the carrier may take these actions with respect to an individual with a disease or infection which has been determined by the U.S. Surgeon General, Centers for Disease Control, or other Federal public health authority knowledgeable about the disease or infection, to be able to be transmitted to other persons in the normal course of a flight. The specific mention of the Surgeon General and CDC is in response to a comment.

Paragraph (c) is new, and spells out the effect of a medical certificate in the case of an individual with a communicable disease. If an individual with a disease which has been determined, as a general matter, to be transmissible in the normal course of

flight presents a medical certificate to the carrier (as provided in § 382.53(c)(2)), the carrier must provide transportation to the individual, unless it is unfeasible for the carrier to carry out the conditions set forth in the medical certificate as needed to prevent the transmission of the disease or infection to other passengers in the course of flight.

Section 382.53 prohibits requirements for a medical certificate, except in two classes of cases. The first case concerns a person traveling in a stretcher or incubator, a person who needs medical oxygen on the flight, or a person whose medical condition is such that there is reasonable doubt that the individual can complete the flight safely (i.e., can avoid dying or suffering serious, long-term adverse health consequences), without requiring extraordinary medical attention.

This last item has been added in response to ATA's comment about persons with serious illnesses, where carrier personnel believe that they have good cause to fear that a passenger may die or require extraordinary medical attention during the flight. We recognize that carrier personnel are not medical experts; one need not be a medical expert to have a genuine concern about whether a seriously ill individual, who appears to be at death's door, can survive the rigors of a flight, however.

This language pertains only to medical conditions (i.e., the acute manifestations of illnesses or injuries). While illnesses may result in persons being handicapped, a disability is not an illness. This sentence is therefore not intended to permit carriers to require medical certificates from people just because they have a disability, even if that disability originally resulted from an illness or injury.

For persons in this category, and oxygen, stretcher, and incubator users, the medical certificate would be a statement by the passenger's physician that the passenger is capable of completing the flight safely, without requiring extraordinary medical assistance during the flight. This statement is added in response to the comment asking that the content of a medical certificate be spelled out.

The second category of persons for whom a medical certificate may be required is someone with a communicable disease or infection which has been determined by public health authorities, as provided in § 382.51(b), to be able to be transmitted, as a general matter, to other persons in the normal course of a flight. In this case, the medical certificate would be a written statement from the passenger's physician saying that under conditions present in the passenger's particular case (e.g., the stage of the illness, factors peculiar to the manifestation of the illness in the individual), the disease or infection would not be transmitted by this passenger to other persons in the normal course of a flight.

The certificate would also include any conditions (e.g., the passenger should wear a surgical mask, the passenger should sit alone in a row, the passenger should not use the lavatory) that would have to be observed to prevent the disease or infection from being transmitted to other persons in the normal course of a flight.

This provision, and the related portions of § 382.51, are intended to clarify the relationship between communicable diseases and medical certificates, as comments requested. We also note that these provisions do not require special accommodations for stretchers, incubators, or medical oxygen to be provided. As with advance notice provisions for similar services, the regulatory provisions apply if a particular accommodation is available on a flight.

Section 382.53—Miscellaneous Provisions

NPRM—This provision would prohibit requirements for handicapped passengers to sit on blankets or to sit in special lounges or holding areas. It would also require carriers to allow dogs and other service animals to accompany their user to the user's seat in the cabin. Information concerning travel with animals outside the continental U.S. would be provided to persons traveling with service animals. The carrier could request documentation or credentials for the animal if there were a reasonable doubt about its status as a service animal.

Comments—There was general agreement among commenters that the blankets and segregated areas provisions of the rule were appropriate. ACB asked for a specific prohibition on requirements that handicapped passengers wear big buttons, ID tags etc.

With respect to service animals, ATA asked that the rule specify that they not be allowed in emergency exit rows or in places where they would not fit under the seat in front of the passenger (e.g., if they would block an aisle). RAA concurred with this point. ATA also asked that if a carrier reasonably doubted that an animal was a genuine service animal, it could refuse to treat the animal as a service animal if the animal's user was unable to produce credible documentation of the animal's status as a service animal. This would be particularly important for non-traditional service animals like monkeys.

PVA said that carriers should not be able to request documentation of the authenticity of the service animal, since there were not any universally accepted credentials for such creatures. It is also unfair to make the owner carry an ID card for the animal, in PVA's view. Also, service animals can be identified, as a practical matter, by the harnesses they wear, identification tatoos, dog tags, or the verbal assurances of people using the animals. These means should be accepted by carriers.

Other disability group commenters said that service animals should be permitted on board all flights. Some commuter carriers said, however, that carriers should be able to establish number limits for service animals on a flight or even to exclude animals during bad weather in small planes.

DOT Response—The Department will retain the provisions regarding blankets and segregated areas. With respect to service animal identification, the Department believes that a wide variety of means of identification are available and should be acceptable. These include ID cards, other documentation, presence of harnesses, markings on harnesses, tags, or the credible verbal assurances of users. The latter phrase is intended to cover a situation where there is no documentation available, but the user of the animal assures the carrier that the animal is in fact a service animal. The carrier is intended to accept this assurance, except in a case where the animal is one that cannot reasonably be viewed as being capable of performing the service animal function claimed for it by its user. In marginal cases, the Department intends that the benefit of the doubt go to the person traveling with the animal.

The Department agrees with ATA that service animals should not be permitted to obstruct an aisle or other area that must remain unobstructed in order to facilitate an emergency evacuation. (Since FAA's rule on exit row seating would have the effect of excluding from exit rows persons who are likely to use service animals, this section does not need to mention exit rows.) Consequently, we are modifying the requirement that service animals be allowed to accompany their users to any seat occupied by the user. Animals would not have to be allowed to stay where they would obstruct an aisle or other area that must remain free of obstructions in order to facilitate an emergency evacuation. Dogs are the animals most frequently used, at this

time, to assist persons with disabilities, and it would be reasonable for carriers to require them to be placed under the seat in front of the passenger, in order to avoid obstructing an aisle or other space.

As with carry-on baggage, the "under the seat" requirement would need to be interpreted reasonably. For example, the fact that some part of the animal extends into the area where the passenger's feet go should not be grounds for determining that the animal could not be accommodated at the passenger's seat, unless the carrier so strictly enforces its carry-on policies that it requires other passengers to move their carry-on items if any part of an item extends into that area. There may also be situations in which it would not be appropriate for a carrier to insist that an animal be placed under the seat in front of the passenger. For example, small monkeys are beginning to be used as service animals for some persons with mobility impairments. If an airline allows parents to hold young infants in their arms during a flight, a disabled passenger should be able to accommodate a monkey of roughly the same size as a human infant in the same way.

The main point is that, for reasons of safety, consistent with FAA regulations, animals cannot obstruct aisles and other passageways. If an animal cannot be accommodated at the passenger's seat, in a way that will not create such an obstruction, then the animal and passenger can relocate to another seat where accommodation is possible (see § 382.37(c)) or the animal can be checked in the manner provided for pets traveling with other passengers.

The Department does not believe it would be appropriate to permit number limits for service animals. No basis for number limits in general for such animals, or for any particular limit, has been demonstrated. While it may not be possible to accommodate all service animals on all small planes (e.g., there might be no place on a very small aircraft where a large dog would fit without blocking an aisle), it would be inconsistent with the ACAA to deny transportation to a particular animal where it could be accommodated on a particular aircraft. Varying the ability of a user to travel with a service animal with changes in the weather would lead to unpredictable, arbitrary results. Service animals are typically well trained to remain calm under a variety of difficult conditions, and are not likely to pose serious problems on a bumpy flight.

It should be pointed out that this section (i.e., the "otherwise mandate separate treatment for handicapped persons" language), along with § 382.7, also prohibits discriminatory administrative requirements applied to handicapped persons. Examples of such requirements include a requirement for handicapped passengers to wear large buttons or ID tags, fill out a waiver form applicable only to handicapped passengers (*see Jacobson* v. *Delta Airlines*, 742 F.2d 1202 (9th Cir., 1984)), or answer detailed, personal questions from ticket agents or other carrier personnel after requesting a service or accommodation.

Section 382.55—Charges for accommodations

NPRM—The NPRM would prohibit carriers from imposing extra or special charges for providing assistance to handicapped persons to comply with the provisions of this rule.

Comments—ATA would substitute an adaptation of the language of § 382.15(d) of the original CAB version of the rule, which permits "reasonable, nondiscriminatory charges for passengers using special assistance," as long as "all other passengers using the assistance are also charged for it." Specifically, carriers could charge for hazardous material battery packages. Carriers could not charge for services necessitated by the fact that their aircraft are not accessible. ATA said it was reasonable to charge for extensive special assistance.

PVA agreed with the provision as written. It opposed ATA's suggestion for regulatory language, suggesting that the notion of charging handicapped persons for accommodations for which all other passengers are charged is meaningless, since handicapped passengers are the only people who need the accommodations in the first place.

Several disability organizations agreed with PVA's objection to any charges for accommodations, with particular reference to hazardous materials battery packages, the cost of which was said to be minimal. Other commenters, including RAA, some carriers and some disability organizations, said that it would be appropriate to charge for items of this kind.

DOT Response—Under the ACA, carriers' obligation not to discriminate includes the duty to provide reasonable accommodation to ensure that qualified handicapped individuals are able to use the carriers' facilities and services. Fulfilling this responsibility involves providing a series of specific accommodations spelled out in this regulation. It is not appropriate, or consistent with law interpreting section 504, to charge "user fees" to members of the protected class for accommodations which a party has a legal obligation to provide. This is as true for service-related accommodations as it is for accommodations resulting from the inaccessible nature of aircraft or other physicial facilities.

PVA also has a fair point when it says that it is meaningless to say that handicapped persons can be charged for an accommodation if other passengers are also charged for it. The kinds of accommodations required by this rule are not needed by passengers who do not have disabilities. As discussed under § 382.39, comparisons between non-essential services for passengers (e.g., boxes for surfboards or skis) and essential accommodations for persons with disabilities (e.g., hazardous material battery packages) do not form a sound basis for imposing charges for the latter.

With respect to services or accommodations that are not required to be provided to handicapped persons, carriers are not precluded from imposing reasonable, nondiscriminatory charges that would be charged to nonhandicapped persons for the services or accommodations involved. For example, carriers may, but are not required to, provide accommodations for persons traveling in stretchers or incubators. To accommodate a person traveling in a stretcher, a carrier may need to block off several seats. It would not be contrary to this section for the carrier to charge for the seats involved. Likewise, a charge for special accommodations needed to provide power to or to safely carry an incubator would be permitted.

Section 382.61—Training

Section 382.63—Carrier Programs

NPRM—Carriers operating aircraft with more than 19 seats would have to train their personnel who deal with the traveling public to proficiency concerning the requirements of this rule, carrier procedures for dealing with handicapped passengers, and awareness and appropriate responses to such passengers, distinguishing among different sorts of disabilities.

In developing a training program, carriers would have to consult with disability groups. The carrier would submit its program (which would include carrier policies concerning handicapped passengers) to DOT for approval within 90 days of the rule's effective date; DOT would have 120 days for review. The carrier would have

to implement it within 90 days of DOT approval.

Personnel would have to receive initial training on a schedule that would call for most covered employees to be trained within 180 days of program approval. There would be annual refresher training for employees. Complaints resolution officials would have to be trained within 60 days of the rule's effective date.

Carriers operating only aircraft with 19 or fewer seats would have to provide training for their personnel, but would not have to draft programs or submit them to the Department for approval.

Comments—Everyone thinks training is a good idea. There are a number of differences on the specifics, however. ATA objects to consulting with disability organizations, suggesting that reasonable efforts to obtain their views is sufficient, ATA also objects to submitting programs for DOT review, saying that this constitutes unnecessary micromanagement. ATA also objects to the requirement for training of contractor personnel.

ATA would also modify the timetables for training, calling for training programs to be developed in 180 days with implementation 90 days later. Employees would be trained within 180 days to a year thereafter. Refresher training would be on an as-needed basis, rather than annually. For training (including annual refresher training) conforming to the proposed rule, ATA estimated annual costs to the industry of $22.9 million, with a present value over 20 years of $289 million.

RAA generally concurs with ATA's positions. It suggests that annual recurrent training for all employees would cost five times as much as initial training, which it views as unnecessary if training programs are effective. Recurrent training every three years would be sufficient, in RAA's view. Moreover, 120 days after program development is needed for implementation and 180 days for training of complaints resolution officers, RAA contends.

PVA strongly supports recurrent training, lest employees forget how they are supposed to accommodate handicapped passengers. PVA also supports submittal of programs for DOT, even for small carriers, since these carriers may be less likely than larger carriers to get the word on appropriate treatment of handicapped passengers. PVA suggests DOT's regulatory evaluation may have overestimated training costs; even at DOT's projected cost levels, however, the benefits justify the costs.

PVA also emphasizes the value of carrier consultation with disability groups, since these are among the best sources of information on the best way to accommodate passengers with disabilities. PVA also disagrees with ATA's comments that training periods should be stretched out and that contractor employees should not have to be trained.

Other disability groups commenting on this section supported the proposed training requirement, including recurrent training and consultation with disability groups. Some of these comments suggested specific elements that should be included in the training, or suggested that a model program be developed. Some disability groups suggested that if pilots or other carrier personnel violate the rule (e.g., by wrongly refusing to provide transportation), remedial training should be required. The ATBCB suggested that the rule should specify that all employees who provide services to passengers (e.g., baggage handlers), not just those who deal directly with the public, be trained.

Some carrier comments agreed that recurrent training need not be annual. Every two years or only when there are changes in rules, procedures, or technology should recurrent training be needed. Other commenters agreed with ATA that recurrent training on an "as needed" basis would be sufficient. Otherwise, it would be too burdensome.

DOT Response—The final rule will maintain the distinction between carriers who operate aircraft with more than 19 seats and those who do not. The latter need only provide training to crewmembers and other appropriate personnel sufficient to ensure compliance with this part. Specific schedules and program development requirements are not required of these carriers, who nonetheless remain fully responsible for implementing the requirements of this rule.

The Department sees little real difference between the NPRM's "consultation" language and ATA's suggestion concerning liaison with disability groups—"make reasonable efforts to obtain the views of organizations * * *." The Department continues to believe that disability groups are a major resource for carriers, to help them devise practical and comprehensive procedures for accommodating passengers with a wide variety of disabilities. Consultation basically means making reasonable efforts to obtain the views of disability organizations: there is no list of organizations or type of contacts that the rule specifically mandates.

The Department is retaining the timetables for training proposed in the NPRM. Expeditious training of employees is essential to the achievement of the ACAA's objectives, and carrier comments suggesting stretched-out training periods did not demonstrate that training on the proposed schedules could not be accomplished. The Department believes that, since complaints resolution officials are key personnel in ensuring carrier compliance with the rule, they should be trained first, and as soon as possible. While 60 days after the effective date of the rule is a relatively short time, it is in the carriers' interest as well as that of passengers to make sure that carriers' in-house experts on regulatory compliance are in place as soon as possible. DOT staff would be willing to participate in ATA/RAA or other industry sessions to work through the provisions of the rule with complaints resolution officials.

With respect to refresher training, the Department is adopting ATA's suggestion that such training occur "as needed" to maintain proficiency. Mandatory annual recurrent training, as ATA and RAA comments pointed out, would be very expensive. Removing this requirement will reduce compliance costs of the rule by $24.8 million per year. It is not clear that carrier personnel will be as forgetful as PVA appears to assume, or that repetition is the essence of compliance.

Training "as needed" is not a license for ignoring training needs of personnel, of course. When procedures or equipment change, for example, training of personnel who have already received initial training is likely to be needed. While DOT is not adopting the comment that suggested mandatory remedial training for employees involved in any rule violation, a carrier employee who exhibited a pattern of conduct inconsistent with the rule would clearly "need" refresher training. If, in taking enforcement action with respect to a particular complaint, the Department discovered that carrier personnel had erred for lack of adequate refresher training, the Department could find a violation of this section as well, since refresher training as needed to ensure continued proficiency had been lacking.

The issue of contractor personnel training is parallel to the issue of coverage of contractors in general. Carriers contact out a number of functions, including some requiring direct contract with passengers. For example, security screening personnel at airports are often employed by contractors to carriers. If they are not

trained in their responsibilities under § 382.47, the carrier could not ensure that this section is properly implemented. The same is true, for example, if carrier contractor employees provide ground services to passengers (e.g., assistance in moving between gates). Under the rule, the carrier can either train contractor employees itself or delegate this task to the contractor. Either way, training is one of those responsibilities that a carrier cannot contract away by contracting a function out.

The requirements for carrier programs have been changed somewhat in response to comments. Carriers operating aircraft with more than 19 seats have to establish a program for compliance with this rule within 180 days of the effective date of the rule. They are not excused from compliance with the rule in the meantime. Compliance with the ACAA through this rule is a legal obligation in its own right, whether or not a program has been completed. The program will include the training schedule for employees and the carrier's policies and procedures for accommodating handicapped passengers consistent with the requirements of this part.

Carriers will begin to implement the program immediately upon its establishment, without waiting for DOT approval. (DOT will not, as such, approve programs.) To reduce burdens on smaller carriers, only Major and National carriers, and those regional carriers that have code-sharing arrangements with Majors and Nationals, will have to submit their programs to DOT. These carriers account for the vast majority of U.S. passengers enplaned. Other carriers will retain their programs on file, and must make them available to DOT on request by DOT staff. As with the FAA carry-on rule, it could be useful for organizations like ATA and RAA to develop model programs that carriers could adopt.

DOT will review the programs that are submitted. If DOT determines that a carrier's program must be changed in order to comply with this rule, DOT will direct the carrier to make the change(s) involved. The carrier is required to make the change(s). This does not constitute micromanagement, nor is it unnecessary. The Department has a responsibility, emphasized in the legislative history of the ACAA, for exercising oversight to make sure that carriers who carry the bulk of U.S. passengers properly implement the rule. Statutes and rules are not self-implementing; it is important to make sure that the parties responsible for implementation in airports and aircraft are going about it in a way consistent with legal requirements.

Section 382.65—Compliance Procedures

NPRM—The NPRM proposed that carriers, working through a complaints resolution official (CRO), would attempt to resolve complaints on the spot. Unhappy passengers could also file a written complaint with the carrier. The carrier, in either case, was required to respond in writing promptly. If the carrier and passenger did not reach agreement, the passenger could file an informal complaint with DOT, which would make an informal determination of whether a violation had occurred.

If the CRO or, on written complaint, the carrier conceded that a violation had occurred, or if DOT found that a violation had occurred, the carrier would have to pay compensation to the passenger at a rate modeled on the Department's DBC rule. Finally, notwithstanding other enforcement procedures, any person retained the right to file a formal complaint for enforcement action with the Department under 14 CFR part 382.

Comments—PVA recommended that DOT make a regulatory commitment to prosecuting all "pattern or practice" complaints filed under part 302. The CRO process should apply to nonscheduled service (under the NPRM, it applied only to scheduled service). A notice informing passengers of their ACAA rights should be included with all tickets and posted at ticket counters. The carrier should have an affirmative responsibility for placing the CRO in contact with any handicapped individual who has a complaint or is to be excluded from a flight on the basis of handicap.

The complaint process should be accessible to disabled person (e.g., if CRO contact is by telephone, TDD service should be available). Time for filing complaints, both with carriers and DOT, should be stretched out to give passengers enough time to file. DOT should also require carriers to provide more detailed information about the appeal process to DOT. The DOT appeal process should include procedures to guarantee that complaints are pursued fully and that complainants have adequate opportunity to present evidence.

PVA argues for a reporting requirement for complaints. DOT should also greatly increase the level of compensation under the rule. The DBC amounts are inadequate, and the DBC analogy (which concerns lawful carrier behavior) is inapposite as applied to an enforcement mechanism to redress violations of a civil rights statute. Substantially higher compensation levels are needed to deter improper carrier behavior and to make passengers whole for the actual losses they suffer as the result of carrier violations.

PVA also says that the implementation date of enforcement provisions should not be delayed. Otherwise, the rule would provide a right without a remedy, contrary to the intent of the ACAA.

ATA sees the enforcement process quite differently. It views the proposed system as unnecessarily complex and burdensome, and argues that the Department lacks legal authority for the DBC-like compensation scheme. Applying this scheme to a situation quite unlike that of denied boarding (where compensation is automatic upon the happening of a defined event, with no need for case-by-case determinations of regulatory violations) creates a hybrid remedy that would be difficult and confusing to apply. The process is also not final, since the complainant who receives compensation is not precluded from seeking additional relief in the same matter under part 302 or in court under the ACAA itself.

ATA recommends that DOT rely on the existing part 302 mechanism as the exclusive enforcement mechanism, asserting that it works well.

Several carriers said there should be between a 60-day and 18-month phase-in period for this provision, to permit carriers to gear up for compliance before they become liable to enforcement action. A number of disability groups argued, like PVA, for higher levels of compensation (including actual damages, and, in some commenters' views, attorney fees). Other favored the CRO system, but urged longer time periods for filing complaints. One comment said that responding to complaints should take priority over the CRO's other duties.

Another commenter suggested that CROs should be regarded as mediators, and that carriers should not surrender their decisionmaking authority to them. CROs should address problems with contractor personnel as well as carrier employees, a commenter urged. Some carriers ought that CROs were not needed at all, were too expensive, and/or duplicated functions that regular consumer affairs offices could perform. Disability group commenters wanted CROs to be easily accessible to persons with vision or hearing impairments and wanted carriers to inform passengers of the availability of CROs and of other rights and procedures. A number of

disability group commenters wanted complaint time frames stretched out.

DOT Response—The Department is dropping the DBC-model compensation scheme proposed in the NPRM. Carriers raised serious questions about the legal authority for such a system. Disability groups challenged the aptness of applying the DBC model to enforcement of a nondiscrimination statute and found the amounts of compensation inadequate. These comments suggested that the system would work only if it could provide something approaching actual damages to passengers.

Moreover, there would be difficulties in implementation. As ATA stated, DBC was set up to operate automatically, in the absence of case-by-case determinations of rule violations. DBC is, in a sense, a no-fault system. Making a similar model work where at least some violations were contested would be problematic. Determining liability for compensation in contested cases could be difficult, both because the adequacy of an informal, non-legal procedure for doing so is questionable (especially given the larger liability amounts that would be involved if actual damages were payable) and because the Department does not have sufficient resources in the relevant program offices to handle the workload, particularly where there were factual disputes.

The Department is retaining, however, the requirements for CROs and written carrier responses to passenger complaints. In ensuring compliance with any regulation, it is far better to head off problems before they occur, or correct them as they occur, than to take enforcement action after they occur. Designating certain employees to prevent or correct problems on the spot is a key part of this compliance process.

