

Accessible Transportation for Persons with Disabilities Regulations

Phase II Consultations





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Preliminary Comment: Overarching Concerns Related to Timing of Consultation and Implementation Burden, Costs, Competitiveness and Safety.

Timing of Consultation and Implementation Burden

Air Canada appreciates the opportunity to comment on these significant matters at this early stage, prior to regulation. However, Air Canada is concerned that embarking on consultations for Phase II while Phase I implementation is pending and the *Air Passenger Protection Regulations (APPR)* implementation is new and adjustments are still needed, places an unreasonable and unfair burden on carriers. The very employees with the expertise needed to analyze the impact of Phase II are the same as those engaged on advising on implementation of Phase I, which is consuming much of their focus, in addition to their usual responsibilities and to their crucial contribution to the ongoing implementation of APPR obligations. It is unreasonable to expect an in-depth analysis of Phase II at the time attention is turned to a timely implementation of Phase I and ongoing implementation challenges for APPR. As laudable as the objectives are, the reality of the effect of an unprecedented regulatory burden being imposed on an industry facing other severe and unprecedented challenges (e.g. Boeing 737-MAX grounding, COVID-19) cannot be overlooked.

Air Canada along with other carriers subject to ATPDR and APPR have already expressed their apprehension about the aggressive implementation timeline, and the lack of timely guidance materials provided by the Agency. All parties involved (the regulated, the regulator and the public) would be much better served by adopting a more reasonable pace accounting for the unprecedented major regulatory reforms impacting the industry. At this time, as should be evident to the Agency, carriers should be given the opportunity to prioritize and devote more attention to implementation efforts of APPR, rather than diverting already-strained resources to address further obligations. Furthermore, conducting consultations at this early time means that the parties cannot learn from any drafting, implementation and interpretation lessons from Phase I.

There is already one important lesson that can be learned from APPR implementation, and that is visible through the current inquiry into the communication of delays, around the dangers rushed implementation and insufficient reflection around the impact of requirements, which have left the public with the impression that the reason for a delay at departure matches the root cause of the delay that drives compensation.

On this basis, Air Canada urges the Agency to postpone any further action on Phase II until Phase I has been fully implemented and a holistic review has been completed of its successes and failures. Compounding potential failure on failure and complexity on top of complexity is anything but a recipe for operational improvement.



Costs and Competitiveness

Separate from these very real and significant timing and resource concerns, Air Canada highlights that accessibility measures in aviation need to be designed in a manner that respects the overall objectives of the National Transportation Policy found in Section 5 of the *Canada Transportation Act*¹, which means not only ensuring an accessible transportation system but also enabling competitiveness, economic growth and not unduly reducing the inherent advantages of the air mode of transportation.

Accordingly, accessibility requirements in aviation should be reasonable, measured and balanced and should not unduly increase the airlines' operating costs to the point where airlines will be required to diminish offerings, reduce network coverage or increase fares, contrary to a stated objective of the government, to cover additional costs that are being imposed at a rapid rate, but which will inevitably happen with this proposed regulation, to the detriment of passengers and Canada's aviation route infrastructure. This is all but assured given that it is happening at a time when carriers and their customers are facing increased cost from other federal government regulation on APPR, carbon pricing, flight duty times etc.

Moreover, requirements which are unique or unprecedented in the world will have the inevitable result of impairing Canadian airlines' ability to compete on a global basis. Such regulatory obligations would have an impact international operations and connectivity which will reverberate beyond the airline sector. The aviation industry is a significant generator of economic activity; any undue regulatory obligations stand to affect not only the global competitiveness of the airline industry but of Canadian business as a whole.

Safety

Finally, it goes without saying that any requirements to improve accessibility must never compromise safety and should account for the unique and highly regulated environment of the aircraft cabin. This key principle has been recognized by Transport Canada in the context of APPR and other cases. Measures adopted and now common in ground transportation, or in everyday life, cannot be readily imported and implemented on aircraft. The simplistic adoption of such measures into highly constrained and fine-tuned spaces could, in this context, threaten the stringent safety requirements on which air transportation depends. (A prime example is the concept of Emotional Support Animals (ESAs), which may be reasonable for public spaces such as schools or offices but are entirely unreasonable and unsafe for the confined space of an aircraft.)