The Department intends that CROs be trained to be thoroughly familiar with the regulation. When a handicapped passenger complains to any carrier employee that there is a problem with how the carrier is treating him or her, the employee has the responsibility of ensuring that the passenger is put in touch with the CRO, if the passenger wishes. (This is the meaning of "make available" in § 382.65(a)(1)). The CRO may be made available either in person at the airport or by telephone (TDD service must be available for persons with hearing impairments).

If the CRO determines that other carrier personnel are making a mistake in implementing the requirements of the rule or failing to provide an accommodation the rule mandates, the CRO will then direct other carrier personnel to fix the problem. This authority is essential. While the CRO certainly plays a kind of "ombudsman" role, the CRO cannot merely be a mediator or public relations person. The CRO has the responsibility of ensuring compliance with the rule, and must have authority to go with the responsibility. Otherwise, the CRO will be ineffectual. The one exception to this authority to direct other carrier personnel concerns the pilot-in-command of an aircraft, whose decisions based on safety grounds the carrier is not required to give the CRO authority to countermand on the spot. For example, if a pilot-in-command proposes to exclude a handicapped person from a flight because the person's appearance would be unpleasant to other passengers, and made this decision on ostensible safety grounds, the CRO would inform the pilot that his decision appeared to be contrary to part 382. The CRO would not be able to force the pilot to carry the person, however.

When a handicapped person alleges to a CRO that a violation has occurred, and the CRO is unable to resolve the problem satisfactorily on the spot, the CRO has a responsibility to provide a written statement to the passenger. If the CRO agrees that a violation occurred (e.g., in the hypothetical situation presented in the previous paragraph), the CRO's statement would admit the violation on behalf of the carrier and set forth a summary of the facts and what steps, if any, the carrier proposed to take in response to the violation (e.g., apology, additional training for the personnel involved, offer of a free ticket for future travel). If the CRO determines that the carrier acted properly under the rule, the statement would include a written summary of the facts and the reasons for the determination that a violation had not occurred. The written statement is important because explaining to a passenger the reasons for a carrier decision is essential to avoid decisions that are arbitrary.

In addition, the statement would be of use should a part 302 enforcement proceeding ensue, as part of the documentary record relevant in the proceeding. The rule requires the written statement to be provided within ten days of the complaint to the CRO, which will ensure prompt response without unreasonably burdening the carrier administratively. This time frame should result in CROs attaching high priority to dealing with complaints, among whatever other duties these individuals perform. When a passenger contacts a CRO concerning a problem that is happening as they speak, it is intended, of course, that the CRO deal with the situation right then and there.

We agree with the comment that suggested that CROs respond to complaints regarding actions of carrier contractors as well as of the carrier's own staff. This is consistent with the general principle that carriers may not discriminate through contractual means or otherwise. Carriers' assurances with contractors under § 382.9 would have to include a provision to this effect.

Nothing in the rule would preclude staff of a carrier's consumer affairs office from acting as CROs. Any person acting as a CRO would have to have the authority to direct other employees to fix problems, and there must be CRO coverage for all times during which the carrier is operating.

As under the NPRM, carriers who do not provide scheduled service are not required to have CROs. Many of these carriers are quite small, and have fewer resources to devote to an administrative mechanism of this kind. These carriers will have to respond to written complaints, however.

Other carriers would also have to have a means of responding to written complaints. A passenger may complain about any alleged violation of the rules in writing, though this provision is intended primarily for situations which, because of timing or other problems, the passenger has not been able to take up with a CRO when the problem occurred. In response to comments, the Department is extending the filing time for written comments to 45 days, to avoid cutting off the opportunity to complain because of passengers' travel plans or the longer time it may take persons with some disabilities to send in a written complaint.

On the other hand, we do not intend for carriers, through the written complaint mechanism, to duplicate work done by their CROs. For this reason, we are requiring complainants to indicate whether they have contacted a CRO on the matter and who the CRO is and when the contact was made. If this information is unavailable (e.g., the complainant has forgotten the CRO's name), the complaint would at least indicate the date of the contact and the airport from which the contact was made. The complainant would also have to enclose a copy of any response received from the CRO. This information will allow the carrier to check with the relevant CRO and avoid duplication of effort, or, if the CRO had already responded, stand on the CRO's response if the carrier believed it was appropriate.

Like the CRO's written responses, the carrier's responses to a written complaint (due within 30 days of receipt

of the complaint) would summarize the facts and state whether or not the carrier concluded that the rule had been violated. If the carrier agreed that the rule had been violated, the response would state what steps, if any, the carrier was taking in response; if not, it would explain the carrier's reasons for its conclusion.

The enforcement procedures of 14 CFR part 302 are available to any person who believes a carrier has violated this regulation. These procedures afford full due process to complainants and respondents alike. If the Department finds that a violation has occurred, it can impose civil penalties on the carrier. In the absence of other enforcement mechanisms (e.g., the DBC-model compensation scheme of the NPRM), the Department will consider individual complaints as well as so-called "pattern or practice" complaints under part 302 procedures. The Department believes that, because the new part 382 is much more specific in its applications to carriers than its predecessors, enforcement in individual cases under part 302 procedures will be substantially clearer, easier, and faster than in the past. Because of the specificity of the new rules, the need for enforcement action should also be reduced.

The Department is not adopting comments which suggested constraints on the discretion of the Department's Aviation Enforcement and Proceedings Office with respect to prosecuting complaints. That office will evaluate all complaints that come in. To mandate that every complaint be prosecuted, however, regardless of its merits, would entail a considerable waste of resources, both the Department's and those of carriers and complainants.

The Department's Consumer Affairs Office is often able to help resolve problems between passengers and carriers on disability issues as well as other airline consumer matters. We recommend that, before filing a part 302 complaint, a passenger write or call this office (202–366–2220) to determine if it can work out a solution to the problem. We also suggest that carriers mention the name and number of this office in responses to complaints.

The Department is not adopting the comment that counter signs and/or ticket notices be required to inform passengers of their rights under this rule. Ticket notices and counter signs involve extensive papework and administrative burdens; it is far from clear whether they would result in substantial benefits in terms of actually informing passengers.

The Department does not believe it would be appropriate to include a "grace period" in the rule before making the enforcement provisions effective. The requirements of the rule are intended to implement the statutory right to nondiscrimination created by the ACAA. To say that these requirements would be unenforceable for six to eighteen months after the rule became effective would be to say, for that period, that Congress had intended to create a right without a remedy. Even before all employees are trained, carriers are responsible for making sure that handicaped passengers are treated appropriately under the rule. The requirement to train CROs quickly should make it easier for carriers to ensure compliance quickly.

During the initial stages of implementation, the Department's focus will be on assisting carriers to comply with the rule, not on penalizing inadvertent or minor errors. At the same time, the Department will not tolerate intentional or major violations of the rule or deliberate attempts to avoid compliance.

Regulatory Process Matters

This rule is not a major rule, because its estimated annual compliance costs do not exceed $100 million. It is a significant rule under the Department of Transportation's Regulatory Policies and Procedures. A Regulatory Evaluation has been prepared and filed in the rulemaking docket.

The Department has determined, under the Regulatory Flexibility Act, that this rule does not have a significant economic effect on a substantial number of small entities. Small entities affected by the rule include such parties as air taxis and small carriers who operate only aircraft with fewer than 19 seats. Many of the specific requirements of the rule do not apply to these smaller carriers. The major responsibilities of these smaller carriers relate to nondiscrimination duties which do not impose significant costs, substantially easing compliance costs. Activities at small airports (less than 2,500 annual enplanements) also are not covered. For these reasons, while there are substantial numbers of small carriers covered by the rule (around 4000 air taxis, for example), the economic effects of the regulation are not likely to be significant for any of them.

This rule imposes information collection requirements (i.e., programs to be submitted to DOT). A Paperwork Reduction Act clearance request has been submitted to the Office of Management and Budget. The information collection requirement does not go into effect until OMB clearance and the assignment of an OMB control number. We will publish a **Federal Register** notice when the OMB control number is received.

Under Executive Order 12612 on Federalism, the Department anticipates one Federalism effect of the regulation. This regulation pertains to "services" provided to passengers by carriers, within the meaning of section 105 of the Federal Aviation Act. It is also a comprehensive regulation in the area of the rights of handicapped passengers, promulgated pursuant to the ACAA (section 404(c) of the Federal Aviation Act), which appears to occupy the field. For these reasons, it is likely that this regulation will have the effect of preempting state regulation of the transportation of handicapped persons by regulated carriers in many instances. While the Department can consider, on a case-by-case basis, whether a particular state action would be preempted, it is likely that most state regulatory action in this area would be subject to preemption. The Department regards this effect as inevitable in view of the provisions of the Federal Aviation Act involved. Since state or local governments are not otherwise affected by the rule, a Federalism assessment has not been prepared.

List of Subjects in 14 CFR Part 382

Aviation, Handicapped.

Issued this 28th day of February, 1990, at Washington, DC.

Samuel K. Skinner,

Secretary of Transportation.

For the reasons set forth in the Preamble, chapter II, subchapter D of title 14 of the Code of Federal Regulations is amended by revising part 382 to read as follows:

PART 382—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN AIR TRAVEL

Subpart A—General Provisions

382.1 Purpose.
382.3 Applicability.
382.5 Definitions.
382.7 General prohibition of discrimination.
382.9 Assurances from contractors.
382.11–382.19 [Reserved]

Subpart B—Requirements Concerning Facilities

382.21 Aircraft accessibility.
382.23 Airport facilities.
382.25–382.29 [Reserved]

Subpart C—Requirements for Services

382.31 Refusal of transportation.
382.33 Advance notice requirements.
382.35 Attendants.
382.37 Seat assignments.
382.39 Provision of services and equipment.
382.41 Stowage of personal equipment.

382.43 Treatment of mobility aids and assistive devices.
382.45 Passenger information.
382.47 Accommodations for persons with hearing impairments.
382.49 Security screening of passengers.
382.51 Communicable diseases.
382.53 Medical certificates.
382.55 Miscellaneous provisions.
382.57 Charges for accommodations prohibited.
382.59 [Reserved]

Subpart D—Administrative Provisions

382.61 Training.
382.63 Carrier programs.
382.65 Compliance procedures.

Authority: Sections 404(a), 404(c), and 411 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1374(a), 1374(c), and 1381).

Subpart A—General Provisions

§ 382.1 Purpose.

The purpose of this part is to implement the Air Carrier Access Act of 1986 (49 U.S.C. 1374(c)), which provides that no air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.

§ 382.3 Applicability.

(a) Except as provided in this section, this part applies to all air carriers providing air transportation.

(b) Sections 382.21–382.63 do not apply to indirect air carriers.

(c) This part does not apply to foreign air carriers or to airport facilities outside the United States, its territories, possessions, and commonwealths.

(d) Nothing in this part shall authorize or require a carrier to fail to comply with any applicable FAA safety regulation.

§ 382.5 Definitions

As used in this Part—

Air Carrier or *carrier* means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation.

Air carrier airport means a public, commercial service airport which emplanes annually 2,500 or more passengers and receives scheduled air service.

Air transportation means interstate, overseas, or foreign air transportation, or the transportation of mail by aircraft, as defined in the Federal Aviation Act.

Department or *DOT* means the United States Department of Transportation.

FAA means the Federal Aviation Administration, an operating administration of the Department.

Facility means all or any portion of aircraft, buildings, structures, equipment, roads, walks, parking lots, and any other real or personal property, normally used by passengers or prospective passengers visiting or using the airport, to the extent the carrier exercises control over the selection, design, construction, or alteration of the property.

Handicapped individual means any individual who has a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(a) *Physical or mental impairment* means:

(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardio-vascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

(b) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) *Has a record of such impairment* means has a history of, or has been classified, or misclassified, as having a mental or physical impairment that substantially limits one or more major life activities.

(d) *Is regarded as having an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by an air carrier as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such an impairment; or

(3) Has none of the impairments set forth in this definition but is treated by an air carrier as having such an impairment.

Indirect air carrier means a person not directly involved in the operation of an aircraft who sells air transportation services to the general public other than as an authorized agent of an air carrier.

Qualified handicapped individual means a handicapped individual who—

(a) With respect to accompanying or meeting a traveler, use of ground transportation, using terminal facilities, or obtaining information about schedules, fares or policies, takes those actions necessary to avail himself or herself of facilities or services offered by an air carrier to the general public, with reasonable accommodations, as needed, provided by the carrier;

(b) With respect to obtaining a ticket for air transportation on an air carrier, offers, or makes a good faith attempt to offer, to purchase or otherwise validly to obtain such a ticket;

(c) With respect to obtaining air transportation, or other services or acommodations required by this part:

(1) Purchases or possesses a valid ticket for air transportation on an air carrier and presents himself or herself at the airport for the purpose of traveling on the flight for which the ticket has been purchased or obtained; and

(2) Meets reasonable, nondiscriminatory contract of carriage requirements applicable to all passengers;

Schedule air service means any flight scheduled in the current edition of the *Official Airline Guide*, the carrier's published schedule, or the computer reservation system used by the carrier.

§ 382.7 General prohibition of discrimination.

(a) A carrier shall not, directly or through contractual, licensing, or other arrangements:

(1) Discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation;

(2) Require a handicapped person to accept special services (including, but not limited to, preboarding) not requested by the passenger;

(3) Exclude a qualified handicapped individual from or deny the person the benefit of any air transportation or related services that are available to other persons, even if there are separate or different services available for handicapped persons except when specifically permitted by another section of this part; or,

(4) Take any action adverse to an individual because of the individual's assertion, on his or her own behalf or

through or behalf of others, of rights protected by this part or the Air Carrier Access Act.

(b) If an indirect air carrier provides facilities or services for passengers that are covered for other carriers by sections §§ 382.21–382.55, the indirect air carrier shall do so in a manner consistent with those sections.

§ 382.9 Assurances from contractors.

Carriers' contracts with contractors who provide services to passengers, including carriers' agreements of appointment with travel agents (excluding travel agents who are not U.S. citizens who provide services to air carriers outside the United States, its territories and commonwealths), shall include a clause assuring

(a) Nondiscrimination on the basis of handicap, consistent with this part, by such contractors in activities performed on behalf of the carriers; and

(b) That contractor employers will comply with directives issued by carrier complaints resolution officials (CROs) under § 382.67.

Subpart B—Requirements Concerning Facilities

§ 382.21 Aircraft accessibility.

(a) The following requirements apply to new aircraft operated under 14 CFR part 121 and ordered by the carrier after the effective date of this part or delivered to the carrier more than two years after the effective date of this part:

(1)(i) Aircraft with 30 or more passenger seats on which passenger aisle seats have armrests shall have movable aisle armrests on at least one-half of passenger aisle seats.

(ii) Such armrests are not required to be provided on aisle seats on which a movable armrest is not feasible or aisle seats which a passenger with a mobility impairment is precluded from using by an FAA safety rule.

(iii) For aircraft equipped with movable aisle armrests as required by this paragraph, carriers shall configure cabins, or establish administrative systems, to ensure that an individuals with mobility impairments or other handicapped persons can readily obtain seating in rows with movable aisle armrests.

(2) Aircraft with 100 or more passenger seats shall have a priority space in the cabin designated for stowage of at least one folding wheelchair;

(3) Aircraft with more than one aisle in which lavatories are provided shall include at least one accessible lavatory. This lavatory shall permit a qualified handicapped individual to enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft's on-board wheelchair. The accessible lavatory shall afford privacy to persons using the on-board wheelchair equivalent to that afforded ambulatory users. The lavatory shall provide door locks, accessible call buttons, grab bars, faucets and other controls, and dispensers usable by qualified handicapped individuals, including wheelchair users and persons with manual impairments;

(4)(i) Aircraft withmore than 60 passenger seats having an accessible lavatory, whether or not required to have such a lavatory by paragraph (a)(3) of this section, shall be equipped with an operable on-board wheelchair for the use of passengers.

(ii) The carrier shall ensure that an operable on-board wheelchair is provided for a flight using an aircraft with more than 60 passenger seats on the request (with advance notice as provided in § 382.33(b)(8)) of a qualified handicapped individual who represents to the carrier that he or she is able to use an inaccessible lavatory but is unable to reach the lavatory from a seat without the use of an on-board wheelchair.

(iii) On-board wheelchairs shall include footrests, armrests which are movable or removable, adequate occupant restraint systems, a backrest height that permits assitance to passengers in transferring, structurally sound handles for maneuvering the occupied chair, and wheel locks or another adequate means to prevent chair movement during transfer or turbulence. The chair shall be designed to be compatible with the maneuvering space, aisle width, and seat height of the aircraft on which it is to be used, and to be easily pushed, pulled, and turned in the cabin environment by carrier personnel.

(b)(1) Except as provided in paragraph (b)(2) of this section, aircraft in service on the effective date of this part shall not be required to be retrofitted for the sole purpose of enhancing accessibility.

(2) Each carrier, within two years of the effective date of this part, shall comply with the provisions of paragraph (a)(4) of this section with respect to all aircraft with more than 60 passenger seats operated under 14 CFR part 121.

(c) Whenever an aircraft operated under 14 CFR part 121 which does not have the accessibility features set forth in paragraph (a) of this section undergoes replacement of cabin interior elements or lavatories, or the replacement of existing seats with newly manufactured seats, the carrier shall meet the requirements of paragraph (a) of this section with respect to the affected feature(s) of the aircraft.

(d) Aircraft operated under 14 CFR part 121 with fewer than 30 passenger seats (with respect to the requirements of paragraph (a)(1) of this section), fewer than 100 passenger seats (with respect to the requirements of paragraph (a)(2) of this section) or 60 or fewer passenger seats (with respect to the requirements of paragraph (a)(4) of this section), and aircraft operated under 14 CFR part 135, shall comply with the requirements of this section to the extent not inconsistent with structural, weight and balance, operational and interior configuration limitations.

(e) Any replacement or refurbishing of the aircraft cabin shall not reduce existing accessibility to a level below that specified in this part.

(f) Carriers shall maintain aircraft accessibility features in proper working order.

§ 382.23 Airport facilities.

(a) This section applies to terminal facilities owned, leased, or operated on any other basis by an air carrier at an air carrier airport, including parking and ground transportation facilities.

(b) Such facilities and services shall, when viewed as a whole, be accessible to and usable by handicapped individuals.

(c) All such facilities designed, constructed, or altered after the effective date of this part shall be accessible to handicapped persons. Compliance with the requirements of the Uniform Federal Accessibility Standards (UFAS), or a substantially equivalent standard, shall be deemed compliance with this requirement. These facilities shall also provide the following additional accessibility features:

(1) The basic terminal design shall permit efficient entrance and movement of handicapped individuals while at the same time giving consideration to their convenience, comfort and safety. The design, especially concerning the location of means of vertical access, shall minimize any extra distance that wheelchair users must travel, compared to other persons, to reach ticket counters, waiting areas, baggage handling areas, and boarding locations.

(2) The ticketing system shall provide handicapped individuals with the opportunity to use the primary fare collection area to obtain a ticket and pay the fare.

(3) Outbound and inbound baggage facilities shall allow efficient baggage handling by handicapped individuals. Passenger baggage facilities shall be

designed and operated without unattended physical barriers, such as gates, which are inaccessible for handicapped individuals.

(4) Each terminal shall contain at least one telecommunications device for the deaf (TDD) to enable persons with hearing impairments to make phone calls from the terminal. The TDD(s) shall be placed in a clearly marked, readily accessible location, and airport signage shall clearly indicate the location of the TDDs.

(5) Terminal information systems shall take into consideration the needs of handicapped individuals. The primary information mode shall be visual words or letters, or symbols, using lighting and color coding.

Terminals shall also have facilities for providing information orally.

(6) Facilities for moving between the gate area and the aircraft, including, but not limited to, loading bridges and mobile lounges, shall be accessible to handicapped individuals.

(d) Each existing fixed facility shall be made accessible as soon as possible but no later than three years after the effective date of this part.

(1) Each such facility shall—

(i) Include at least one accessible route from an accessible entrance to those areas in which the carrier conducts activities related to the provision of air transportation; and

(ii) Include the accessibility features specified in paragraphs (c)(1) through (c)(6) of this section.

(2) An element or feature required by this paragraph to be accessible shall be deemed to be accessible if it meets the requirements of the standards referenced in paragraph (c) of this section. Departures from particular scoping and technical standards by the use of other methods are permitted where substantially equivalent or greater access to and usability of the buildings or other fixed facilities is provided. For this purpose, the special technical provisions of § 4.1.6(a)(4) of the UFAS apply.

(3) Operational arrangements in lieu of facility improvements shall be permitted for up to three years from the effective date of this part or during the time when a waiver is in effect where substantially equal access to the facilities is provided.

(e) Contracts or leases between carriers and airport operators concerning use of airport facilities shall set forth the respective responsibilities of the parties for compliance with accessibility requirements under this section and 49 CFR 27.71.

Subpart C—Requirements for Services

§ 382.31 Refusal of transportation.

(a) Unless specifically permitted by a provision of this part, a carrier shall not refuse to provide transportation to a qualified handicapped individual on the basis of his or her handicap.

(b) A carrier shall not refuse to provide transportation to a qualified handicapped individual solely because the person's handicap results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers.

(c) A carrier shall not refuse to provide transportation to qualified handicapped individuals by limiting the number of such persons who are permitted to travel on a given flight.

(d) Carrier personnel, as authorized by 49 U.S.C. 1511, 14 CFR 91.8, or 14 CFR 121.533, may refuse to provide transportation to any passenger on the basis of safety, and may refuse to provide transportation to any passenger whose carriage would violate the Federal Aviation Regulations. In exercising this authority, carrier personnel shall not discriminate against any qualified handicapped individual on the basis of handicap and their actions shall not be inconsistent with the provisions of this Part. In the event that such action is inconsistent with the provisions of this Part, the carrier shall be subject to remedies provided under § 382.65.

(e) When a carrier refuses to provide transportation to any person on a basis relating to the individual's handicap, the carrier shall specify in writing to the person the basis for the refusal, including, where applicable, the reasonable and specific basis for the carrier's opinion that transporting the person would or might be inimical to the safety of the flight. This written explanation shall be provided within 10 calendar days of the refusal of transportation.

§ 382.33 Advance notice requirements.

(a) Except as provided in paragraph (b) of this section, a carrier shall not require a qualified handicapped individual to provide advance notice of his or her intention to travel or of his or her disability as a condition of receiving transportation or of receiving services or accommodations required by this part.

(b) A carrier may require up to 48 hours advance notice and one-hour advance check-in concerning a qualified handicapped individual who wishes to receive any of the following services, types of equipment, or accommodations:

(1) Medical oxygen for use on board the aircraft, if this service is available on the flight;

(2) Carriage of an incubator, if this service is available on the flight;

(3) Hook-up for a respirator to the aircraft electrical power supply, if this service is available on the flight;

(4) Accommodation for a passenger who must travel in a stretcher, if this service is available on the flight;

(5) Transportation for an electric wheelchair on a flight scheduled to be made with an aircraft with fewer than 60 seats;

(6) Provision by the carrier of hazardous materials packaging for a battery for a wheelchair or other assistive device;

(7) Accommodation for a group of ten or more qualified handicapped individuals, who make reservations and travel as a group; and

(8) Provision of an on-board wheelchair on an aircraft that does not have an accessible lavatory.

(c) If a passenger does not meet advance notice or check-in requirements established by a carrier consistent with this section, the carrier shall nonetheless provide the service, equipment, or accommodation if it can do so by making a reasonable effort, without delaying the flight.

(d) Carriers' reservation and other administrative systems shall ensure that when advance notice is provided by qualified handicapped individuals as provided by this section, the notice is recorded and properly transmited to operating employees responsible for providing the accommodation concerning which notice was provided.

(e) If the qualified handicapped individual provides the notice required by the carrier for a service under paragraph (b) of this section, the carrier shall ensure that the requested service is provided.

(f) If a qualified handicapped individual provides advance notice to a carrier, and the individual is forced to change to the flight of a different carrier because of the cancellation of the original flight or the substitution of inaccessible equipment, the first carrier shall, to the maximum extent feasible, provide assistance to the second carrier in providing the accommodation requested by the individual from the first carrier.

§ 382.35 Attendants.

(a) Except as provided in this section, a carrier shall not require that a qualified handicapped individual travel with an attendant as a condition of being provided air transportation. A

concern on the part of carrier personnel that a handicapped individual may need to use inaccessible lavatory facilities or may otherwise need extensive special assistance for personal needs which carrier personnel are not obligated to provide is not a basis on which the carrier may require an attendant.

(b) A carrier may require that a qualified handicapped individual meeting any of the following criteria travel with an attendant as a condition of being provided air transportation, if the carrier determines that an attendant is essential for safety:

(1) A person traveling in a stretcher or incubator. The attendant for such a person must be capable of attending to the passenger's in-flight medical needs;

(2) A person who, because of a mental disability, is unable to comprehend or respond appropriately to safety instructions from carrier personnel, including the safety briefing required by 14 CFR 121.571 (a) (3) and (a)(4) or 14 CFR 135.117(b);

(3) A person with a mobility impairment so severe that the person is unable to assist in his or her own evacuation of the aircraft;

(4) A person who has both severe hearing and severe vision impairments, if the person cannot establish some means of communication with carrier personnel, adequate to permit transmission of the safety briefing required by 14 CFR 121.571(a)(3) and (a)(4) or 14 CFR 135.117(b).

(c) If the carrier determines that a person meeting the criteria of paragraph (b)(2), (b)(3) or (b)(4) of this section must travel with an attendant, contrary to the individual's self-assessment that he or she is capable of traveling independently, the carrier shall not charge for the transportation of the attendant.

(d) If, because there is not a seat available on a flight for an attendant whom the carrier has determined to be necessary, a handicapped person with a confirmed reservation is unable to travel on the flight, the handicapped person shall be eligible for denied boarding compensation under 14 CFR part 250.

(e) For purposes of determining whether a seat is available for an attendant, the attendant shall be deemed to have checked in at the same time as the handicapped person.

§ 382.37 Seat assignments.

(a) Carriers shall not exclude any qualified handicapped individual from any seat in an exit row or other location or require that a qualified handicapped individual sit in any particular seat, on the basis of handicap, except in order to comply with the requirements of an FAA safety regulation or as provided in this section.

(b) If a person's handicap results in involuntary active behavior that would result in the person properly being refused transportation under § 382.31, and the safety problem could be mitigated to a degree that would permit the person to be transported consistent with safety if the person is seated in a particular location, the carrier shall offer the person that particular seat location as an alternative to being refused transportation.

(c) If a service animal cannot be accommodated at the seat location of the qualified handicapped individual whom the animal is accompanying (see § 382.55(a)(2)), the carrier shall offer the passenger the opportunity to move with the animal to a seat location, if present on the aircraft, where the animal can be accommodated, as an alternative to requiring that the animal travel with checked baggage.

§ 382.39 Provision of services and equipment.

Carriers shall ensure that qualified handicapped individuals are provided the following services and equipment:

(a) Carriers shall provide assistance requested by or on behalf of qualified handicapped individuals, or offered by air carrier personnel and accepted by qualified handicapped individuals, in enplaning and deplaning. The delivering carrier shall be responsible for assistance in making flight connections and transportation between gates.

(1) This assistance shall include, as needed, the services personnel and the use of ground wheelchairs, boarding wheelchairs, on-board wheelchairs where provided in accordance with this part, and ramps or mechanical lifts.

(2) Boarding shall be by level entry boarding platforms or accessible passenger lounges, where these means are available. Where these means are not available, carriers shall use ramps, mechanical lifts, or other devices (not normally used for freight) for enplaning and deplaning qualified handicapped individuals who need them. Such devices shall be maintained in proper working order.

(3) Carriers shall not leave a handicapped passenger unattended in a ground wheelchair, boarding wheelchair, or other device, in which the passenger is not independently mobile, for more than 30 minutes.

(4) In the event that physical limitations of an aircraft with less than 30 passenger seats preclude the use of existing models of lifts, boarding chairs or other feasible devices to enplane a handicapped person, carrier personnel are not required to carry the handicapped person onto the aircraft by hand.

(b) Carriers shall provide services within the aircraft cabin as requested by or on behalf of handicapped individuals, or when offered by air carrier personnel and accepted by handicapped individuals as follows:

(1) Assistance in moving to and from seats, as part of the enplaning and deplaning processes;

(2) Assistance in preparation for eating, such as opening packages and identifying food;

(3) If there is an on-board wheelchair on the aircraft, assistance with the use of the on-board wheelchair to enable the person to move to and from a lavatory;

(4) Assistance to a semiambulatory person in moving to and from the lavatory, not involving lifting or carrying the person; or

(5) Assistance in loading and retrieving carry-on items, including mobility aids and other assistive devices stowed on board in accordance with § 382.41.

(c) Carriers are not required to provide extensive special assistance to qualified handicapped individuals. For purposes of this section, extensive special assistance includes the following activities:

(1) Assistance in actual eating;

(2) Assistance within the restroom or assistance at the passenger's seat with elimination functions;

(3) Provision of medical services.

§ 382.41 Stowage of personal equipment.

(a) All stowage of qualified handicapped individuals' wheelchairs and other equipment covered by this Part in aircraft cabins shall be in accordance with 14 CFR 121.589 and 14 CFR 121.285(c) or 14 CFR 135.87, as applicable.

(b) Carriers shall permit qualified handicapped individuals using personal ventilators/respirators to bring their equipment, including non-spillable batteries that meet the requirements of 49 CFR 173.260(d) and any applicable FAA safety regulations, on board the aircraft and use it.

(c) Carriers shall permit qualified handicapped individuals to stow canes and other assistive devices on board the aircraft in close proximity to their seats, consistent with the requirements of FAA safety regulations for carry-on items.

(d) Carriers shall not, in implementing their carry-on baggage policies, count toward a limit on carry-on items any assistive device brought into the cabin by a qualified handicapped individual.

(e) Carriers shall provide for on-board stowage of passengers' wheelchairs as follows:

(1) Carriers shall permit the stowage of wheelchairs or components of wheelchairs in overhead compartments and under seats, consistent with the requirements of FAA safety regulations for carry-on items.

(2) In aircraft in which a closet or other approved stowage area is provided in the cabin for passengers' carry-on items, of a size that will accommodate a folding wheelchair, the carrier shall designate priority stowage space, as described below, for at least one folding wheelchair in that area. A handicapped individual who takes advantage of a carrier offer of the opportunity to pre-board the aircraft may stow his or her wheelchair in this area, with priority over the carry-on items brought onto the aircraft by other passengers enplaning at the same airport. A handicapped individual who does not take advantage of a carrier offer of the opportunity to preboard may use the area to stow his or her wheelchair on a first-come, first-served basis along with all other passengers seeking to stow carry-on items in the area.

(3) If an approved stowage area in the cabin is not available for a folding wheelchair, the wheelchair shall be stowed in the cargo compartment.

(f) When passenger compartment stowage is not available, carriers shall provide for the checking and timely return of passengers' wheelchairs and other assistive devices as close as possible to the door of the aircraft, so that passengers may use their own equipment to the extent possible, except where this practice would be inconsistent with DOT regulations governing the transportation of hazardous materials.

(1) At the request of the passenger, the carrier may return wheelchairs or other assistive devices to the passenger at the baggage claim area instead of at the door of the aircraft.

(2) In order to achieve the timely return of wheelchairs, passengers' wheelchairs and other assistive devices shall be among the first items retrieved from the baggage compartment.

(3) Wheelchairs and other assistive devices shall be stowed in the baggage compartment with priority over other cargo and baggage. Where this priority results in passengers' baggage being unable to be carried on the flight, the carrier shall make its best efforts to ensure that the other baggage reaches the passengers' destination within four hours of the scheduled arrival time of the flight.

(g) Where baggage compartment size and aircraft airworthiness considerations do not prohibit doing so, carriers shall accept as baggage battery-powered wheelchairs, including the batteries, consistent with the requirements of DOT regulations on the transportation of hazardous materials (49 CFR parts 172, 173, and 175).

(1) Carriers may require that qualified handicapped individuals wishing to have electric wheelchairs transported on a flight check in one hour before the scheduled departure time for the flight. If such a handicapped individual checks in after this time, the carrier shall nonetheless carry the wheelchair if it can do so by making a reasonable effort, without delaying the flight.

(2) Whenever feasible, the carrier shall transport electric-powered wheelchairs secured in an upright position, so that batteries need not be separated from the wheelchair in order to comply with DOT hazardous materials rules.

(3) When it is necessary to detach the battery from the wheelchair, carriers shall, upon request, provide packaging for the batteries meeting the requirements of the DOT hazardous materials rules and package the battery. Carriers may refuse to use packaging materials or devices other than those they normally use for this purpose.

(4) Carriers shall not drain batteries.

(5) Handicapped individuals shall be permitted to provide written directions concerning the disassembling and assembling of their wheelchairs.

§ 382.43 Treatment of mobility aids and assistive devices.

(a) When wheelchairs or other assistive devices are disassembled by the carrier for stowage, the carrier shall reassemble them and ensure their prompt return to the handicapped passenger. Wheelchairs and other assistive devices shall be returned to the passenger in the condition received by the carrier.

(b) With respect to domestic flights, carriers shall not limit liability for loss, damage, or delay concerning wheelchairs or other mobility aids to any amount less than twice the liability limits established for passengers' luggage under 14 CFR part 254.

(c) Carriers shall not require qualified handicapped individuals to sign waivers of liability for damage to or loss of wheelchairs or other assistive devices.

§ 382.45 Passenger information.

(a) A carrier shall make available, on request, the following information concerning facilities and services related to the provision of air transportation to qualified handicapped individuals. This information shall pertain to the type of aircraft and, where feasible, the specific aircraft scheduled for a specific flight:

(1) The location of seats, if any, with movable armrests and any seats which the carrier, consistent with this part, does not make available to qualified handicapped individuals;

(2) Any limitations on the ability of the aircraft to accommodate qualified handicapped persons;

(3) Any limitations on the availability of storage facilities, in the cabin or in the cargo bay, for mobility aids or other equipment commonly used by handicapped persons;

(4) Whether the aircraft has an accessible lavatory.

(b) The following provisions govern the provision of individual safety briefings to qualified handicapped individuals:

(1) Individual safety briefings shall be conducted for any passenger where required by 14 CFR 121.571 (a)(3) and (a)(4) or 14 CFR 135.117(b);

(2) Carrier personnel may offer an individual briefing to any other passenger;

(3) Individual safety briefings for qualified handicapped individuals shall be conducted as inconspicuously and discreetly as possible;

(4) Carrier personnel shall not require any qualified handicapped individual to demonstrate that he or she has listened to, read, or understood the information presented, except to the extent that carrier personnel impose such a requirement on all passengers with respect to the general safety briefing, and shall not take any action adverse to a qualified handicapped individual on the basis that the person has not "accepted" the briefing.

(c) Each carrier shall ensure that qualified handicapped individuals, including those with vision or hearing impairments, have timely access to information the carrier provides to other passengers in the terminal or on the aircraft (to the extent that it does not interfere with crewmembers' safety duties as set forth in FAA regulations) including, but not limited to, information concerning ticketing, flight delays, schedule changes, connections, flight check-in, gate assignments, and the checking and claiming of luggage; *Provided,* That persons who are unable to obtain such information from the audio or visual systems used by carriers in airports or on aircraft shall request the information from carrier personnel. Carriers shall also provide information

on aircraft changes that will affect the travel of handicapped persons.

(d) Carriers shall have, at each airport they use, a copy of this part and shall make it available for review by handicapped persons on request.

§ 382.47 Accommodations for persons with hearing impairments.

(a) Each carrier providing scheduled air service, or charter service under section 401 of the Federal Aviation Act, and which makes available telephone reservation and information service available to the public shall make available a telecommunications device for the deaf (TDD) service to enable persons with hearing impairments to make reservations and obtain information. The TDD service shall be available during the same hours as the telephone service for the general public and the response time for answering calls shall be equivalent. Users of the TDD service shall not be subject to charges for a call that exceed those applicable to other users of the telephone information and reservation service.

(b) In aircraft in which safety briefings are presented to passengers on video screens, the carrier shall ensure that the video presentation is accessible to persons with hearing impairments.

(1) Except as provided in paragraph (b)(2) of this section, the carrier shall implement this requirement by using open captioning or an inset for a sign language interpreter as part of the video presentation.

(2) A carrier may use an equivalent non-video alternative to this requirement only if neither open captioning nor a sign language interpreter inset could be placed in the video presentation without so interfering with it as to render it ineffective or would be large enough to be readable.

(3) Carriers shall implement the requirements of this section by substituting captioned video materials for uncaptioned video materials as the uncaptioned materials are replaced in the normal course of the carrier's operations.

§ 382.49 Security screening of passengers.

(a) Qualified handicapped individuals shall undergo security screening in the same manner, and be subject to the same security requirements, as other passengers. Possession by a qualified handicapped individual of an aid used for independent travel shall not subject the person or the aid to special screening procedures if the person using the aid clears the security system without activating it. *Provided,* That this paragraph shall not prohibit security personnel from examining a mobility aid or assistive device which, in their judgment, may conceal a weapon or other prohibited item. Security searches of qualified handicapped individuals whose aids activate the security system shall be conducted in the same manner as for other passengers. Private security screenings shall not be required for qualified handicapped individuals to a greater extent, or for any different reason, than for other passengers.

(b) Except as provided in paragraph (c) of this section, if a qualified handicapped person requests a private screening in a timely manner, the carrier shall provide it in time for the passenger to enplane.

(c) If a carrier employs technology that can conduct an appropriate screening of a handicapped passenger without necessitating a physical search of the person, the carrier is not required to provide a private screening.

§ 382.51 Communicable diseases.

(a) Except as provided in paragraph (b) of this section, a carrier shall not take any of the following actions, with respect to a person who is otherwise a qualified handicapped individual, on the basis that the individual has a communicable disease or infection:

(1) Refuse to provide transportation to the person;

(2) Require the person to provide a medical certificate; or

(3) Impose on the person any condition, restriction, or requirement not imposed on other passengers.

(b) The carrier may take actions listed in paragraph (a) of this section with respect to an individual who has a communicable disease or infection which has been determined, by the U.S. Surgeon General, the Centers for Disease Control, or other Federal public health authority knowledgeable about the disease or infection, to be transmissible to other persons in the normal course of a flight.

(c) If a qualified handicapped individual with a communicable disease or infection of the kind described in paragraph (b) of this section presents a medical certificate to the carrier, as provided in § 382.53(c)(2), the carrier shall provide transportation to the individual, unless it is not feasible for the carrier to implement the conditions set forth in the medical certificate as necessary to prevent the transmission of the disease or infection to other persons in the normal course of a flight.

§ 382.53 Medical certificates.

(a) Except as provided in this section, a carrier shall not require a person who is otherwise a qualified handicapped person to have a medical certificate as a condition for being provided transportation.

(b)(1) A carrier may require a medical certificate for a qualified handicapped individual—

(i) Who is traveling in a stretcher or incubator;

(ii) Who needs medical oxygen during a flight, as provided in 14 CFR 121.574; or

(iii) Whose medical condition is such that there is reasonable doubt that the individual can complete the flight safely, without requiring extraordinary medical assistance during the flight.

(2) For purposes of this paragraph, a medical certificate is a written statement from the passenger's physician saying that the passenger is capable of completing a flight safely, without requiring extraordinary medical assistance during the flight.

(c)(1) If a qualified handicapped individual has a communicable disease or infection of the kind described in § 382.51(b), a carrier may require a medical certificate.

(2) For purposes of this paragraph, a medical certificate is a written statement from the passenger's physician saying that the disease or infection would not, under the present conditions in the particular passenger's case, be communicable to other persons during the normal course of a flight. The medical certificate shall state any conditions or precautions that would have to be observed to prevent the transmission of the disease or infection to other persons in the normal course of a flight. It shall be dated within ten days of the date of the flight for which it is presented.

§ 382.55 Miscellaneous provisions.

(a) Carriers shall permit dogs and other service animals used by handicapped persons to accompany the persons on a flight.

(1) Carriers shall accept as evidence that an animal is a service animal identification cards, other written documentation, presence of harnesses or markings on harnesses, tags, or the credible verbal assurances of the qualified handicapped individual using the animal.

(2) Carriers shall permit a service animal to accompany a qualified handicapped individual in any seat in which the person sits, unless the animal obstructs an aisle or other area that must remain unobstructed in order to facilitate an emergency evacuation.

(3) In the event that special information concerning the

transportation of animals outside the continental United States is either required to be or is provided by the carrier, the information shall be provided to all passengers traveling with animals outside the continental United States with the carrier, including those traveling with service animals.

(b) Carriers shall not require qualified handicapped individuals to sit on blankets.

(c) Carriers shall not restrict the movements of handicapped persons in terminals or require them to remain in a holding area or other location in order to be provided transportation, to receive assistance, or for other purposes, or otherwise mandate separate treatment for handicapped persons, except as permitted or required in this part.

§ 382.57 Charges for accommodations prohibited.

Carriers shall not impose charges for providing facilities, equipment, or services that are required by this part to be provided to qualified handicapped individuals.

Subpart D—Administrative Provisions

§ 382.61 Training.

(a) Each carrier which operates aircraft with more than 19 passenger seats shall provide training, meeting the requirements of this paragraph, for all its personnel who deal with the traveling public, as appropriate to the duties of each employee.

(1) The carrier shall ensure training to proficiency concerning:

(i) The requirements of this part and other DOT or FAA regulations affecting the provision of air travel to handicapped persons; and

(ii) The carrier's procedures, consistent with this part, concerning the provision of air travel to handicapped persons, including the proper and safe operation of any equipment used to accommodate handicapped passengers.

(2) The carrier shall also train such employees with respect to awareness and appropriate responses to handicapped persons, including persons with physical, sensory, mental, and emotional disabilities, including how to distinguish among the differing abilities of handicapped individuals.

(3) The carrier shall consult with organizations representing persons with disabilities in developing its training program and the policies and procedures concerning which carrier personnel are trained.

(4) The carrier shall ensure that personnel required to receive training shall complete the training by the following times:

(i) For crewmembers subject to training required under 14 CFR part 121 or 135, who are employed on the date the carrier's program is established under § 382.63, as part of their next scheduled recurrent training;

(ii) For other personnel employed on the date the carrier's program is established under § 382.63, within 180 days of that date;

(iii) For crewmembers subject to training requirements under 14 CFR part 121 or 135 whose employment in any given position commences after the date the carrier's program is established under § 382.63, before they assume their duties; and

(iv) For other personnel whose employment in any given position commences after the date the carrier's program is established under § 382.63, within 60 days of the date on which they assume their duties.

(5) Each carrier shall ensure that all personnel required to receive training receive refresher training on the matters covered by this section, as appropriate to the duties of each employee, as needed to maintain proficiency.

(6) Each carrier shall provide, or require its contractors to provide, training to the contractors' employees concerning travel by handicapped persons. This training is required only for those contractor employees who deal directly with the traveling public at airports, and it shall be tailored to the employees' functions. Training for contractor employees shall meet the requirements of paragraphs (a)(1) through (a)(5) of this section.

(7) Current employees of each carrier designated as complaints resolution officials, for purposes of § 382.65 of this part, shall receive training concerning the requirements of this part and the duties of a complaints resolution official within 60 days of the effective date of this part. Employees subsequently designated as complaints resolution officers shall receive this training before assuming their duties under § 382.65. All employees performing the complaints resolution official function shall receive annual refresher training concerning their duties and the provisions of this regulation.

(b) Each carrier operating only aircraft with 19 or fewer passenger seats shall provide training for flight crewmembers and appropriate personnel to ensure that they are familiar with the matters listed in paragraphs (a)(1) and (a)(2) of this section and comply with the requirements of this part.

§ 382.63 Carrier programs.

(a)(1) Each carrier that operates aircraft with more than 19 passenger seats shall establish and implement, within 180 days of the effective date of this part, a written program for carrying out the requirements of this part.

(2) Carriers are not excused from compliance with the provisions of this part during the 180 days before carrier programs are required to be established.

(b) The program shall include the following elements:

(1) The carrier's schedule for training its personnel in compliance with § 382.61;

(2) The carrier's policies and procedures for accommodating handicapped passengers consistent with the requirements of this part.

(c)(1) Major and National carriers (as defined in the DOT publication *Air Carrier Traffic Statistics*), and every U.S. carrier that shares the designator code of a Major or National carrier (as described in 14 CFR 399.88), shall submit their program to the Department for review within 180 days of the effective date of this part.

(2) The Department shall review each carrier's program, which the carrier shall implement without further DOT action at the time it is submitted to the Department.

(3) If the Department determines that any portion of a carrier's plan must be amended, or provisions added or deleted, in order for the carrier to comply with this part, DOT will direct the carrier to make appropriate changes. The carrier shall incorporate these changes into its program and implement them.

(d) Other carriers shall maintain their programs on file, and shall make them available for review by the Department on the Department's request. If, upon such review, the Department determines that any portion of a carrier's plan must be amended, or provisions added or deleted, in order for the carrier to comply with this part, DOT will direct the carrier to make appropriate changes. The carrier shall incorporate these changes into its program and implement them.

§ 382.65 Compliance procedures.

(a) Each carrier providing scheduled service shall establish and implement a complaint resolution mechanism, including designating one or more complaints resolution official(s) (CRO) to be available at each airport which the carrier serves.

(1) The carrier shall make a CRO available to any person who complains of alleged violations of this part during all times the carrier is operating at the airport.

(2) The carrier may make the CRO available via telephone, at no cost to the passenger, if the CRO is not present in person at the airport at the time of the complaint. If a telephone link to the CRO is used, TDD service shall be available so that persons with hearing impairments may readily communicate with the CRO.

(3) Each CRO shall be thoroughly familiar with the requirements of this part and the carrier's procedures with respect to handicapped passengers.

(4) Each CRO shall have the authority to make dispositive resolution of complaints on behalf of the carrier.

(5) When a complaint is made to a CRO, the CRO shall promptly take dispositive action as follows:

(i) If the complaint is made to a CRO before the action or proposed action of carrier personnel has resulted in a violation of a provision of this part, the CRO shall take or direct other carrier personnel to take action, as necessary, to ensure compliance with this part. *Provided,* That the CRO is not required to be given authority to countermand a decision of the pilot-in-command of an aircraft based on safety.

(ii) If an alleged violation of a provision of this part has already occurred, and the CRO agrees that a violation has occurred, the CRO shall provide to the complainant a written statement setting forth a summary of the facts and what steps, if any, the carrier proposes to take in response to the violation.

(iii) If the CRO determines that the carrier's action does not violate a provision of this part, the CRO shall provide to the complainant a written statement including a summary of the facts and the reasons, under this part, for the determination.

(iv) The statements required to be provided in paragraph (a)(5) of this section shall inform the complainant of his or her right to pursue DOT enforcement action under this section. This statement shall be provided in person to the complainant at the airport if possible; otherwise, it shall be forwarded to the complainant within 10 calendar days of the complaint.

(b) Each carrier shall establish a procedure for resolving written complaints alleging violation of the provisions of this part.

(1) A carrier is not required to respond to a complaint postmarked more than 45 days after the date of the alleged violation.

(2) A written complaint shall state whether the complainant has contacted a CRO in the matter, the name of the CRO and the date of the contact, if available, and include any written response received from the CRO.

(3) The carrier shall make a dispositive written response to a written complaint alleging a violation of a provision of this part within 30 days of its receipt.

(i) If the carrier agrees that a violation has occurred, the carrier shall provide to the complainant a written statement setting forth a summary of the facts and what steps, if any, the carrier proposes to take in response to the violation.

(ii) If the carrier denies that a violation has occurred, the response shall include a summary of the facts and the carrier's reasons, under this part, for the determination.

(iii) The statements required to be provided in paragraph (b)(3) of this section shall inform the complainant of his or her right to pursue DOT enforcement action under this section.

(c) Any person believing that a carrier has violated any provision of this part may contact the following office for assistance: Department of Transportation, Office of Consumer Affairs, 400 7th Street, SW., Washington, DC 20590, (202) 366–2220.

(d) Any person believing that a carrier has violated any provision of this part may file a formal complaint under the applicable procedures of 14 CFR part 302.

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Federal Aviation Administration

14 CFR Parts 121 and 135

[Docket No. 25821; Amdt. No. 121–214 and 135–36]

RIN 2120–AC75

Exit Row Seating

AGENCY: Federal Aviation Administration (FAA). DOT.

ACTION: Final rule.

SUMMARY: This final rule regulates exit row seating in aircraft operated by U.S. air carrier and commercial operators (certificate holders), except on-demand air taxis with nine or fewer passenger seats. It requires that only persons who are determined by the certificate holder to be able without assistance, to activate an emergency exit and to take the additional actions needed to ensure safe use of that exit in an emergency may be seated in exit rows. This action is intended to further safety for all passengers.

DATES: Effective Date: April 5,1990.
Compliance Date: October 5, 1990.

FOR FURTHER INFORMATION CONTACT: Ms. Irene H. Mields or Mr. John Walsh, General Legal Services Division (AGC–100), Office of the Chief Counsel, 800 Independence Avenue, SW., Washington, DC 20591. Telephone: (202) 267–3473.

SUPPLEMENTARY INFORMATION:

Availability of Final Rule

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA–430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–3484. Communications must identify the docket number of this final rule.

Persons interested in being placed on the mailing list for future notices of proposed rulemaking (NPRM's) and final rules should request from the above office a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

In an effort to make this information available in an accessible format to individuals who are blind or visually impaired and to other individuals who are print handicapped, the Federal Aviation Administration (FAA) will make available for copying a number of audio cassette tapes of the entire amendment (and the accompanying regulatory evaluation) in the FAA Rules Docket, Room 915G, FAA Headquarters, 800 Independence Avenue, SW., Washington, DC. In addition, single cassette tapes will be available in the Public Affairs offices of the agency's nine regional headquarters; at the Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma; and at the FAA Technical Center, Atlantic City, New Jersey.

Background

Introduction

This rule prescribes requirements relating to the seating of airline passengers near emergency exits. The FAA has determined that a rule is necessary to establish clearly understood, consistent, and predictable practices regarding the seating of passengers in so-called "exit rows," and to prevent instances of arbitrary, unexpected, or unwarranted treatment by airline employees.

The issues addressed by the rule are among the most difficult and controversial ever addressed by the FAA, for they require, in the interest of what is essential for the safety of all

passengers, that some passengers be treated differently from other passengers, depending on their physical abilities.

The FAA must be satisfied that any differences in prescribed treatment are fully justified by the incremental gains in safety achieved thereby. The criteria set forth in the present rule have been weighed against this standard with the greatest care. The FAA is persuaded that, in this case, the standard has been met.

Mishaps in commercial aviation are extremely infrequent, but when they occur, survivability is a function of a great many regulatory decisions relating to the design and construction of the aircraft and its interior and to the procedures invoked by airline employees. Some of those decisions, in isolation, may seem small or "on the margin," but all are necessary elements to the total safety equation.

A critical prerequisite to survivability in many such circumstances is the fastest possible evacuation of the aircraft. Essential to the objective is the fastest possible safe opening of emergency exit doors, followed by the fastest possible movement of passengers through those exits and toward safety.

The FAA has determined, in light of the importance of maximizing the likelihood of a successful evacuation in the event of a mishap, and because of the pivotal role played by those passengers seated in closest proximity to airplane exits, that it is necessary to issue a rule, based on verifiable qualifications, establishing passenger eligibility to sit in an exit row.

Summary of the Rule

A passenger aircraft crashes. Inside the cabin, there are many survivors. A fire begins. If the passengers are to stay alive, they must get out of the aircraft as soon as they can. Seconds mean the difference between life and death. This is the scenario on which a crashworthiness standard is based. Many other FAA rules are intended to prevent a crash from ever happening. A crashworthiness rule assumes that a survivable crash has happened and then specifies certain actions to maximize people's chances of getting out alive.

This rule on exit row seating provides a crashworthiness standard. Exit doors must be opened quickly and properly if an emergency evacuation is to succeed. Often, crewmembers are not in a position to lead or conduct this part of the evacuation. Passengers sitting near the doors must perform the functions on which their lives, and the lives of their fellow passengers, depend.

What are some of these functions? *First, a passenger must be able to locate the door and quickly follow the instructions, written and oral, for its use.* Door operations and instructions differ from aircraft to aircraft. A delay in figuring out how to operate the door can cost precious seconds; operating it improperly can injure or result in the deaths of passengers.

Second, a passenger must be able physically to open the door. Doors are often heavy and clumsy to manipulate, and not every passenger can open them quickly.

Third, a person must be able to determine when to open the door. This involves being able to respond to shouted or hand-signalled instructions from flight attendants, as well as being able to tell when opening an exit would be too dangerous (e.g., because of fire on the adjacent wing).

Fourth, a person must be able to go quickly through the open exit, in order not to cause a traffic jam at the door, and perhaps to assist other passengers to leave the danger zone around the aircraft.

Fifth, a passenger must devote full attention to his or her emergency task. A passenger who must care for small children, for example, may be unable to do so.

The rule says simply that airlines shall seat in exit rows only persons who appear able to perform these and other relevant functions in an emergency evacuation. Persons who do not appear able to perform all the functions may sit in any other seat. Airlines also must take steps to inform passengers sitting in exit rows about what may be required of them in an emergency evacuation. By following these requirements, airlines will minimize the likelihood of passenger-caused evacuation delays that could cost lives.

In addition to the critical nature of the tasks just cited for opening the exit doors quickly, it is equally important that queues form readily and that evacuation proceeds as rapidly as possible. Therefore, in drafting this rule, the FAA had to consider not only the requirements for quickly opening the exit door (when and where appropriate) but also the requirements for initiating the orderly progression of the evacuees to safety, beginning at the exit rows.

As discussed further herein, this rule has been promulgated with full consideration of the Air Carrier Access Act of 1986 (ACAA), which prohibits discrimination in air transportation on the basis of handicap, but also requires that measures to eliminate such discrimination take into account the safety of all passengers.

During a regulatory negotiation to implement the ACAA, the participating groups representing persons with disabilities, the industry groups, and the Government were unable to reach agreement on the exit row seating issue. Accordingly, the Office of the Secretary of Transportation (OST), in an NPRM to implement the ACAA, formulated its own proposal on exit row seating (53 FR 23574; June 22, 1988). It took cognizance of the safety implications of exit row seating by proposing that carriers be prohibited from excluding persons from any seat on the basis of handicap, except in order to comply with an FAA safety rule.

This rule addresses the safety aspects of exit row seating and will result in some persons being seated in seats other than those in exit rows, based on the application of neutral, functional criteria. For example, young children, persons who are too large or too small, persons with some disabilities, and elderly persons who are physically frail will be seated in a location other than an exit row. This rule does not affect exit row seating in the on-demand operations of air taxis that have nine or fewer passenger seats. The purpose of a charter flight very well may be to carry a person whose disabilities make other commercial flights unavailable.

Summary of Comments

Notice of proposed rulemaking No. 89–8 was published in the **Federal Register** on March 13, 1989 (54 FR 10484). The comment period closed June 12, 1989. The FAA, in accordance with its standard policy, continued to accept comments and to consider them so far as possible without incurring expense or delay. Approximately 650 respondents registered their comments in the public docket on the proposed regulation as of July 28, 1989. Of that number, approximately 550 opposed the NPRM, while 90 supported it.

Individuals provided over 600 of the comments, while 40 came from various public or private associations and organizations. The largest number of individual comments came from blind persons or friends, associates, and relatives of blind persons. Individual comments also came from other persons with disabilities, passengers who have no disabilities, students, and flight attendants, pilots, and other persons connected currently or in the past with the aviation industry.

Representatives of organizations of persons with disabilities also commented. Again, the largest number came from groups with blind membership: the National Federation of

the Blind (NFB), the New Mexico Commission for the Blind, the Golden Triangle Council of the Blind, the American Foundation for the Blind, the American Council for the Blind, and various state or local affiliates of the NFB in Indiana, Alaska, Pennsylvania, Florida, Maine, New York City, Colorado, Kansas, Wisconsin, Maryland, Nebraska, South Carolina, Oregon, Georgia, and Connecticut, as well as from the NFB Federation Center for the Blind.

In addition, the national office of the NFB filed 2 volumes of materials and a 13-page unsigned document identified on the first page only as being from the "National Federation of the Blind." After the comment period closed, the NFB wrote to the Secretary of Transportation (the Secretary), concerning the exit row seating issues, reiterating the NFB's position and disagreeing with an internal, deliberative FAA memorandum which had come into the NFB's possession. This letter and the agency reply also were submitted to the docket. The FAA received over 200 form letters of several types, many without return addresses and/or legible signatures. We believe these also came from NFB members, since the comments made repeated those made by the national office, its chapters, and identifiable members. The FAA acknowledges these, but it has not included them in the count of commenters who wrote their own letters.

Commenters representing groups of persons with a variety of disabilities included: the National Association of the Physically Handicapped, the Society for the Advancement of Travel for the Handicapped, the State of Washington Governor's Committee on Disability Issues and Employment, the Paralyzed Veterans of America, the Disability Advocacy Organization, and the Southwest Center for Independent Living. The Architectural and Transportation Barriers Compliance Board (ATBCB), a Federal organization devoted to monitoring the implementation of the Architectural Barriers Act and related statutes and regulations, also commented.

In general terms, most of the blind individuals and their organizations oppose the NPRM, as do most of the organizations representing persons with other disabilities. Supporters of the NPRM, however, include some individuals and organizations who are blind or who have other disabilities. Also, while the NFB and its members oppose the entire NPRM and *any* seating restrictions, the other organizations are more selective in their comments, opposing portions of the NPRM and offering alternatives.

The following organizations, representing facets of the aviation industry, commented: the Association of Professional Flight Attendants, the Retired Airline Pilots Association, the Association of Flight Attendants (AFA), the Air Transport Association of America (ATA), the National Transport Safety Association, Inc., Airport Safety Services, International, the Interaction Research Corporation, and the Regional Airlines Association (RAA). The National Transportation Safety Board (NTSB), an independent safety agency of the Federal government, also commented.

Those connected with the aviation industry are unanimous in their support of the NPRM. The ATA and the RAA, however, provided detailed comments on changes their members wanted to see reflected in a final rule.

The FAA also considered the comments and questions of Members of Congress who wrote to the Secretary, to the Administrator, or to the docket regarding the NPRM or related matters; a variety of published interviews or articles on the exit row seating issue; studies; accident records; the record of a hearing before the Subcommittee on Aviation, Committee on Commerce, Science, and Transportation, United States Senate, on March 14, 1989; relevant news articles and videotapes, and information made available to the FAA regarding an evacuation test held by World Airways at the request of the NFB. The relevant materials were placed in the docket.

Since most of the comments came from the National Federation of the Blind (NFB), its affiliates, and members, the NFB's issues will be presented first, along with the positions of other commenters on these issues.

Discussion of the Issues

The NFB focused on seven specific issues in its formal comments within the two volumes it filed. The NFB's affiliates and individual members tended to comment on several of the seven issues, but not on all of them. The seven issues, however, really made three major points, so they are grouped together, as indicated below, to reflect this.

Whether the FAA Has a Genuine Evidentiary Basis for the Exit Row Seating Rule

This issue combines points 1, 2, and 7 of the NFB's formal comments that question whether the FAA has substantial evidence, flight safety evidence, or other evidence that there is a safety necessity for the NPRM. Basically, the NFB criticizes the evacuation study conducted by the Civil Aeromedical Institute (CAMI) of the FAA. Chiefly, the NFB criticizes the FAA for measuring blind persons only for their rate of movement from a given seat to the exit door or window; for not testing blind persons' capacity to perform other functions related to an emergency evacuation; for not limiting the test group to blind persons who are frequent fliers; and for using simulated blind persons in testing emergency evacuation through an over-the-wing exit. The NFB also alleges that the FAA's failure to issue a rule after completion of the CAMI study in 1973 shows that the study does not warrant such action.

The NFB also criticizes FAA's reliance on accident reports and other studies, stating that none of them show that blind persons ever caused an accident or slowed an evacuation. It alleges that in 1968 and 1976, blind persons actually were instrumental in the evacuation of passengers during aircraft emergencies. The NFB also alleges that an experiment the NFB conducted with World Airways in 1985 proves that exit row seating restrictions should not apply to blind persons. The NFB says that blind persons are capable of performing the functions that may be the responsibility of those persons sitting in emergency exit rows.

The Society for the Advancement of Travel for the Handicapped, whose former spokesperson also is blind, concurs in large measure with the NFB. The Paralyzed Veterans of America (PVA) comments adversely on the studies, stating that the FAA has not performed statistically valid tests on passengers with a variety of impairments, including old age, obesity, pregnancy, sobriety, and those related to various types of disabilities.

The criticism of the American Council for the Blind (ACB), another major organization with blind membership, is based chiefly on the limited number of functions tested by CAMI, but the ACB agrees with the FAA that it might not be feasible to test all the functions, especially those that could result in injury. It suggests additional testing and careful study of the World Airways experiment.

The aviation industry, conversely, supports the NPRM, the CAMI study, and the other data on which tha FAA based its proposal. The RAA finds the CAMI data "compelling." The ATA states: "The studies cited in the NPRM are persuasive, empirical evidence that what common sense tells us is true: to allow persons with known physical

deficits to sit in exit rows will impede the process." All the other aviation groups and organizations support the FAA findings directly or indirectly by focusing on the need for speed in initiating the emergency evacuation, the dangers of any delay in the beginning phases of an evacuation, and the wisdom of placing persons in exit rows who are not limited by a physical or mental disability.

In regard to additional testing of functions that might have to be performed during an emergency evacuation, none of the disability groups commented on the fact that the FAA invited representatives of disability groups to accompany FAA staff to a certificate holder's flight attendants' training facility to enable them to demonstrate the proficiency of persons with disabilities in finding mechanisms, opening doors, removing over-the-wing exits, responding to flight crew instructions, and other evacuation functions. None of the disability groups accepted this invitation. Representatives from the ATBCB and the Association of Flight Attendants, however, did participate.

The information available from this training program is instructive. In the training devices of this certificate holder alone, there are at least 11 types of doors or emergency exits, each of which requires varying degrees of strength and agility to open and each of which operates somewhat differently from the others. During the notice period, several FAA representatives visited another major certificate holder's training facility where similar observations were made. It is reasonable to conclude that, given the differences in operating instructions and techniques, sight also would play a major role in successfully opening the door or exit in a timely fashion.

Findings of CAMI Study

The CAMI study, conducted in 1973, was designed to assess the effects of handicapped passengers aboard an aircraft during an emergency evacuation. CAMI's project was undertaken in response to the Civil Aeronautics Board's (CAB) request for clear safety standards in this area. Basically, the position of the CAB in 1972 was similar to that of the FAA today. It recognized that handicapped persons were encountering inconsistent practices and policies in the provision of air carriage. The CAB recommended that appropriate actions be taken, looking towards the issuance of safety regulations on this pressing problem. "Flight Standards Technical Division Report on Air Transportation of Handicapped Persons," June 1973, p. 3.

As discussed further herein, the FAA elected not to regulate directly, in regard to exit row seating or other issues relating to the carriage of handicapped persons. Instead, by Amendment 121–133 (42 FR 18392; April 7, 1977) the FAA issued § 121.586 of the Federal Aviation Regulations (FAR), "Authority to refuse transportation," which allows air carriers to establish their own procedures for persons who may need assistance in an emergency evacuation.

In light of the FAA's experience under the current regulation, FAA finds that the CAMI research supports restrictions on exit row seating. A CAMI report on the subject states that:

> The average ambulatory handicapped passenger appears to possess adequate mobility for escape. He could be seated anywhere in the cabin except in an exit row or a primary overwing exit route * * *
>
> "Emergency Escape of Handicapped Air Travelers," Report FAA–AM 77–11, July 1977, p. 36. (A copy of this report was entered in the Regulatory Docket).

This report was prepared for possible publication in scientific journals and, therefore, includes certain observations and tests conducted by the researchers that are not contained in the 1973 report by the FAA's Flight Standards Service, "Air Transportation of Handicapped Persons," Project Report No. 73–740–120A. Although both reports are based on the tests conducted in 1973, only the 1973 report, which contains no direct conclusions on exit row seating, was available at the time Amendment 121–133 was adopted. The research does make a number of findings relevant to the seating of persons with disabilities in exit rows. The agency simply did not have available the full, considered opinions of the researchers at the time Amendment 121–133 was adopted. Among the research findings are the following:

> Persons with disabilities increased the exit time through floor-level exits in all cases, ranging from 3.9 seconds to 49.8 seconds. In the case of window exits, the increases ranged from 3.4 to 42.5 seconds.
>
> *Id.*, Tables 10 and 11, at 31 and 32.
>
> Although the time needed to evacuate anthropomorphic dummies was somewhat higher than would have been the case for most human beings, the times required by actual persons with disabilities also were greater than those of the able persons.
>
> *Id.*, at 29.

These findings are relevant because, if these delays occur at the beginning of an exit queue during an emergency, the effect will be felt throughout the entire evacuation flow, as traffic backs up.

Rapid aircraft evacuation is necessary, of course, due to the hazards of fire, smoke, explosion, and flooding in the event of an inadvertent water landing. It is vital, therefore, to minimize evacuation delays in every possible way. In the CAMI study, the researchers concluded that aircraft passenger seating location could be used to minimize the delays.

In the CAMI study, information for the study of seat location was drawn from a variety of tests. These included:

(1) An evaluation of individuals with handicaps, where individuals moved from one of three designated seat locations to a specific exit;

(2) Evaluation of handicapped passengers who required assistance to move to an exit;

(3) Evaluation of the evacuation of totally incapacitated passengers;

(4) Evaluation of the evacuation of grouped handicapped passengers;

(5) Evaluation of mixed group evacuations;

(6) Evaluation of the effect of exit configuration on evacuation; and

(7) A separate evaluation of the evacuation of a paraplegic subject. *Id.*, at 4 through 28.

Subjects were recruited from a variety of sources. Nonhandicapped subjects were FAA employees or were hired through the University of Oklahoma Office of Research Administration. Most handicapped subjects were recruited from participating organizations, such as the Oklahoma Foundation for the Disabled, the Oklahoma League for the Blind, the United Cerebral Palsy Rehabilitation Workshop of Greater Oklahoma City, and The Carver School. *Id.*, at 2.

One hundred sixty-two subjects, ranging in age from 15 to 84 years, participated. Eight had disabilities resulting from cerebral palsy; four from arthritis; three from polio; four from multiple sclerosis; two from muscular dystrophy; and five from birth defects. Eighteen were paraplegics; 2 were quadriplegics; and 15 were hemiplegics. Twelve were classified as elderly, either on the basis of age alone or on their physical condition. Their ages ranged from 55 to 84. Fifteen were totally blind. In addition, another person was classified as legally blind, and eight other persons were partially sighted. In addition, 22 normally-sighted persons performed as simulated blind passengers. Two were in casts and seven had fractures, amputations, or breaks that had mended poorly and affected their mobility. Seventeen had mental deficiencies and 7 had mental illnesses (depression or schizophrenia).

Two had no handicap and were capable of speed running. Four were obese, and four were deaf. *Id.*, appendix B.

Especially relevant to this rule are the results of the CAMI tests on group evacuations. The research team found that seating of handicapped passengers in a normal passenger population during normal flight conditions results in, at most, an occasional minor inconvenience to other passengers. They found, however, that under circumstances where the passenger cabin must be speedily evacuated, placement of the handicapped passengers becomes important.

Information for the study of seat location (for persons with non-sensory handicaps) was drawn from three test series: using an actual handicapped passenger in a passenger population of 24; using simulated handicapped passengers in a passenger population of 23; and using simulated handicapped passengers in a passenger population of 50. The simulated passengers were anthropomorphic dummies, to avoid injury to persons with actual disabilities.

Five tests involving the actual handicapped person, who required an assistant to carry him from the plane, showed that better evacuation times generally resulted when the handicapped passenger and his assistant were seated away from the exit. The implication of this finding is that evacuation times would be longer if the person were seated very near the exit, as in an exit row. This enabled the assistant to position the handicapped person on his back properly, without delaying passengers behind him and without experiencing difficulties himself, due to crowding and shoving. *Id.*, at 19.

In tests involving subjects simulating total incapacitation, one man assisting a fairly light dummy worked skillfully into the flow of passengers without delay. Evacuation of a 200-pound dummy from a seat near the exit was more difficult, and a delay of about 3 seconds resulted. *Id.*, at 19.

Placing the dummies at the farthest point from the exit, the extreme end of the passengar population, allowed the cabin attendant to establish a good evacuation flow immediately. The total evacuation of 23 live passengers took only 25.04 seconds. There was little delay in this test because most passengers were not detained by the action required to move the dummies and because their assistants had ample time to position them for transport while the forward line of passengers was evacuating. *Id.*, at 23.

When the simulated handicapped persons were placed in forward positions (i.e., nearer the exit), only 6 passengers (including 2 dummies) exited in the same time (20 seconds) that 17 passengers exited when the dummies were placed at the farthest point from the exit. *Id.*, at 23.

Passengers with upper limb and sensory handicaps had the least delaying effect on passenger flow times once their seatbelts were released. *Id.*, at 34. The tests, however, measured only their capacity to move from their seats to an exit under optimum conditions. To safeguard the subjects, none were asked to use evacuation slides. None were asked to open emergency exits and to perform the other tasks addressed in this rule, all of which are much more demanding than the relatively simple task of leaving a seat and moving forward to an exit without the dangers of flame, smoke, debris, and panic.

It was suggested by some persons that there may be little or no relationship between a passenger's rate of movement from a seat to an emergency exit and his or her ability to open the exit and perform the other functions stated in the proposed rule. The FAA requested commenters to provide copies of any study that supports that thesis, but none was submitted to the docket. The CAMI study does not point to that conclusion.

Videotapes of the experiments, copies of which have been placed in the docket, show the effect of various disabilities on movement from the passenger seats to the emergency exit doors. In many cases, it is readily apparent that the cause of slow progress, such as the immobilized arm of a stroke victim, also would affect the person's ability to open an emergency exit door.

The videotapes also show that some passengers with a fairly good rate of movement down an airplane passenger compartment aisle would have trouble, nevertheless, opening the emergency exit door. A paraplegic with strong shoulders and arms, for example, could drag himself or herself toward the exit but would not have the stability to stand and remain upright to operate the emergency exit door or emergency overwing exit mechanisms.

The tests revealed that evacuation of the control group (persons with no handicaps) consistently was faster than that of groups with handicaps of all types. Further, the evacuation time increased in all handicapped groups when the evacuation test involved a window exit rather than a floor-level exit. It is significant that this rather modest increase in complexity, from a floor-level to a window exit test, resulted in increased evacuation times.

It is logical to conclude that additional complexity, such as finding and manipulating emergency exit opening mechanisms, would impose additional burdens on persons with handicaps and cause delays.

Given the results of the tests, the researchers concluded that ambulatory handicapped passengers could be seated anywhere in the cabin except in an exit row or an overwing exit route, where he or she might impede the early stages of an evacuation or be injured by the rush of other passengers.

Further, the researchers also found that "if nonambulatory passengers are seated in a group, the group should be seated in the cabin so that they, and their assistants, would be at the end of a line of evacuees so as not to interfere with the evacuation of other passengers and to avoid crowding by other passengers during their preparation for evacuation." *Id.*, at 36. Clearly, this preferred seating position for nonambulatory persons is incompatible with sitting in an exit row, which by its nature is likely to be at the beginning of a line of evacuees.

It should be noted that seating "at the end of a line of evacuees" does not necessarily mean being seated at the back of the airplane or being the last person to evacuate. The location of the emergency exits determines the end of the line. Between a forward exit door and a window exit, for example, it is likely that two exit flows will develop—one toward the door and one toward the window. The break between the two flows will tend to come at midpoint between the two exits.

While it always is possible that one of the exits will become inoperable in an emergency, thereby changing the anticipated passenger flow, the FAA studies show that this rule promotes the expeditious evacuation of the greatest number of passengers.

The FAA reviewed scenes from a videotape, made at the time of the 1973 CAMI study, which shows actual, as well as simulated, handicapped persons, in the process of evacuating a simulated transport category airplane fuselage section. While the study's statistics provide ample evidence of the difference between the evacuation times of passengers with and without disabilities, the film provides very graphic evidence of the difficulties of movement associated with certain types of disabilities. This tape is also part of the rulemaking docket.

The FAA also reviewed a study completed in October 1970 by the Office of Aviation Medicine of the FAA, entitled, "Survival in Emergency Escape

from Passenger Aircraft." (Document No. AM 70–16). This document discusses human factors relating to survival in emergency escapes from passenger aircraft. Data was secured from three actual accidents, with a total of 261 passengers, 105 of whom lost their lives.

The accidents involved a United Airlines DC–8, which crashed during a landing at Stapleton Field, Denver; a United Airlines Boeing 727, which crash-landed at Salt Lake City Municipal Airport; and a Trans World Airlines (TWA) Boeing 707–331, which crashed on takeoff from Fiumicino Airport in Rome, Italy. The study, a copy of which was entered in the Regulatory Docket, deals in detail with the emergency evacuations; the behavior of the passengers; their seat locations, the age, sex, and other characteristics of the passengers; the causes of death or injury, and the effect of the crashes on the emergency exits.

This study concluded that:

> In aircraft accidents in which decelerative forces do not result in massive cabin destruction and overwhelming trauma to passengers, survival is determined largely by the ability of the uninjured passenger to make his way from a seat to an exit *within time limits imposed by the thermotoxic environment.*
>
> (Emphasis added) *Id.* at 57.

That is, it is crucial that people evacuate quickly before heat, flames, toxic fumes, or an explosion kill or injure them.

In addition, the FAA reviewed a "Protection and Survival Laboratory Memorandum," No. AAM–119–87–6, dated November 5, 1987, based on CAMI "Accident/Incident Bio-Medical Data Reports." This memorandum was placed in the rulemaking docket. At the time of the November 5, 1987, memorandum, the CAMI Cabin Safety Data Bank contained 3,382 entries. Of these, 132 pertained to problems of persons with handicaps or with characteristics that are likely to affect their ability to activate an emergency exit and to take the additional actions needed to ensure safe use of that exit in an emergency. The memorandum focused on 50 of these entries in the data bank. While information in such a document is subject to additional evaluation or change on review of the data, conduct of additional testing, or receipt of additional facts, the memorandum lends support to the CAMI conclusions regarding problems encountered by the disabled and others during evacuation. The FAA also reviewed the 50 entries individually. All included problems affecting persons with physical disabilities, the aged, children, the obese, and others having characteristics which could affect the evacuation process.

While the memorandum includes some reports of successful, rapid evacuation by persons with disabilities, the reports show rather dramatically that certain factors generally impede rapid evacuation—advanced age or extreme youth; parental responsibilities for minors; physical disabilities; obesity; injury or ill health; etc. Many of the persons impeded by these factors required the assistance of others to escape.

As a result of the studies and the other available data and information referred to herein, the FAA has concluded that it is more probable than not that persons with handicaps that prevent them from performing certain evacuation functions would be likely to impede emergency evacuation if seated in an exit row. This is especially true in an emergency where an exit row occupant is responsible for opening the exit. The data provide support for the FAA's conclusion that rulemaking is necessary to avoid the establishment or continuation of practices that are in derogation of the safety of all passengers.

The World Airways experiment, which was videotaped, has achieved considerable importance in light of the NFB's contention that it proves that exit row seating restrictions should not be applied to blind people. Since the NFB has not made the unedited videotape available either to the FAA or to World Airways, the FAA has relied on several eyewitnesses to the event. The eyewitnesses include two flight attendants and the managing editor of *Ninnescah*, a magazine that is published by an organization devoted to improving air travel for persons with disabilities. The flight attendants provided signed declarations, and the managing editor provided a copy of the issue in which he reported on the experiment. The FAA also studied the Report of a Senate Subcommittee on Aviation hearing held on exit row seating in Washington, DC, on March 14, 1989. At the hearing, the NFB leader, Dr. Kenneth Jernigan, discussed certain aspects of the experiment. These materials were entered in the docket.

After studying these materials, the FAA cannot agree, for the following reasons, that the World Airways exercise constituted a scientific experiment or valid study for the support of the NFB's position:

(1) There was no testing protocol;

(2) There appears to have been no pre-arrangement regarding the matter of neutral observers or instructions on what and where to observe;

(3) No formal report was issued;

(4) The only published report was written as a magazine article from memory or informal notes 2 years after the exercise;

(5) There was confusion as to the purpose of the NFB visit to the World Airways airplane; and

(6) practice sessions were used by the NFB to open the exit.

Other information which refutes the NFB's contention that the World Airways experiment proves that blind persons can perform the functions that may be the responsibility of persons seated in emergency exit rows include problems reported by the flight attendants who participated. These included the inability of the group to form a double line; hesitancy to jump without being pushed out; insistence by a woman with a guide dog that she be allowed to sit down, holding the dog, instead of jumping without it; inability to leave the slide rapidly at the bottom; and failure to catch some passengers when blind persons assisted at the bottom of the slide. One flight attendant reported that she was in danger of being shoved out of the exit due to her need to move forward to push some of the evacuees in order to make them jump

The managing editor and the flight attendants reported in depth on a second evacuation, with the blind persons holding their canes, that had to be aborted due to the danger posed by the canes to flight attendants, other passengers, and the assistants at the bottom of the slide.

In addition, practice sessions were used by the NFB prior to opening the door. One flight attendant reported on the difficulty of briefing blind persons and of translating such terms as "red" and "white" tabs and "short" and "long" handles for persons without sight. In her briefing, she specifically pointed out that there were certain things they would not be able to do without the aid of a sighted person.

Finally, the exit row seating proposal contemplates aircraft evacuation performance by passengers, with or without the help of a flight attendant. In the World Airways experiment, flight attendants and other World Airways aircraft evacuation employees were involved in all of the evacuation processes.

In sum, the World Airway experiment had none of the scientific planning, controls, measurement, or analysis of the CAMI study on which the FAA relies. In the World Airways experiment, it appears that only one person actually opened an emergency exit door, and then only after repeated

practice. Only a limited group assisted at the bottom of the emergency exit slide, and no one opened an over-the-wing exit.

The question has arisen as to whether certificate holders should ensure that at least one seat is occupied in each emergency exit row. The FAA does not believe that such a requirement is necessary. Nearby passengers who are able to perform the necessary functions could move into an empty row rapidly to perform the necessary functions.

Some commenters suggest that the seats in all exit rows be removed or the aisles widened. The FAA does not believe that either approach would remove the need for positioning persons capable of performing the necessary functions near enough to the emergency exits to perform the evacuation functions that may be required.

Following are additional NFB comments:

Whether the FAA's Exit Row Seating Proposal Discriminates Against Persons With Disabilities, Especially the Blind

The NFB's 3rd, 4th, 5th, and 6th points are interrelated in that all deal in some manner with discrimination. Succinctly stated, the NFB contends that exit row seating restrictions for blind persons: (a) are contrary to the Air Carrier Access Act of 1986; (b) promote unlawful discrimination against the blind; and (c) result in a disproportionate restrictive impact on blind persons as compared with sighted persons.

Many of the individual blind commenters and the affiliates of the NFB appear to be under the impression that the NPRM singled out blind persons in regard to exit row seating restrictions. This same theme appeared in the official NFB comment and is difficult to understand, given the scope of the NPRM and the many other persons and types of disabilities covered. All organizations representing blind persons were notified that the NPRM and its related documents were available on audio cassettes for taping. It may be that some of these commenters were not made aware of that fact.

In varying degrees, the other disability groups concur that the proposal is discriminatory. They base this view largely on the fact that unseen disabilities will allow persons to sit in exit rows, while identifiable ones will not. The NFB also feels that blindness is not a disability and that it is discriminatory for the FAA to include blind persons in the category of "disabled." If this position were to be accepted, however, blind persons would be denied the protection of laws, such as the ACAA, that prohibit discrimination against persons with disabilities.

The aviation community and other groups and individuals supporting the NPRM strongly disagree that exit row seating restrictions are discriminatory. One group of 12 individual signatories writes:

> Some of us would probably be denied seats in an exit row under the proposed rule, due to age and/or questionable strength to handle an over-the-wing emergency door. We do not consider such denial 'discrimination.' On the contrary, in an emergency we would welcome being relieved of the responsibility for the prompt and safe evacuation of our fellow passengers. We plan when making future reservations by phone, mail, or through a travel-agent, to indicate that we do not want to be seated in an exit row.

The ATA's comment makes it clear that the ATA considers exit row seating a safety issue. It enclosed editorials from the New York Times and Aviation Week and Space Technology, both of which disagree that discrimination is involved.

The comments concerning discrimination were analyzed by the FAA in light of the ACAA and the Rehabilitation Act, both of which prohibit discrimination on the basis of handicap, and in light of relevant case law. The Air Carrier Access Act of 1986 (Pub. L. 99–435, October 2, 1986) prohibits discrimination in air transportation on the basis of handicap. The ACAA also requires that measures taken to eliminate such discrimination take into account the safety of all passengers. Specifically, it provides:

> (c)(1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.
>
> (2) For the purposes of paragraph (1) of this subsection the term "handicapped individual" means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.
>
> * * * * *
>
> Sec. 3. Within one hundred and twenty days after the date of enactment of this Act, the Secretary of Transportation shall promulgate regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with the safe carriage of all passengers on air carriers.

In order to formulate regulatory proposals implementing the ACAA, the Secretary of Transportation formed an advisory committee consisting of representatives from groups of persons with disabilities, the Government, and the air transportation industry (52 FR 19881; May 28, 1987). The Committee began meeting on June 3, 1987, under the guidance of the Federal Mediation and Conciliation Service and was scheduled to present its recommendations to the Secretary in December 1987.

The Committee was unable to reach a consensus regarding a recommendation on exit row seating, which had been an issue of some concern to the Committee. Consequently, the Department (OST) had the responsibility of proposing its own provision on this subject, which it did in a notice of proposed rulemaking (NPRM) published June 22, 1988 (53 FR 23574). Concerning exit row seating, that NPRM proposed that carriers be prohibited from excluding persons from any seat on the basis of handicap, except in order to comply with an FAA safety rule. This rule is an FAA safety rule within the terms of the ACAA NPRM. This final rule, amending 14 CFR Parts 121 and 135, places restrictions on exit row seating on the basis of neutral, nondiscriminatory criteria applicable to all passengers. The statutory authority for Part 121 is 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S C. 106(g) (Revised Pub. L. 97–449, January 12, 1983). The statutory authority for Part 135 is 49 U.S.C. 1354(a), 1355(a), 1421–1431, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

Exit row seating has been the subject of FAA rulemaking in the past. In Notice 74–25 (July 2, 1974; 39 FR 24667), the FAA proposed a regulation, § 121.584, which would have provided that a handicapped person capable of traveling alone (e.g., a blind or a deaf person) could not be denied transportation so long as the person could be seated in any seat other than:

> The two seats nearest an exit, and any seat in a row immediately adjacent to an exit with the exception of the farthest seat from the exit in that row.

In other words, the two seats nearest an exit would have been unavailable to all handicapped persons in all cases, and other seats in an exit row would have been unavailable as well, depending on the length of the row, with the exception of the seat farthest from the exit.

That proposal was not adopted. The FAA chose instead to adopt in Amendment 121–133 a rule allowing each certificate holder to develop procedures appropriate to its own operations and aircraft. The FAA, however, issued an advisory circular (AC 120–31; March 25, 1977, the same date as Amendment 121–133) to assist certificate holders in developing their own procedures, which provided

guidance on seating. Paragraph 9 of the advisory circular states:

9. *SEATING HANDICAPPED PASSENGERS.* FAA's Civil Aeromedical Institute has conducted research to determine where handicapped passengers should be seated in an aircraft operated under parts 121 and 135 so that, in the event of an emergency evacuation, they can leave the aircraft, either unassisted or assisted, by the safest and most expedient route while not slowing the evacuation.

a. Those nonambulatory handicapped passengers should be seated in aisle seats where they would be near the end of lines of passengers being evacuated through floor-level, nonoverwing exits. Tests revealed that due to the narrow aisle width, an accompanying attendant trying to lift the handicapped person would temporarily block the aisle and hinder other passengers attempting to evacuate. Once the mainstream of evacuating passengers has passed, the attendant and the handicapped passenger can normally catch up to the flow since there is a bunching at the exit. Two nonambulatory passengers with attendants should not be seated directly across the aisle from each other because their attendants would interfere with each other while attempting to remove the nonambulatory passengers from their seats.

b. To determine the amount of assistance nonambulatory passengers will require to evacuate the aircraft, an agent should first ask the passengers what their capabilities are. If there is some question as to whether an individual is ambulatory or nonambulatory, the agent may ask him to perform a simple test such as transferring from a wheelchair, unaided, to another seat. Additionally, the passenger may furnish evidence of his capability, such as a driver's license or a statement signed by a qualified professional person (e.g. a physician or physical therapist).

c. Ambulatory handicapped passengers should be seated in areas in which evacuation would normally occur through a floor-level, nonoverwing exit.

The FAA's intent, in issuing this advisory circular, was that carriers would adopt reasonable seating policies consistent with the FAA's advice and consequently, to a significant extent, consistent with other carriers' policies.

The FAA's experience, including a review of a large number of carrier policies carried out in connection with the work of the advisory committee, suggested that FAA's intent had not been realized fully. Some carriers had not established seating policies fully consistent with the advisory circular. Carrier policies appeared to be inconsistent with one another in a number of cases.

Further, information available to the advisory committee showed that certificate holder personnel, in excluding persons from exit row seats, may have done so in the mistaken notion that an existing FAA regulation required it or may have alluded to a non-existent regulation to "settle the argument." This, in turn, led to increased pressure from persons with disabilities to remove restrictions on seating handicapped persons in exit rows. Under these circumstances, the FAA determined that it was necessary to consider regulatory requirements concerning exit row seating.

The need to review and reconsider the FAA position was heightened by the provision of the ACAA NPRM, referred to above. Concerning seat assignments, proposed § 382.31 states:

> Carriers shall not exclude any person from a seat in an exit row or other location or require that a person sit in a particular seat, on the basis of handicap, except in order to comply with the requirements of an FAA safety regulation.

This formulation contemplates consideration of an FAA proposal on this subject. Unless the FAA promulgated a safety regulation on exit row seating, the proposed provision of the rule implementing the ACAA would abolish all air carrier seating policies in effect, and it would prohibit the institution of new ones, regardless of valid safety considerations. For all the foregoing reasons, the FAA determined to reexamine the issue of exit row seating from the standpoint of both discrimination and safety.

Whether the FAA Exit Row Seating Rule Will Compromise Air Safety

The NFB believes: (1) That it would be safer to populate exit rows with blind persons than with persons who imbibe alcoholic beverages, and (2) that blind persons perform better in the dark than sighted persons and thus could be more effective than others during an emergency evacuation.

The blind community is joined by the ATBCB in identifying the service of alcohol in exit rows as a problem. The comments, generally, discuss alcoholism as an abstract problem, rather than accounts of actual experiences with inebriated passengers. The NFB's submissions do include an article published in the "Braille Monitor," on this topic. The article includes, among other things, statistics on the amount of liquor sold on air carriers; comments by a spokesperson for AFA on drinking as a problem on air carriers; and the results of blood alcohol level tests of passengers after an emergency landing by an Air Canada DC–9 in 1983. The ATA comments that its members believe that sufficient protection would be provided by current § 121.575 of the FAR, which prohibits boarding inebriated persons or serving alcohol to those who become inebriated while on board, and by the proposed exit row seating rule. In addition, this exit row seating rule applies to *all* persons who appear incapable, for whatever reason, of performing the functions necessary during an emergency evacuation. If a crewmember has reason to suspect that a person is inebriated, even if he or she is not showing easily discernible signs of such inebriation, the crewmember will have the authority to refuse to seat the person in an exit row or to move that passenger to another seat. In view of these authorities, the FAA does not believe that further restrictions are necessary at this time. The FAA will consider carefully, however, any evidence brought to its attention regarding this issue in the future and take such action as may be necessary.

The NFB's argument regarding the performance of blind persons in a smoke-filled or otherwise totally-dark cabin may have some merit. It appears to be based on the assumption, however, that darkness is the rule rather than the exception.

Most of the aviation organizations that commented focus on the need to see external fires as one of the important functions that must be performed. Such fires provide light, as do daylight, floor lights, door lights, and airport lights. Even in smoke-filled cabins, it often is the case that a glimpse of light finally leads people to safety. The NFB cites two instances in which blind persons ostensibly led others to safety in emergency evacuations. The FAA has insufficient information on the conditions of the evacuations, the locations of these two individuals on board the aircraft, the extent of their disabilities, etc., in order to form a judgment. Even conceding that these two individuals performed heroically, however, the FAA believes that two actions cannot outweigh the clear advantage of sight in most evacuations.

This was illustrated dramatically during the NBC "Today Show," July 20, 1989, when two survivors of the recent crash of United Air Lines Flight 232 were interviewed. When the DC–10 crashed, en route from Denver to Chicago, it burst into flames, and smoke filled the cabin. Eventually a glimpse of light enabled one of the interviewed passengers to make his way out of the aircraft.

The same passenger, by spotting an external fire, decided not to open an exit that would have admitted the smoke and/or flames into that part of the cabin. A second passenger was responsible for leading to safety two other passengers, including a woman who had arrived in a wheelchair but had

some mobility. A videotape of these interviews was entered in the docket, along with other comments and documents that were late, but which the FAA was able to take into consideration.

It is the view of the FAA, therefore, that this rule does not compromise safety as alleged by the NFB but carries out the concern of Congress that safety not be sacrificed in the course of implementing the ACAA.

While the ACAA protects the civil rights of handicapped persons, it also by its terms mandates continued concern for safety. The legislative history amplifies the safety theme. The Senate Report focused on this issue at several points. It states that the statute "does not mandate any compromise of existing DOT or Federal Aviation (FAA) safety regulations." Sen. Rept. 99-400, August 13, 1986, p. 4. The FAA's existing rules allow carriers to establish their own procedures for persons who may need assistance in an emergency evacuation (§ 121.586 of the FAR), but they do not cover specifically the role of exit row seating in air safety. Consequently, the FAA found it necessary to address the issue directly. In drafting this final rule to regulate exit row seating, the FAA remained mindful of both the words of the Act and the expressed Congressional intent regarding safety and civil rights.

The FAA notes, for example, that the Senate Report states that it was intended that certificate holders will not "impose upon handicapped travelers any regulations or restrictions unrelated to safety and unrelated to the nature and extent of any individual's handicap." *Id* at 4. This rule is wholly consistent with the ACAA.

It is clear that the principles enunciated by the courts with respect to discrimination under Section 504 of the Rehabilitation Act apply to the ACAA. The legislative history shows that Congress passed the ACAA specifically to close a gap in the Rehabilitation Act. During consideration of the Senate bill, S. 2703, Senator Dole stated specifically that the purpose of the legislation is to "overturn the recent Supreme Court decision in the case of Paralyzed Veterans of America versus the Department of Transportation. This case, which was handed down by the high court in the closing days of its spring term, held that section 504 of the Rehabilitation Act of 1973 'is not applicable' to U.S. carriers, except for those few small regional carriers who receive direct Federal subsidies." Congressional Record, August 15, 1986, at S11784. Senator Alan Cranston and Senator Howard M. Metzenbaum also addressed this point. *Id.* at S11787.

Similarly, in discussing the House version of the bill, H.R. 5274, Congressman John Paul Hammerschmidt stated:

> Unfortunately, our efforts on behalf of the handicapped were set back by the recent Supreme Court decision in the case of Paralyzed Veterans of America versus DOT. In that case, the Court decided that the Rehabilitation Act, which prohibits discrimination against the handicapped, did not apply to [unsubsidized] air travel * * *

Congressional Record, September 18, 1986, at H7193.

Congressman Gary L. Ackerman expressed similar intent:

> As you know, Mr. Speaker, last summer I introduced similar legislation to amend the Federal Aviation Act immediately following the Supreme Court ruling that major airlines cannot be forced to comply with the Rehabilitation Act because they do not receive direct Federal assistance.

Id., at H7194.

Given this recognition of the interrelationship between the Rehabilitation Act and the ACAA, logic requires that the standards set by the Supreme Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979) and in *Alexander* v. *Choate*, 469 U.S. 287, 105 S. ct. 712 (1985), regarding "reasonable accommodation" and "meaningful access" under Section 504 of the Rehabilitation Act, apply to the ACAA as well. The exit row seating restriction established by this rule is narrowly defined and does not constitute a barrier to meaningful access to air carrier transportation.

In addition, the rule is in accord with other governing judicial decisions. The Supreme Court has held that nondiscrimination on the basis of handicap does not require the imposition of undue financial and administrative burdens, nor does it require modifications that would result in a fundamental alteration of the nature of a program. *Southeastern*, 3 at 405; *American Public Transit* v. *Lewis*, 665 F.2d 1272 (D.C. Cir. 1981). In *Alexander*, the Supreme Court again examined the extent of accommodation required for persons with disabilities, finding that in *Southeastern* a balance was struck between "two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep Section 504 [of the Rehabilitation Act] within manageable bounds." *Alexander*, at 299.

The Supreme Court concluded in *Alexander* that "the balance struck in *Davis* [*Southeastern*] requires that an otherwise qualified handicapped individual must be provided with *meaningful access* to the benefit that the grantee offers * * * to assure meaningful access, *reasonable accommodations* in the grantee program or benefit may have to be made." (Emphasis supplied.) *Alexander*, at 301.

These principles and section 3 of the ACAA require carriers to ensure meaningful access to air transportation and the FAA to consider the potential safety impact of seating policies that are necessary for transporting passengers with the maximum degree of safety. Banning all persons with disabilities from particular seats, or requiring all disabled persons to sit in particular seats, would be unlawful discrimination because such a policy would be overbroad or unreasonable; but the exclusion of persons with certain disabilities from the seats covered by the rule for legitimate safety reasons does not deprive them of "meaningful access" to air carrier transportation. Exit rows provide only a small fraction of the available seating in the air carrier fleet. The rule does not bar any person from a seat unless that seating location adversely affects his or her safety or that of other passengers. It is the intent of the rule that a person with a disability not be denied transportation as a result of the safety restrictions established by the rule. There is a remote possibility, however, that such a denial could occur. Denial of transportation conceivably could occur when the aircraft configuration is such that, due to the nature of the person's handicap, the only seat which can physically accommodate the person is one that is covered by the rule. Such a situation is most apt to involve a small aircraft having only one exit. In such circumstances, there is often no flight attendant, and the need for a passenger to perform the emergency functions set forth in the rule is vital.

The FAA also received many technical comments from both the disability and the aviation groups. Some issues were raised only by one type of group, without comment by the other, depending on the vantage point or orientation of the commenter. The disability and the aviation issues are presented below.

Whether a Solution Can Be Found by Removing All the Seats in Exit Rows

Many persons who opposed the NPRM would not oppose removal of the exit row seats to enhance safety. These commenters do not specify what should be done about the other rows nearest the exits. There would remain the question as to whether seating

restrictions should be applied to those rows, if the exit row seats were removed. If nearby rows were not restricted, it is conceivable that their occupants would not be the persons with the greatest potential for assuming successfully the emergency evacuation duties.

Whether a Solution Can Be Found By Leaving All Exit Row Seats Vacant

A number of persons who oppose the NPRM would not be opposed to leaving all exit row seats vacant. There still would remain the question as to whether seating restrictions should be applied to other rows. The aviation industry did not raise or comment on this issue.

Whether the FAA Should Concentrate on Studying Seat Configurations, Aisle Widths, the Number of Seats, Door Mechanisms, and Other Factors That Affect Evacuations, Rather Than the Abilities of Persons With Disabilities to Lead an Evacuation

The ATBCB and several disability groups recommend that the FAA find other ways to ensure rapid emergency evacuations, such as improving seating configurations and other factors, instead of focusing on restricting persons with disabilities. One commenter recommends strongly that the FAA require seats to be reversed to face the aft section of the aircraft, claiming that this configuration has been proved safer. A recent article in "FAA World," by a president emeritus of the Flight Safety Foundation, addresses this point, indicating that it is questionable that backward seating enhances safety sufficiently to offset other dangers and discomforts which would arise. A copy of this article was entered in the docket.

The AFA, on the other hand, credits the FAA with its overall concern for passenger survivability, stating: "[W]e believe that the FAA's proposal to regulate exit row seating is non-discriminatory, as well as long overdue. It is nondiscriminatory because the agency is not singling out one aspect of cabin safety to raise to a high standard, while leaving the rest at some modest level." The AFA mentions specifically the following recent or current FAA rulemaking projects: requirements for seat fire-blocking layers; new flammability rules for the entire cabin interior; new seat strength standards for new aircraft types; floor-level lighting; automatic fire extinguishers in lavatories; new carry-on baggage rules; new requirements for cargo liners; the placement of better seats on existing aircraft; fire extinguishers in cargo compartments that currently lack them; and a maximum distance restriction between exits. As the AFA has indicated, the FAA is addressing a wide spectrum of cabin safety problems, and it will continue to do so. The FAA believes, however, that exit row seating constitutes one of these problems and warrants attention at this time.

Whether Passenger Information Cards Should Be Made Available in Braille, on Tape, or in Large Print

The ACB and some blind individuals recommend the provision of passenger information cards in Braille and in large print, regardless of whether blind passengers sit in exit rows, in order to facilitate their emergency evacuation. This suggested action also is outside the scope of the NPRM. It is the understanding of the FAA, however, that some air carriers already are carrying a limited number of Braille cards to make available to blind passengers. Further, a conference held by the FAA on aircraft occupant safety in November 1988 resulted in a recommendation for improved communication of safety information to blind or otherwise handicapped passengers. Although action on this would be outside the scope of the NPRM on exit row seating, the FAA intends to support improved communication and the availability of a certain number of Braille cards through an advisory circular.

Whether Written Procedures for Making Determinations Regarding Exit Row Seating Should Be Available in Braille, Large Print, and on Cassettes at All Loading Gates and Ticket Counters, Along With Information on How Aggrieved Passengers May Appeal to the FAA

The ACB proposes the above. The ATA, conversely, objects to any requirement to maintain written copies of procedures at all passenger loading gates and ticket counters, stating that the cost of complying with this requirement would far outweigh the potential benefit. As an alternative, the ATA suggests that written copies of any sort should be maintained at a central location. The RAA also proposes that copies should be maintained at a central location, namely, where the contract of carriage is kept. Neither the ATA nor the RAA addresses the issue of procedures in Braille, large print, or on cassettes.

At the regulatory negotiations relating to the ACAA, representatives from disability groups voiced their strong concern and frustration regarding the general unavailability of the procedures and information affecting air transportation for persons with disabilities. The FAA believes their comments and similar ones received in response to the NPRM have merit.

The FAA recognizes that, in general, it is satisfactory and certainly more economical to maintain the various procedures and other documents relevant to an air carrier's operations in a central location. The FAA believes, however, that the rule lends itself to relatively simple procedures which can be reproduced at minimum cost and made available to interested persons at the gates and counters.

Whether the Procedures Will Require Testing or Quizzing and Medical Expertise on the Part of Air Carrier Personnel or Crew

Both the ATA and the RAA comment that the NPRM seems to call for quizzing or testing passengers as to their capacity to perform the emergency evacuation procedures. They state that this would require medical expertise on the part of the air carrier personnel or crew, since they would have to evaluate the responses of the passengers. The ATA and the RAA also state that quizzing or testing would be demeaning and embarrassing to the passengers. The view of the ATA and the RAA is that air carriers should be required only to make reasonable decisions based upon observation.

The FAA agrees that quizzing or testing passengers as to the state of their mental or physical disabilities and their capacity to perform the evacuation functions would impose an undue burden on the air carriers. In drafting the NPRM, the FAA did not envisage such procedures. It is clear that even a full-scale physical and mental examination would not be foolproof. A person in excellent health could faint with fright during an emergency. Athletes with no record of illness have been known to suffer heart attacks. Strokes can occur with little or no warning.

This rule cannot guarantee that exit row passengers will be able to perform the necessary functions. It only can maximize the chances for selecting persons most able to begin and lead an emergency evacuation. Further, it must do so in a practical way—a way that can be implemented in the midst of a busy airport, with a multitude of passengers waiting in line or boarding, and with schedules to meet.

The FAA also concurs with the ATA and the RAA that most quizzing and testing would embarrass passengers. The FAA believes, however, that there may be a few situations where some

minimal questioning would be appropriate. If there is doubt regarding a person's capacity to hear, speak, or understand the English language, flightcrew or other personnel could ask a simple question. This would not involve a medical determination. Questions of this nature simply would ascertain a fact. They should prove no more embarrassing than queries as to whether a certain piece of luggage will fit beneath the seat or whether a person's seat belt is fastened.

The FAA does not anticipate, therefore, that a carrier's procedures for selecting exit row occupants will include detailed standards regarding the physical or mental abilities of passengers. It is the FAA's view that the rule is sufficiently explicit regarding the criteria for selection and the functions to be performed to allow the air carriers to make determinations based upon reasonable observation.

The procedures must contain, in addition to the selection criteria and the functions to be performed, as set forth in the rule, information on when and by whom the determinations will be made; identification of the office or person to whom to complain in the event of a disagreement; how moves to other seats will be handled; and other similar aspects of the process.

The FAA intends to provide detailed guidance on these aspects of a carrier's procedures, but it assumes that determinations will be made largely on the basis of observation and perhaps on some simple questions as discussed above.

Whether Passengers Who Are Seated by Mistake in Exit Rows Should Be Moved

The ACB raises the issue of reseating, but its comments are not entirely clear. It states initially that § 121.585(k) of the FAR "should be clarified to make it crystal clear that determinations once made by a carrier employee to assign a passenger to an exit row seat will not be changed, if the passenger prefers to keep that seat."

The ACB also states, however, that "If this rule is adopted and if a blind person is assigned to such a seat by mistake, the carriers must be forced to correct the mistake in the most discreet, courteous, and sensitive manner."

The ACB also states: "We believe that if a blind person is moved from an exit row seat against his will and it is not possible to place him in a comparable seat on the same plane, he should be compensated to the maximum possible extent *vis-a-vis* reaccommodations on the next flight, cash payment, and payment for consequential damages."

Objection to movement was universal on the part of those who commented on this, but for different reasons. The handicapped groups cite humiliation and discrimination. The industry groups cite delay or movement at an inappropriate and dangerous time, such as after the plane has started taxiing or before the captain permits unfastening seat belts after takeoff. The ATA comments on some loss of control over passengers, where the movement results from a passenger's decision to "opt out" of an exit row (whether based on health, fear, or unwillingness to perform emergency evacuation functions).

The ATA also objects to reseating on the basis that this would require "testing" on the part of the flight attendants, rather than the use of best efforts to keep out of exit rows those passengers who do not appear to be able to perform the functions required. It states that subsequent moves, coupled with the movement of persons who themselves "opt out" of the exit row seating, could result in tremendous delays.

The ATA points out that on an average day, more than 18,000 commercial passenger flights carry 1.25 million passengers. If an average of 10 passengers on each flight must be evaluated and if only 3 minutes are spent confirming their qualifications or reseating them, the total time spent complying with this requirement would be 9,000 hours per day.

The RAA also comments unfavorably on the movement of persons that may be seated in exit rows erroneously, but it supports "opting out," if done prior to takeoff.

In regard to its objection to allowing persons to "opt out," the ATA believes that persons should not be given this option, since it believes some persons may use this simply as an opportunity to obtain another seat more to their liking and will delay other passengers unnecessarily.

The RAA suggests that "opting out" should occur prior to entering the plane. It suggests that briefing cards be given to exit row passengers by the ticket agent. If, after reading the briefing cards, passengers do not wish to sit in the exit rows, they would be issued new seat assignments at the gate, minimizing the need for onboard reseating. The RAA points out that this also would eliminate the need for a lengthy oral briefing to the general passenger population. The RAA suggests that flight attendants or the second officers could collect the cards when the final cabin check is made.

The FAA concurs that onboard reseating should be minimized and believes the RAA suggestion should be followed whenever possible. Clearly, this would provide maximum control and eliminate delays in most cases. The exceptions would be cases where persons have second thoughts after enplaning, where persons attempt to hide disabilities, or where persons believe their disability to be inconsequential, even though the air carrier does not.

In these cases, and in all others where the air carrier notes that an error has been made, the passenger should be moved prior to takeoff, if at all possible. If taxiing has begun or takeoff already is underway, this rule does not require that the passenger be moved. Obviously, this would create dangers as great or greater than allowing the person to remain in place until the craft is airborne. To some extent, the crew's discovery of the problem already will have ameliorated some of the danger. They can remain alert in regard to the location of the problem until they are airborne; they can prepare the passenger to move; and they can alert another passenger to be ready for a seat exchange.

In regard to lengthy oral briefings, the FAA concurs that these might be counter-productive. A brief reference to the special cards in the exit rows, regarding the emergency functions to be performed, should suffice, if delivered with appropriate emphasis. Such emphasis already is being given to limiting carry-on luggage to two pieces and to stowing it completely under the seat or in the overhead compartment. Some air carriers already are asking persons to forego conversation or reading during the briefing and to look at the cards or a video while the flight attendant reviews the safety features as a whole.

Whether the FAA Should Consolidate This Rulemaking With a Rulemaking Pursuant to the ATA/RAA Petition for Rulemaking on Limiting the Number of Passengers With Disabilities and on Requiring Attendants for Passengers with Certain Disabilities

The ATA and the RAA petitioned the FAA to consolidate the exit row rulemaking with rulemaking regarding two issues: (1) limiting the number of passengers with certain disabilities that could be carried at one time on any given flight, and (2) requiring assistants for passengers with certain disabilities.

This is a very specific rulemaking concerning a specific safety issue that the FAA has identified. It would be well beyond the scope of this rulemaking to consider other, far broader issues raised in the ATA and RAA petitions. The

issues of refusal of service (including number limits) and attendant requirements are being considered as part of the rulemaking implementing the ACAA, in which ATA's and RAA's extensive comments are being fully taken into account. Consequently, it would be inappropriate to consider these issues as part of this rulemaking.

Further, the CAMI study demonstrates that any form of disability increases the exit time of an individual and can increase the overall exit time of the passengers as a whole. The salient question then becomes: "What practical steps can be taken to ensure that both the able and disabled passengers complete the emergency evacuation in the least amount of time possible?"

The FAA, after full analysis of the problem, believes that one practical step is to establish exit row seating restrictions. The exit row functions are definable, clear-cut, and absolutely essential to the emergency evacuation process. Even if an exit becomes unusable, this does not alter the need for capable passengers in that row to identify that the exit *is* unusable, to redirect other passengers, or to lead the way to another exit. When considering the factors that affect emergency evacuations, exit row seating is a variable that consistently remains of prime importance. It always will impact upon the capacity of all passengers to evacuate the airplane. Only if *all* the passengers in *all* the exit rows become incapacitated or if *all* exits become unusable will the requirement be moot.

In contrast, the presence of attendants and limitations on the number of persons with disabilities constitute variables of less demonstrable significance. It is possible to demonstrate conclusively that the inability to open an exit door always will affect other passengers. It is not possible to demonstrate conclusively that the presence of an attendant always will affect positively the egress of other passengers. The attendant may fail to assist his or her disabled companion, who may or may not then block other passengers. Able passengers, who were not required to have attendants upon boarding, may be injured and become disabled by virtue of the accident itself. A non-working exit door may alter the flow of traffic and affect the attendant's ability to move a disabled companion without blocking others. The attendant, in fact, may become disabled.

In short, while it is certain that exit row seating will influence the overall speed of the evacuation, it is conjectural that the presence of one or more attendants will do so. The FAA recognizes, of course, that attendants may be necessary to assist persons with certain disabilities in the course of ordinary activities, such as eating, stowing carry-on baggage, taking medication, or moving about the aircraft. That is a service question, however, and not a safety one.

It is somewhat less conjectural that the number of passengers with disabilities will affect the evacuation rate, but the FAA believes that limitations may not be feasible, except where the size and configuration of the aircraft demand them. The right to travel has been interpreted by the courts to be constitutionally protected. As already discussed, the law also requires meaningful access to air transportation for persons with disabilities. In the case of exit row seating, the right to travel is not infringed, and meaningful access is assured. Further, the exit row seating restrictions apply not only to persons with disabilities, but to parents with small children, obese persons, pregnant women, the elderly frail—a wide spectrum of the passenger population. It could be argued that persons in these categories, therefore, also will affect the speed of evacuation and should be restricted by number.

Clearly, it is not desirable to limit air travel to adults in the prime of their lives, both from the standpoint of age and health. Even limitations short of that would require, in the estimation of the FAA, concrete evidence of detriments to safety that require restrictions on the right to travel. This was not produced during the NPRM comment period. If such evidence is brought to the attention of the FAA, it will reopen the question.

Whether Additional Testing Should Be Undertaken by the FAA, Regarding Attendants and Number Limitations

In 1986, the Office of Science and Technology Policy (OSTP), Executive Office of the President, published a notice regarding a "Proposed Model Federal Policy for Protection of Human Subjects," as a response to the First Biennial Report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (51 FR 20204; June 3, 1986). The OSTP's response was made on behalf of all the affected Federal agencies, including the Department of Transportation, which had concurred with the Model Federal Policy. *Id.*, at 20216.

While the OSTP has not as yet issued a final statement of policy, the Department of Transportation has voluntarily adopted the principles of the proposed model Federal policy. With certain exceptions not relevant to this discussion, the policy applies to all research involving human subjects conducted, supported, or otherwise subject to regulation by any Federal department or agency that takes appropriate administrative action to make the policy applicable to such research. The Department of Transportation has not taken formal action to make the policy applicable; but, as stated above, it has concurred with the policy.

In brief, the policy calls for careful review of all proposed research involving human subjects, to make certain that:

(1) Risks are minimized;

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to the subjects;

(3) Selection of the subjects is equitable;

(4) Informed consent has been given by each subject or the subject's legally authorized representative, and the informed consent is appropriately documented;

(5) The data collected will be monitored to ensure the safety and privacy of subjects; and

(6) Subjects likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons are afforded additional safeguards to protect their rights and welfare.

In view of this, the FAA has not performed studies that replicate certain types of external or internal hazardous conditions. The FAA has not performed studies that include a panic situation in an emergency evacuation, nor has it sponsored competitive emergency evacuations.

In Great Britain, on the other hand, competitive emergency evacuations are performed for experimental purposes. In effect, volunteer "passengers" are rewarded financially for being first to exit the plane or for escaping within a given time. Persons are encouraged to perform as they would during an actual emergency.

Behavior under such circumstances can be extreme. Unlike the orderly progress toward exits required in FAA experiments, competitive emergency evacuations can and do include shoving, screaming, climbing over other passengers, etc. Common sense indicates that under such conditions, volunteers can be injured, especially if physical or mental disabilities add to their vulnerability.

The FAA believes that the end result of such competitive testing would not differ, except in degree, with studies already performed.

Whether the Requirements Regarding Children in Exit Rows Should Be Simplified by Eliminating All Children From Exit Rows

The ATA suggests that the final rule be simplified by directly banning all children from exit rows. As written, the NPRM affected small children by indirection only, whether traveling alone or with an adult, by describing the types of functions that must be performed during an emergency evacuation and the skills necessary for performing those functions. All of the required functions clearly are beyond the capabilities of small children. The intent of the NPRM was to eliminate young persons who would require the assistance of an adult companion (relative, guardian, etc.) during an emergency evacuation or who, due to their age or size, would not have the cognitive or physical ability to perform emergency evacuation functions, if traveling alone.

The FAA concurs that simplification is desirable and that children should be banned from emergency exit rows. Dictionaries define a "child" variously as someone between "infancy" and "youth" or a person between "birth" and "puberty" or "adolescence." Since persons vary in their maturation and growth, it is difficult to establish a clear cut-off point between childhood and adolescence. A number of existing laws, regulations, and practices, however, point to the age of 15 as a turning point into adulthood. In many States it is the age when driver's licenses and work permits become available. In view of this, the FAA has selected 15 as the necessary minimum age for exit row occupancy.

Whether the Definition of "Exit Row" Should Be Narrowed To Take Into Account Varying Fleet Configurations Among Airlines

The ATA comments that certain exit rows could be excluded from the scope of the rule, if all of the following criteria are met:

(a) The nearest seat in the exit row is at least 36 inches from the exit;

(b) The width of the access aisle is at least 22 inches; and

(c) The exit is a floor level exit (one without a sill).

The ATA claims that exit rows meeting the above criteria would not be blocked by a person who does not meet the functional requirements listed in the NPRM. The RAA requests clarification of the definition of an "exit row," since in some aircraft there is no clearly discernible aisleway. This would cause confusion as to what is considered a floor-level exit row.

The NFB, in the past, and other commenters have suggested that the rule could be made less restrictive by restricting only the seats next to the exit doors. The ATA suggestion also would result in a less restrictive rule and was given very careful consideration by the FAA in view of this. Many persons with disabilities voiced their displeasure during the ACAA regulatory negotiations, however, with air carrier instructions to remain seated until they could be assisted. The FAA believes it would not be realistic to consider that persons with disabilities would not attempt to unbuckle their seat belts or attempt to move toward the exit immediately. This could occur at the critical point of initiating sufficient momentum for the evacuation flow.

Further, seating persons with disabilities in those rows would result in some time loss, as other passengers or crewmembers made their way to the exits. These functions involve a cooperative group effort. Persons in an over-the-wing exit row, for example, may have to move out of the way rapidly while the person in the window seat removes the exit and places it upon the seat or maneuvers it over the back of the seat.

In cases where the exit is not immediately adjacent to the row, an accident requiring an emergency evacuation might create obstacles that would impede getting to the exit to begin the evacuation process. An able-bodied person would be in a better position to cope with a disabled flight attendant strapped in a rearward-facing bulkhead seat immediately adjacent to the exit.

The initial evacuees should be able to hold down the slide and to assist people in getting away from the slide. If the one non-handicapped person in the row is incapacitated, by default the others in that row will become those who must not only open the exit but perform the balance of the team functions.

The FAA recognizes the dilemma of the RAA in designating "exit rows," since many smaller aircraft have no seats adjacent to floor-level exit doors. In view of this, the definition of an "exit row" has been modified to include the closest row or any seat which has direct access to an exit or has no obstruction between it and the exit.

Whether the Functions and Criteria and a Statement About Passengers' Performing Exit Row Duties Should Be Included in Passenger Information Cards at Seats Affected by the Rule and in Passenger Briefings

The ATA believes that excessive information on cards (the cards required by §§ 121.571 and 135.117 of the FAR to supplement the oral passenger briefings also required by these sections) and lengthy briefings will be ignored by passengers and will create anxiety. ATA recommends that, instead, all passengers should be advised by a simple notice on the existing information cards, or as part of the standard safety briefing, that they may be called upon to open an exit or otherwise assist the crew in the event of an emergency.

The RAA comments that in 1985, the NTSB completed a study on briefing cards. The study concluded that the use of illustrations and minimal verbiage resulted in more passengers reading the cards. The RAA suggests that a special briefing card be offered to exit row passengers and that other cards not be changed.

As previously discussed, other groups such as the ACB opt for more information, rather than less, and want it in Braille, large print, and on tapes. Several persons suggest that the locations and types of mechanisms may pose problems for persons other than those with disabilities. They recommend more detailed instructions on both the passenger evacuation cards and near the emergency exits for everyone's benefit.

The FAA concurs that briefing cards must be kept simple and succinct to encourage passengers to read them. The FAA believes, however, that safety will be enhanced if passengers are given additional information on emergency evacuation functions. While these functions may fall only to persons seated in exit rows, it is conceivable that incapacitation of one or more exit row occupants may require assistance from other passengers. Further, if all passengers are aware of the procedures, it may elicit greater cooperation on their part, such as not crowding the exit row occupants while the exit is being opened, moving back to allow stowage of an over-the-wing exit door, and even readily accommodating a transfer of seating before takeoff.

In view of this, the FAA final rule requires that all briefing cards for the general public contain the basic illustrations regarding emergency

evacuations already found on briefing cards, concerning the following:

(1) The location and types of exits;

(2) The opening mechanisms;

(3) The use of the opening mechanisms;

(4) The activation and/or use of slides;

(5) Use of the wings for emergency evacuations;

(6) Movement away from the airplane after reaching the ground;

(7) Emergency evacuations over water ("ditching");

(8) Use of oxygen masks; and

(9) Any other information/illustration needed to impart information on emergency evacuations of the particular airplane involved or new developments in evacuation techniques and procedures.

In addition, this rule requires that the safety functions stated in §§ 121.585 and 135.127 of the FAR be listed on all briefing cards. Some, but not all, of these functions already are illustrated on the cards now used by certificate holders. The listing will serve to reinforce the graphic information and also will draw attention to functions that are not illustrated easily.

Finally, this rule requires that each certificate holder shall include on passenger information cards, at all seats affected by these sections, presented in the languages used by the certificate holder for passenger information cards, the criteria set forth in paragraph (b) of §§ 121.585 and 135.127 of the FAR, to enable passengers to self-identify if they are or believe they are incapable of performing the functions. Multilingual cards may be necessary to enable passengers to self-identify. Exit row occupants, however, must be capable of understanding the crew's oral commands. Proficiency in the English language is not necessary, but exit row occupants should be able to understand simple instructions in English. This requirement must be made clear on the cards.

As previously discussed, the matter of providing cards in Braille or large print for passengers seated in non-exit rows is outside the scope of this rulemaking. The FAA encourages certificate holders to do so, however, and to design the cards in a manner that will ensure maximum independence for blind passengers who desire this during an emergency evacuation.

Whether a Less Stringent Standard for Exit Row Seating Should Be Adopted for Regional Carriers Due to Smaller Cabin Size

The RAA strongly opposes a less stringent standard, commenting that the absence or small number of flight attendants on aircraft with limited seating makes it even more imperative that able persons be seated near the exits to assist.

It is apparent from the RAA's reference to flight attendants that the RAA's comment concerns commuter flights. The FAA concurs with the RAA in regard to commuters, and the rule sets the same standard for all U.S. air carriers and commercial operators (certificate holders) of this type.

The FAA has decided, however, to exempt the on-demand operations of air taxis with nine or fewer passenger seats from this rule. Persons with disabilities, to whom other types of commercial flights are unavailable, should have access to air travel. Since these chartered flights may carry only the handicapped person, or, at most, friends, family, or assistants, instead of large numbers of passengers, the FAA has determined that exit row seating restrictions should not apply.

Whether Written Procedures Should Be Approved by the Local Principal Operations Inspector Rather Than by the Director of the Flight Standards Service

The RAA states that the requirement for final approval in FAA Headquarters could cause situations where a carrier's procedures will be unenforceable until the approval is granted, with exit row restrictions not implemented for several months.

The FAA believes that the RAA's comment is premised on the belief that the FAA expects complicated procedures regarding the identification of exit row passengers. This is not the case. As already discussed, the FAA believes that the functions and criteria stated in the rule are clear and sufficiently self-explanatory to be adopted by certificate holders and to serve as the procedures for the selection of exit row passengers. The balance of the procedures, which will relate to the personnel making the selections, the filing of complaints, and other administrative actions, should be fairly simple. The final product, therefore, should not require prolonged review. The main thrust of that review will be to determine that the certificate holders have not added criteria and functions that are not in accord with the rule or which go beyond what is required for safety.

During the ACAA regulatory negotiations, organizations representing persons with disabilities strongly recommended that any procedures developed relative to their constituents be reviewed by high-level management to ensure that the nondiscriminatory purposes of the ACAA be carried out. The FAA recognizes that this is a valid request in regard to the exit row seating rule, as well. In the concern for air safety, it is sometimes difficult to keep other important concerns in mind, both within the FAA and among the certificate holders. Approval by the Director of the FAA's Flight Standards Service will highlight the necessity of accomplishing the aim of safety without detriment to the goal of nondiscrimination.

Discussion of Emergency Evacuations—Exit Row Passenger Functions

In the NPRM, the FAA discussed the types of functions which may be necessary for exit row occupants to perform. While these are contained in the rule, the FAA believes it is appropriate to repeat the discussion material found in the NPRM in order to provide certificate holders and other interested parties with a single document that encompasses all the FAA thinking on this issue.

Note: Some portions of the following discussion have been modified to reflect the impact of comments or rearrangement of the information in response to a comment.

From a safety standpoint, a person who sits in an exit row or, in cases where there is no aisle, in any seat that has direct access to an exit must be able to accomplish a number of tasks under a variety of conditions without assistance. These include:

Locating the Exit

In order to be able to locate the exit in an emergency, the passenger in an exit row must be able to comprehend and identify that he or she is in such a row. The primary means of such comprehension and identification is seeing the exit, as well as its placards, and recognizing their significance. Although a person familiar with one or more aircraft seating configurations might be able to recognize that he or she is in an exit row by counting seat rows, that method is not reliable. Seating configurations vary from certificate holder to certificate holder and even from aircraft to aircraft in the same fleet. Further, the ability to remember seating configurations is not something that can be discerned by ordinary means of observation. It would not be practical to expect that a certificate holder assigning seats could identify a person with that ability, or be sure that one who claims such ability actually has it. It has been suggested that special briefings could be given to blind persons to inform them of their exit row

occupancy and to familiarize them with the door or window opening mechanism. During an actual evacuation, however, there is no guarantee that the nearest exit will be operable or should be used. The FAA's study of three major accidents (Report AM–70–16) includes data on this point. In the Denver accident, the left window exits became unusable due to fire on the wing. Debris blocked the main, rear boarding door. Fire destroyed the slide at the aft galley door after about 20 persons used it. Other passengers then had to jump—a situation with special hazards for blind and other handicapped passengers. In the Salt Lake City accident, fire on the left side of the fuselage drove persons away from the window exits there to the right side instead. In the Rome crash, fire spread to the left side of the aircraft, hampering the escape of passengers from that side. Further, the forward galley door was not used due to fire. "Survival in Emergency Escape from Passenger Aircraft," at 11, 12, 22, 31, and 33. Clearly all passengers benefit if the persons seated in an exit row can determine quickly whether its door or window exit remains operable or conditions outside allow its us.

Recognizing, Comprehending the Instructions for Use, and Operating the Exit Opening Mechanism

These tasks call for the ability to locate and identify the mechanism and the range and direction of motion required to use the mechanism effectively. They require the ability to perceive and understand the normally available directions pertaining to use of the mechanism. Ascertaining the complete directions for opening an exit often requires observation of both the exit itself, which may have on it a graphic illustration regarding the direction in which the mechanism must be moved to open the exit, and a passenger information card and/or video tape presentation. These contain further graphic illustrations of the complete set of actions required for use of the opening mechanism.

It should be emphasized that these presentations rely on graphic displays as well as on words. Reliable oral interpretation of the graphics for the benefit of a blind person by another passenger depends on the ability of the person attempting to convey the information. There would be no practical way to test this in advance. Similarly, relying on another passenger to translate instructions would be impractical in the case of persons who do not speak the same language. In addition, other passengers have no legal duty to convey such information to a handicapped, non-English speaking, or illiterate passenger, and it would not be feasible to require them to demonstrate such an ability.

Further, many passenger information cards focus on main handles of the exit, on the assumption that passengers will be able to see or read further instructions or find adjunct mechanisms. To illustrate, during the FAA's visit to the training facility for flight attendants, the following were noted:

An overwing window exit generally will have a handle marked "Pull" or "Pull Down." but no placard or information concerning the other hand grip that must be located and grasped at the same time as the movable handle. Both must be grasped to enable the person opening the exit window to move it out of the way to prevent blockage of the exit.

Certain operating mechanisms are not integral parts of the exit doors but may be located adjacent to the exit door. Still others have covers, labeled with words indicating they should be removed to allow use of the mechanism in an emergency.

On power-assisted exit doors, in addition to the mechanism for opening it, there often is an arming device located near the opening handle. If activated by mistake, it will prevent the door from opening. Sighted persons can differentiate this handle from the door mechanisms, which are fully labelled. No instructions are provided to passengers in connection with the arming devices because they are intended for crew use only. Yet, their proximity to the opening handles presents a chance that a person, who cannot discern the difference between the two mechanisms, inadvertently could render the exit useless. Once this occurs, it is not reversible without the assistance of trained mechanics.

Assessing Conditions

This requirement includes both sensory and cognitive abilities. The primary sense involved is sight. Cognitive abilities include the capacity to judge danger. Young children, for example, may lack the ability to make the required judgments. Opening an exit in an emergency may increase the danger to which all passengers are exposed, if doing so allows an external fire or even its smoke to enter the cabin. Danger to passengers also can be increased if they are encouraged to use an exit that might open onto dangerous conditions, such as jagged metal, ice, water, unexpected distance to the ground or some other condition that might be avoided by using another exit.

It has been suggested that a blind person could be advised orally of a sighted person's assessment without derogating the safety of others. The FAA does not agree that this offers a practical alternative to excluding blind people from exit rows. Emergencies are more likely than not to foster confusion. To add a requirement for one person to assess conditions and relay that assessment to another before an emergency exit can be opened, solely to allow the latter to sit in an exit row, would be to increase risk unnecessarily.

It also has been suggested that a blind person can assess the danger presented by external fire through the sense of touch. The argument is that a blind person could sense an external fire by feeling the inside of the door. While that may be true in some cases, this argument is not valid in the case of fire that is not yet near enough to the airplane or of sufficient intensity to cause the inside of the door to be warm enough to warn against opening the door. Large, modern aircraft are extremely well-insulated. At 30,000 feet, a passenger cannot feel the intense cold (as low as −70 degrees centigrade) by placing a hand on the fuselage.

In addition, this assertion does not deal with the dangers presented by smoke, jagged metal, water, and other hazards such as those mentioned above. Certificate holders train crewmembers to "feel" the door while looking out the window to assess conditions, but this action is designed to cause a pause for assessment of viewed conditions before reaching for the exit operating mechanism. It is not considered an independent means of assessment.

In some doors, prism windows now allow visual assessment along the full length of the aircraft all the way to the ground to determine whether fire or obstacles are present. Clearly, blind persons cannot make such an assessment.

Automatic slides fail from time to time. When this happens, the person nearest the exit must recognize that manual deployment will be necessary, find the manual deployment handle, and operate it. If this fails, it may be necessary to find and communicate the need for a totally different means of escape. Sighting flashing door lights, following floor lights, or seeing the hand signals of others may be necessary for effective escape leadership. While this leadership may fall to a passenger outside the exit row, it will do so more rapidly if those in the exit row can quickly and accurately assess the state of that exit.

Finally, it has been suggested that blind persons are better able to function in the dark and actually may be more useful than sighted persons in an emergency evacuation. As previously discussed, it is not certain, however, that in any given crash scenario darkness will be so complete as to render sight useless.

Assessing Whether a Slide Can Be Used Safely

This includes judging whether the slide has extended, whether it terminates in a safe area, whether the physical integrity of the slide is adequate for its use, and whether passengers are accumulating on the slide in such numbers as to threaten its integrity.

Stowing or Securing the Exit Door

The action needed to stow or secure the exit door expeditiously and safely varies widely. On power-assisted doors, no separate action beyond turning the handle may be required. Removal of a window exit, however, will require maneuvering a 40- to 80-pound, approximately 2- × 3-foot window over the adjacent seat back into the row behind the exit or onto seats in the balance of the exit row. This requires strength, sight to ensure that others are out of harm's way of the detached window, and speaking ability to issue the appropriate orders or warnings to passengers in the way.

In stowing doors that swing outward, such as those on some Boeing 727 models, care must be taken to avoid falling out of the airplane. A handle near the door is provided for just this purpose, and its purpose is obvious to a sighted person attempting to open the door. In the passenger information cards of one major certificate holder, this handle is visible in pictures of the door, but its use is not discussed. This makes it unlikely that it would be revealed to a blind person being apprised of the exit operating instructions by a sighted companion. Such communication was suggested by at least one witness appearing before the advisory committee as being all a blind person would need to function as effectively as a sighted person in regard to opening an emergency exit safely and expeditiously. A similar argument could be made with respect to passengers who cannot understand the language in which crew commands are given. It is the FAA's position that such instruction or explanation by another person constitutes an unnecessary delay factor and simply points to the need not to place persons needing such explanation in exit rows.

Safely Using the Exit

This includes passing expeditiously through the exit and assessing, selecting, and following a safe path away from the exit. A person leading the way out of an exit in an emergency should have the agility to exit quickly, the strength to assist other passengers, and the ability to avoid hazards such as water, jagged metal, unexpected heights (such as might be caused by failed or damaged slides), and rescue vehicles and associated equipment.

Following Oral Directions or Hand Signals From a Crewmember

During an anticipated evacuation, survival may depend on the ability of persons in exit rows to see, hear, and understand the instructions issued by crewmembers. As discussed previously herein, exits may become inoperable or unavailable due to fire, structural damage, or damage to slides. In some situations, opening an exit may exacerbate the danger by allowing flames or smoke to rush into the cabin. The potential for such danger is increased if persons in those exit rows cannot see it or hear and understand shouted directions and warnings from crewmembers.

Other Options for Exit Row Seating

The FAA invited comments on other options previously considered by the FAA as well as any other options the agency may not have considered. As discussed below, the FAA did not find alternative exit row seating plans persuasive.

The first option is the approach originally proposed in Notice 74.25 in 1974. Basically, this would prohibit handicapped passengers from sitting in all exit row seats except the seat farthest from the exit. The FAA did not select this approach for the following reasons: (1) in the event the remaining seats in the exit row were not assigned, the sole passenger in that row could be a handicapped person; (2) similarly, if the other passengers became incapacitated, the sole passenger in that row could be a handicapped person; and (3) even if the other passengers were able-bodied, a handicapped person in the exit row would be more likely than an able-bodied person to cause some delay in establishing the evacuation flow, as demonstrated in the CAMI study.

The second option was suggested by a representative of one of the groups of persons with disabilities. This calls for only the seat adjacent to a window exit to be reserved for persons capable of performing the necessary functions. Again, this approach presupposes the survival or undiminished capacity of this able-bodied person during an accident or emergency landing. Further, it would allow handicapped persons to be seated in a row of seats adjacent to a floor-level exit row. This approach is not viable, given the available data on evacuation flow.

The FAA's objective in this rule is to maximize the likelihood for survival. In order to do so, it is necessary that only persons capable of performing the necessary functions be seated in exit rows, to enhance the ability of all passengers to evacuate safely. As already discussed, persons in exit rows may have to work as a team. In the window exit rows, for example, the task of removing the window hatch ordinarily would fall to the person next to the window hatch. Window hatches weigh 45 to 80 pounds and must be maneuvered either over the back of the seat to the next row or placed on the seat next to the window exit seat. In either case, nearby passengers must be able to recognize the need for moving out of the way rapidly and have the capacity to do so. In addition, everyone in the row must be capable of performing the necessary functions because the seat adjacent to the emergency exit may be unoccupied.

The FAA reiterates that initial evacuees also may have to work as a team on the ground. In a high wind, it may be necessary for several persons to hold down a slide and to catch passengers (especially disabled ones) and assist them away from the slide.

Another concern that was expressed relates, in the commenters' view, to the questionable need for exit row seating restrictions, in light of the allegedly negligible probability that a crash would occur with a handicapped person sitting in an exit row. The suggestion is that this limited chance should be balanced against the inconvenience to persons who are removed from exit row seats assigned by mistake or inadvertence.

This comment overlooks the purpose of crashworthiness rules such as proposed herein. Crashworthiness rules are designed to deal with the post-crash environment by creating the greatest possible chance for survivors to escape the aircraft. Another example of a crashworthiness measure is the use of seatbelts. It is well-established that a fastened seatbelt may be the difference between saving and losing a life. Although seldom needed, they always are required. As discussed herein in conjunction with the matters of attendants and limitations on numbers of passengers with disabilities, the FAA

recognizes that the crashworthiness standard does not stand alone. It is subject to technical limitations and competing social aims. The social aims, however, must rise above the level of mere inconvenience.

The FAA's goal in this matter is safety for the maximum number of people possible. It is clear from the studies that any delay in beginning the flow of persons through an exit works to the detriment of all those trying to use the exit. The FAA studies show that persons without handicaps are less likely to cause such delays than are persons with handicaps. The studies also show that a handicapped person, who might cause a substantial delay at the head of an exit queue, can be accommodated once the queue is established and moving, without detriment to the exit flow rate or to his or her own escape through an exit.

The FAA sought additional studies or data concerning the issues raised by this rulemaking. The FAA was able to obtain further information on an evacuation exercise the National Federation of the Blind conducted in conjunction with World Airways in 1985. No other experiments, exercises, or studies came to light.

Requirements for Compliance With the Rule

In order to comply with the regulations, certificate holders must develop procedures and revise their pertinent handbooks, for review and approval by the principal operations inspectors (POI's) at the FAA Flight Standards District Offices that are charged with the overall inspection of their operations. A carrier's procedures will not become effective until final approval is granted by the Director, Flight Standards Service, at FAA Headquarters.

To ensure that the procedures of all certificate holders are consistent with the regulations, explicit criteria for the selection of exit row occupants have been included in the rule. To be approved, a certificate holder's procedures must include the criteria and address all of the functions enumerated in the regulations as ones that may fall to a person in an exit row.

The procedures also must include provisions by each certificate holder to make available at all loading gates and counters at each airport it serves, and at each seat affected by the regulations, the information advising the occupying passenger that he or she may be called upon to perform the enumerated functions. Passenger information cards for other rows and seats also shall enumerate the emergency evacuation functions.

Certificate holders also must include provisions verify the appropriateness of exit row seating assignments prior to takeoff and to brief passengers on the need to identify themselves and to move out of the exit row if they cannot meet the criteria or do not wish to be responsible for performing the required functions. For example, a procedure might consist of a flight attendant asking questions to ensure that a person seated in an exit row can hear and understand English. The flight attendant would then instruct the passenger briefly as to the responsibilities of sitting in that seat, and the person would indicate whether he or she feels capable of performing those functions and responding to oral commands in English from the crew.

Approval will be based solely upon the safety aspects of the certificate holders' procedures. The FAA's approval of procedures will not insulate the certificate holder, therefore, from challenges based upon discrimination or other matters not related to safety.

As with any changes to part 121 or 135 of the FAR, certificate holders' procedures must provide for training, as already required by FAA regulations in 14 CFR part 121, specifically, §§ 121.415, "Crewmember and dispatcher training requirements"; 121.417, "Crewmember emergency training"; 121.418, "Differences training: Crewmembers and dispatchers"; 121.421, "Flight attendants: Initial and transition ground training"; 121.417. "Recurrent training"; 135.295, "Initial and recurrent flight attendant crewmember testing requirements"; and 135.319, "Crewmember training requirements." Accordingly, §§ 121.585 and 135.127 of the FAR contain no separate requirement for training.

In developing the foregoing proposed compliance procedures, the FAA considered eliminating the requirement for submission of the procedures to the FAA for approval. The rationale presented for nonsubmission includes:

(1) The rule is very explicit and could be implemented with minimal written procedures;

(2) Passengers with complaints based on either safety or discrimination have adequate recourse to the FAA or the Office of the Secretary of Transportation, whether or not written procedures have been submitted for approval; and

(3) Since the rule will be implemented with minimal written procedures, there will be little to review and approve, and the cost of submission will not be warranted.

On the other hand, the FAA considered the following factors:

(1) Representatives of handicapped groups have expressed strong disapproval of the fact that the procedures developed by certificate holders under § 121.586 of the FAR, "Authority to refuse transportation," were submitted solely for review and not for approval by the FAA. A compliance mechanism that eliminates even the submission of the procedures may be considered a step in the wrong direction, regardless of the rule's level of detail;

(2) If the procedures are not submitted for approval, the FAA will have to rely solely on complaints to determine the compliance of the certificate holders;

(3) Without ready access to the procedures, the FAA will be in a less informed position, when attempting to resolve a problem informally; and

(4) There is no guarantee that each certificate holder will interpret the rule in exactly the same way.

The requirements are applicable to the operations of all part 135 air taxi operators, except the operations of on-demand air taxis with nine or fewer passenger seats, and commercial operators, as well as to part 121 domestic, flag, and supplemental air carriers and commercial operators of large aircraft. The FAA considered limiting the applicability of § 135.129 of the FAR, however, to aircraft having a passenger seating configuration of more than 19 passengers, but was persuaded by the comments of the RAA that this would not be advisable.

Compliance Dates

As previously discussed herein, OST has proposed a rule to implement the ACAA, to which the FAA's exit row rule relates. It is the intention of the Department that both rules, if adopted, become effective simultaneously to the extent possible, to avoid a hiatus between the existing procedures of certificate holders, concerning exit row seating, and the requirements established through amending parts 121 and 135 of the FAR.

While OST recognizes that the existing procedures of certificate holders may have shortcomings, at present they constitute the only available mechanism for monitoring emergency exit row seating from the standpoint of safety. A hiatus would not be in the best interests of safety, and the present procedures must be used until §§ 121.585 and 135.129 of the FAR become effective.

The present air carrier procedures also must remain in effect until the certificate holders complete any training

that may be necessary for crewmembers and other personnel; make appropriate revisions to their manuals; and complete production of new passenger information cards for occupants of aisle seats as well as other informational material that may be necessary under the rule. The FAA believes that these actions can be accomplished within 180 days of the effective date of this rule, and the compliance date has been set accordingly.

Regulatory Evaluation

Economic Impact Summary

This section summarizes a regulatory evaluation prepared by the FAA that provides detailed estimates of the economic consequences of this rule. The full evaluation quantifies, to the extent practicable, estimated costs to the private sector; consumers; and Federal, State, and local governments, as well as anticipated benefits and impacts.

Executive Order 12291 dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for each regulatory change outweigh potential costs. The order also requires the preparation of a Regulatory Impact Analysis of all "major" proposals except those responding to emergency situations or other narrowly defined exigencies. A "major" proposal is one that is likely to result in an annual effect on the economy of $100 million or more, a major increase in consumer costs, or a significant adverse effect on competition, or one that is highly controversial.

The FAA has determined that this rule is not "major" as defined in the Executive Order; therefore, a regulatory analysis, which includes the identification and evaluation of cost-reducing alternatives to the rule, has not been performed. Instead, the FAA has prepared a regulatory evaluation of just this rule without identifying alternatives. In addition to a summary of the regulatory evaluation, this section also contains a regulatory flexibility determination required by the 1980 Regulatory Flexibility Act (Pub. L. 96–354) and an international trade impact assessment. If more detailed economic information is desired than is contained in this summary, the reader is referred to the full regulatory evaluation contained in the docket.

Analysis of Benefits and Costs

The FAA has estimated the costs and benefits associated with this proposed rule by analyzing it section by section.

This rule replaces the industry's varying policies and inconstant practices with a uniform and uniformly applicable rule. The rule provides a comprehensive set of procedures, based on explicit criteria, that can be carried out with only minimal training cost. Changes to the certificate holders' operations manuals, appropriate parts of the crewmembers' manuals, and appropriate segments of airlines' training programs are made periodically as a matter of routine. The provisions of this rule will be incorporated routinely into those manuals and training programs at little additional cost. Factors such as an accelerated training schedule, if used, could result, however, in some additional training costs. Presently, the FAA does not anticipate this will be necessary.

The requirement for passengers to comply with instructions, or be subject to denial of transportation at the discretion of the certificate holder, will impose no cost because such a requirement is presently industry practice reflecting section 902(j) of the Federal Aviation Act of 1958 (49 U.S.C. 1472(j)).

The requirement that certificate holders make available, at each seat affected, information advising the occupant of the functions he or she might be called upon to perform in an emergency and the requirement that passenger information cards be presented in multiple languages will cost, at maximum, approximately $220,000 for all potentially affected seats under the applicability in both part 121 and part 135 of the FAR. The maximum approximate cost per aircraft will range from $20 to $60 for part 135 commuters with more than 19 seats and airplanes operating under part 121 of the FAR. The approximate cost per aircraft for part 135 commuters with 19 or fewer seats and for large air taxis (10–19 seats) will be $5.

The cost of making copies of the criteria available at airports will be negligible. The incremental cost of printing the procedures and making them available at each airport will range from less than $100 to probably no more than $1,000 per year for each part 121 operator and part 135 commuter operator, depending on the number of airports each operator serves.

The requirement for verification of appropriately occupied affected seats prior to closing all passenger entry doors preparatory to taxi or pushback will be accomplished during the currently-required baggage stowage check with no delay of flight or incremental cost.

The required inclusions in the passenger briefings are minimal expansions and will be accomplished at no cost.

Accommodating a passenger being relocated from an exit row seat when non-exit row seats are fully booked will involve no cost. That person will not be denied transportation, nor will any cost result from moving another passenger, who is willing and able to assume the evacuation functions that may be required, into an exit row seat. (In a rare case, it may be impossible to relocate a handicapped passenger due to his or her particular handicap and the particular configuration of an aircraft; e.g., the only seat on the aircraft that can accommodate a leg cast will be in an exit row.)

The certificate holder's submission of procedures to the FAA will involve a negligible administrative cost for the transaction.

Since it is highly unlikely that a passenger will be denied transportation, there will be no, or, at the most, a negligible loss of revenue.

The potential benefits that will be derived from this rule are substantial. The FAA estimates the benefits based on a broad body of information which is discussed in detail elsewhere in this rule. Of particular import is the information contained in a study completed in October 1970 by the FAA's Office of Aviation Medicine, entitled "Survival in Emergency Escape from Passenger Aircraft" (Report No. AM–70–16). The study concluded that in aircraft accidents in which decelerative forces do not result in massive cabin destruction and overwhelming trauma to passengers, survival is determined largely by the ability of the uninjured passenger to make his or her way from a seat to an exit within time limits imposed by the thermotoxic environment. Seconds can mean the difference between life and death in the aftermath of a crash inasmuch as evacuation might be terminated abruptly by an explosion at any point.

The reason for this rulemaking is a concern for potential derogation of safety. Any effort to calculate monetary values for expected saved lives would be speculative, since there is no historical base from which to derive valid estimates. Nevertheless, the FAA estimates that the rules will account for a benefit of substantial numbers of lives saved as contrasted with potential loss of life in the absence of such regulations.

The prevention of only one life lost in an accident will alone more than pay for the cost of this rule. The data clearly indicate that the rule will be justified on

a benefit-to-cost basis. Each affected section in part 121 and part 135 of the FAR is identified and explained in the detailed section-by-section analysis contained in the full Regulatory Evaluation placed in the docket.

Regulatory Flexibility Determination

Since there will be only negligible cost associated with this rule for an operator, the FAA has determined that the rule will not have a significant economic impact, positive or negative, on a substantial number of small entities.

Trade Impact Statement

Since this rule will affect only part 121 and part 135 certificate holders (except operations of on-demand air taxis with nine or fewer passenger seats) regarding seating of passengers in exit rows, the FAA has determined that the regulation will not have an impact on international trade.

Paperwork Reduction Act Clearance

This rule imposes information collection requirements (i.e., procedures to be submitted to the FAA, revision of passenger information cards in exit rows, and dissemination of procedures at airports served by the air carriers). A Paperwork Reduction Act clearance request has been submitted to the Office of Management and Budget. The information collection requirement does not go into effect until OMB clearance and the assignment of an OMB control number. We will publish a **Federal Register** notice when the OMB control number is received.

Federalism Implications

These regulations will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 12612, it is determined that this regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed in the preamble and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this regulation is not major under Executive Order 12291 and certifies that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This rule is considered significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A regulatory evaluation, including a Regulatory Flexibility Determination and Trade Impact Analysis, has been placed in the regulatory docket. A copy may be obtained by contacting the person identified under "**FOR FURTHER INFORMATION CONTACT.**"

List of Subjects:

14 CFR Part 121

Air carriers, Air safety, Air transportation, Aircraft, Airplanes, Handicapped, Safety, Transportation.

14 CFR Part 135

Air safety, Air carriers, Air transportation, Aircraft, Airplanes, Aviation safety, Handicapped, Safety, Transportation.

The Rule

Accordingly, the FAA amends parts 121 and 135 of the Federal Aviation Regulations (14 CFR parts 121 and 135) as follows:

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. The authority citation for 14 CFR part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

2. New § 121.585 is added to read as follows:

§ 121.585 Exit row seating.

(a) Each certificate holder shall determine, to the extent necessary to perform the applicable functions of paragraph (d) of this section, the suitability of each person it permits to occupy a seat in a row of seats that provides the most direct access to an exit (including all of the seats in the row from the fuselage to the first aisle inboard of the exit or, in cases where there is no aisle, in the closest row or in any seat that has direct access to an exit, hereafter referred to as exit row seats), in accordance with this section. These determinations shall be made in a non-discriminatory manner consistent with the requirements of this section, by persons designated in the certificate holder's required operations manual.

(b) No certificate holder may seat a person in a seat affected by this section if the certificate holder determines that it is likely that the person would be unable to perform one or more of the applicable functions listed in paragraph (d) of this section because—

(1) The person lacks sufficient mobility, strength, or dexterity in both arms and hands, and both legs:

(i) To reach upward, sideways, and downward to the location of emergency exit and exit-slide operating mechanisms;

(ii) To grasp and push, pull, turn, or otherwise manipulate those mechanisms;

(iii) To push, shove, pull, or otherwise open emergency exits;

(iv) To lift out, hold, deposit on nearby seats, or maneuver over the seatbacks to the next row objects the size and weight of over-wing window exit doors;

(v) To remove obstructions similar in size and weight to over-wing exit doors;

(vi) To reach the emergency exit expeditiously;

(vii) To maintain balance while removing obstructions;

(viii) To exit expeditiously;

(ix) To stabilize an escape slide after deployment; or

(x) To assist others in getting off an escape slide;

(2) The person is less than 15 years of age or lacks the capacity to perform one or more of the applicable functions listed in paragraph (d) of this section without the assistance of an adult companion, parent, or other relative;

(3) The person lacks the ability to read and understand instructions related to emergency evacuation provided by the certificate holder in printed, handwritten, or graphic form or the ability to understand oral crew commands in the English language;

(4) The person lacks sufficient visual capacity to perform one or more of the applicable functions in paragraph (d) of this section without the assistance of visual aids beyond contact lenses or eyeglasses;

(5) The person lacks sufficient aural capacity to hear and understand instructions shouted by flight attendants, without assistance beyond a hearing aid;

(6) The person lacks the ability adequately to impart information orally to other passengers; or,

(7) The person has:

(i) A condition or responsibilities, such as caring for small children, that might prevent the person from performing one or more of the applicable functions listed in paragraph (d) of this section; or

(ii) A condition that might cause the person harm if he or she performs one or more of the applicable functions listed in paragraph (d) of this section.

(c) Each passenger shall comply with instructions given by a crewmember or other authorized employee of the certificate holder implementing exit row seating restrictions established in accordance with this section.

(d) Each certificate holder shall include on passenger information cards, presented in the languages used by the certificate holder for passenger information cards, at each seat affected by this section, information that, in the event of an emergency in which a crewmember is not available to assist, a passenger occupying an exit row seat may use if called upon to perform the following functions:

(1) Locate the emergency exit;

(2) Recognize the emergency exit opening mechanism;

(3) Comprehend the instructions for operating the emergency exit;

(4) Operate the emergency exit;

(5) Assess whether opening the emergency exit will increase the hazards to which passengers may be exposed;

(6) Follow oral directions and hand signals given by a crewmember;

(7) Stow or secure the emergency exit door so that it will not impede use of the exit;

(8) Assess the condition of an escape slide, activate the slide, and stabilize the slide after deployment to assist others in getting off the slide;

(9) Pass expeditiously through the emergency exit; and

(10) Assess, select, and follow a safe path away from the emergency exit.

(e) Each certificate holder shall include on passenger information cards, presented in the languages used by the certificate holder for passenger information cards, at all seats affected by this section, the selection criteria set forth in paragraph (b) of this section, and a request that a passenger identify himself or herself to allow reseating if he or she:

(1) Cannot meet the selection criteria set forth in paragraph (b) of this section;

(2) Has a nondiscernible condition that will prevent him or her from performing the applicable functions listed in paragraph (d) of this section;

(3) May suffer bodily harm as the result of performing one or more of those functions; or,

(4) Does not wish to perform those functions.

A certificate holder shall not require the passenger to disclose his or her reason for needing reseating.

(f) Each certificate holder shall make available for inspection by the public at all passenger loading gates and ticket counters at each airport where it conducts passenger operations, written, procedures established for making determinations in regard to exit row seating.

(g) No certificate holder shall allow all passenger entry doors to be closed in preparation for taxi or pushback unless at least one required crewmember has verified that no exit row seat is occupied by a person the crewmember determines is likely to be unable to perform the applicable functions listed in paragraph (d) of this section.

(h) Each certificate holder shall include in its passenger briefings a reference to the passenger information cards, required by paragraphs (d) and (e), the selection criteria set forth in paragraph (b), and the functions to be performed, set forth in paragraph (d) of this section.

(i) Each certificate holder shall include in its passenger briefings a request that a passenger identify himself or herself to allow reseating if he or she—

(1) Cannot meet the selection criteria set forth in paragraph (b) of this section;

(2) Has a nondiscernible condition that will prevent him or her from performing the applicable functions listed in paragraph (d) of this section;

(3) May suffer bodily harm as the result of performing one or more of those functions listed in paragraph (d) of this section; or,

(4) Does not wish to perform those functions listed in paragraph (d) of this section.

A certificate holder shall not require the passenger to disclose his or her reason for needing reseating.

(j) Each certificate holder shall honor expeditiously a passenger's request to be relocated to a non-exit row seat.

(k) In the event a certificate holder determines in accordance with this section that it is likely that a passenger assigned to an exit row seat would be unable to perform the functions listed in paragraph (d) of this section, or a passenger requests a non-exit row seat, the certificate holder shall relocate the passenger to a non-exit row seat.

(l) In the event of full booking in the non-exit row seats, the certificate holder shall move a passenger, if necessary to accommodate a passenger being relocated from an exit row seat, who is willing and able to assume the evacuation functions that may be required, to an exit row seat.

(m) A certificate holder may deny transportation to any passenger under this section only because—

(1) the passenger refuses to comply with instructions given by a crewmember or other authorized employee of the certificate holder, implementing exit row seating restrictions established in accordance with this section, or

(2) the only seat that will physically accommodate the person's handicap is an exit row seat.

(n) In order to comply with this section certificate holders shall—

(1) Establish procedures that address:

(i) The criteria listed in paragraph (b) of this section;

(ii) The functions listed in paragraph (d) of this section;

(iii) The requirements for airport information, passenger information cards, crewmember verification of appropriate seating in exit rows, passenger briefings, seat assignments, and denial of transportation as set forth in this section;

(iv) How to resolve disputes arising from implementation of this section, including identification of the certificate holder employee on the airport to whom complaints should be addressed for resolution; and,

(2) Submit their procedures for preliminary review and approval to the principal operations inspectors assigned to them at the FAA Flight Standards District Offices that are charged with the overall inspection of their operations.

(o) Certificate holders shall assign seats prior to boarding consistent with the criteria listed in paragraph (b) and the functions listed in paragraph (d) of this section, to the maximum extent feasible.

(p) The procedures required by paragraph (n) of this section will not become effective until final approval is granted by the Director, Flight Standards Service, Washington, DC. Approval will be based solely upon the safety aspects of the certificate holder's procedures.

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

3. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983)

4. New § 135.129 is added to read as follows:

§ 135.129 Exit row seating.

(a) Except for on-demand air taxis with nine or fewer passenger seats, each certificate holder shall determine, to the extent necessary to perform the applicable functions of paragraph (d) of this section, the suitability of each person it permits to occupy a seat in a row of seats that provides the most direct access to an exit (including all of

the seats in the row from the fuselage to the first aisle inboard of the exit or, in cases where there is no aisle, in the closest row or in any seat that has direct access to an exit, hereafter referred to as exit row seats), in accordance with this section. These determinations shall be made in a non-discriminatory manner consistent with the requirements of this section, by the pilot in command, in those cases described in § 135.21(a), when an operations manual is not required, or by persons designated in the certificate holder's manual if it is required by that section.

(b) No certificate holder may seat a person in a seat affected by this section if the certificate holder determines that it is likely that the person would be unable to perform one or more of the applicable functions listed in paragraph (d) of this section because—

(1) The person lacks sufficient mobility, strength, or dexterity in both arms and hands, and both legs:

(i) To reach upward, sideways, and downward to the location of emergency exit and exit-slide operating mechanisms;

(ii) To grasp and push, pull, turn, or otherwise manipulate those mechanisms;

(iii) To push, shove, pull, or otherwise open emergency exits;

(iv) To lift out, hold, deposit on nearby seats, or maneuver over the seatbacks to the next row objects the size and weight of over-wing window exit doors;

(v) To remove obstructions of size and weight similar over-wing exit doors;

(vi) To reach the emergency exit expeditiously;

(vii) To maintain balance while removing obstructions;

(viii) To exit expeditiously;

(ix) To stabilize an escape slide after deployment; or

(x) To assist others in getting off an escape slide;

(2) The person is less than 15 years of age or lacks the capacity to perform one or more of the applicable functions listed in paragraph (d) of this section without the assistance of an adult companion, parent, or other relative;

(3) The person lacks the ability to read and understand instructions related to emergency evacuation provided by the certificate holder in printed, handwritten, or graphic form or the ability to understand oral crew commands in the English language.

(4) The person lacks sufficient visual capacity to perform one or more of the applicable functions in paragraph (d) of this section without the assistance of visual aids beyond contact lenses or eyeglasses;

(5) The person lacks sufficient aural capacity to hear and understand instructions shouted by flight attendants, without assistance beyond a hearing aid;

(6) The person lacks the ability adequately to impart information orally to other passengers; or,

(7) The person has:

(i) A condition or responsibilities, such as caring for small children, that might prevent the person from performing one or more of the applicable functions listed in paragraph (d) of this section; or

(ii) A condition that might cause the person harm if he or she performs one or more of the applicable functions listed in paragraph (d) of this section.

(c) Each passenger shall comply with instructions given by a crewmember or other authorized employee of the certificate holder, implementing exit row seating restrictions established in accordance with this section.

(d) Each certificate holder shall include on passenger information cards, presented in the languages used by the certificate holder for passenger information cards, at each seat affected by this section, information that, in the event of an emergency in which a crewmember is not available to assist, a passenger occupying an exit row seat may be called upon to perform the following functions:

(1) Locate the emergency exit;

(2) Recognize the emergency exit opening mechanism;

(3) Comprehend the instructions for operating the emergency exit;

(4) Operate the emergency exit;

(5) Assess whether opening the emergency exit will increase the hazards to which passengers may be exposed;

(6) Follow oral directions and hand signals given by a crewmember;

(7) Stow or secure the emergency exit door so that it will not impede use of the exit;

(8) Assess the condition of an escape slide, activate the slide, and stabilize the slide after deployment to assist others in getting off the slide;

(9) Pass expeditiously through the emergency exit; and

(10) Assess, select, and follow a safe path away from the emergency exit.

(e) Each certificate holder shall include on passenger information cards, presented in the languages used by the certificate holder for passenger information cards, at all seats affected by this section, the selection criteria set forth in paragraph (b) of this section, and a request that a passenger identify himself or herself to allow reseating if her or she:

(1) Cannot meet the selection criteria set forth in paragraph (b) of this section;

(2) Has a nondiscernible condition that will prevent him or her from performing the applicable functions listed in paragraph (d) of this section;

(3) May suffer bodily harm as the result of performing one or more of those functions; or,

(4) Does not wish to perform those functions.

A certificate holder shall not require the passenger to disclose his or her reason for needing reseating.

(f) Each certificate holder shall make available for inspection by the public at all passenger loading gates and ticket counters at each airport where it conducts passenger operations, written procedures established for making determinations in regard to exit row seating.

(g) No certificate holder shall allow all passenger entry doors to be closed in preparation for taxi or pushback unless at least one required crewmember has verified that no exit row seat is occupied by a person the crewmember determines is likely to be unable to perform the applicable functions listed in paragraph (d) of this section.

(h) Each certificate holder shall include in its passenger briefings a reference to the passenger information cards, required by paragraphs (d) and (e), the selection criteria set forth in paragraph (b), and the functions to be performed, set forth in paragraph (d) of this section.

(i) Each certificate holder shall include in its passenger briefings a request that a passenger identify himself or herself to allow reseating if he or she—

(1) Cannot meet the selection criteria set forth in paragraph (b) of this section;

(2) Has a nondiscernible condition that will prevent him or her from performing the applicable functions listed in paragraph (d) of this section;

(3) May suffer bodily harm as the result of performing one or more of those functions; or,

(4) Does not wish to perform those functions.

A certificate holder shall not require the passenger to disclose his or her reason for needing reseating.

(j) Each certificate holder shall honor expeditiously a passenger's request to be relocated to a non-exit row seat.

(k) In the event a certificate holder determines in accordance with this section that it is likely that a passenger assigned to an exit row seat would be unable to perform the functions listed in paragraph (d) of this section, or a passenger requests a non-exit row seat,

the certificate holder shall relocate the passenger to a non-exit row seat.

(l) In the event of full booking in the non-exit row seats, the certificate holder shall move a passenger, if necessary to accommodate a passenger being relocated from an exit row seat, who is willing and able to assume the evacuation functions that may be required, to an exit row seat.

(m) A certificate holder may deny transportation to any passenger under this section only because—

(1) The passenger refuses to comply with instructions given by a crewmember or other authorized employee of the certificate holder, implementing exit row seating restrictions established in accordance with this section, or

(2) The only seat that will physically accommodate the person's handicap is an exit row seat.

(n) In order to comply with this section certificate holders shall—

(1) Establish procedures that address:

(i) The criteria listed in paragraph (b) of this section;

(ii) The functions listed in paragraph (d) of this section;

(iii) The requirements for airport information, passenger information cards, crewmember verification of appropriate seating in exit rows, passenger briefings, seat assignments, and denial of transportation as set forth in this section;

(iv) How to resolve disputes arising from implementation of this section, including identification of the certificate holder employee on the airport to whom complaints should be addressed for resolution; and,

(2) Submit their procedures for preliminary review and approval to the principal operations inspectors assigned to them at the FAA Flight Standards District Offices that are charged with the overall inspection of their operations.

(o) Certificate holders shall assign seats prior to boarding consistent with the criteria listed in paragraph (b) and the functions listed in paragraph (d) of this section, to the maximum extent feasible.

(p) The procedures required by paragraph (n) of this section will not become effective until final approval is granted by the Director, Flight Standards Service, Washington, DC. Approval will be based solely upon the safety aspects of the certificate holder's procedures.

Issued in Washington, DC, on February 28, 1990.

James B. Busey,

Administrator.

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