Summary Conclusion

It is on these grounds, as will be further elaborated below, that Air Canada opposes the Agency's proposals of expanding One Person One Fare (1P1F) to international flights to and from Canada and requiring carriers to transport Emotional Support Animals on flights to, from and within Canada.

It is also on these grounds that Air Canada urges the Agency to ensure that any regulations regarding the format of accessibility plans, feedback processes and progress reports are cost-effective and not overly burdensome.

¹ It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

- (a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;
- (b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;
- (c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;
- (d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and
- (e) governments and the private sector work together for an integrated transportation system.



I. While a Noble Notion, 1P1F International Is Misguided and Harmful to Canadian Passengers and the Canadian Aviation Industry Alike

A. THE AGENCY BROADENED THE CONCEPT OF ONE PERSON ONE FARE (1P1F)

The Agency's initial 1P1F Decision ordered Air Canada, Air Canada Jazz and WestJet to adopt a One-Person-One-Fare Policy for persons with severe disabilities on flights within Canada. The Decision meant that, for pure domestic services, these carriers could not charge more than one fare for persons with disabilities who:

- Must be accompanied by an attendant for their personal care or safety in flight as they are not self-reliant, as required by the carriers' domestic tariffs²; or
- Require additional seating for themselves, including those determined to be functionally disabled by obesity.

Air Canada has complied with this decision, notwithstanding its objection to the requirement to give away its product for free.

However, Phase I of ATPDR does not mention the concept of self-reliance or a carrier's assessment that a passenger is unable to travel independently. Instead, it lists situations in which a carrier must accept a support person for travel according to the assistance needed. There is no clarity specifically allowing for exclusion in the event that the carrier already provides assistance with these needs, such as orientation or communication or assistance in the event of an emergency, or the carrier disagrees with the passenger's assessment that an additional seat is needed.

In doing this, the Agency has arguably broadened the scope of those who would be entitled to travel with an attendant. The Agency has advised that this will be clarified through guidance materials, but this is wholly inadequate: such an important detail must be included in the regulations as opposed to non-binding guidance materials.

² Agency Decision No. 6-AT-A-2008, paragraph 117, <https://www.otc-cta.gc.ca/eng/ruling/6-at-a-2008>.



B. 1P1F INTERNATIONAL VIOLATES CANADA'S INTERNATIONAL OBLIGATIONS

1P1F International infringes Canada's Blue Sky Policy, where a key principal is to allow market forces to determine the commercial offer of airlines.³ The liberalization resulting from the Blue Sky Policy has allowed for new or expanded air services to flourish between Canada and 107 countries,⁴ a development which is put at risk by policies such as 1P1F International.

Most of Canada's Air Transport Agreements (ATAs) negotiated under Canada's Blue Sky Policy remove unnecessary regulation by aeronautical authorities, allowing market forces to prevail. Indeed, Canada's largest and most significant ATAs (with the United States and with the European Union) both specify that prices shall be freely established by free and fair competition or market forces.⁵

1P1F runs directly counter to these agreements by forcing carriers to provide as many additional seats as the passenger needs to travel for the price of \$0. In the best-case scenario, where the passenger only requires one additional seat, this is directly equivalent to setting the price limit for the passenger's ticket at 50% of what the market determines. In other cases, where the passenger requires two additional seats to travel, the price limit is 33%. This is, in effect, a price limitation.

Canada's international obligations and air policy set out important objectives and principles to promote free and fair competition. These are fundamental principles that allow prices to be set by market forces and not by public policy and were developed to react to lessons learned in the pre-deregulation era when public policy did dictate the price of air services. Indeed, intervention by regulators in airline pricing resulted in limiting options for consumers, options now available through liberalization that are driving real and robust competition between airlines.

The Government of Canada has argued against bilateral partners infringing on this ATA language, relying on the treaty commitment by partners that market forces are how pricing should be determined.

Adopting 1P1F International would have significant consequences for Canada's international aviation policy and adversely impact bilateral negotiations.

While there is a general perception that regulation is beneficial to airline passengers and that policy regulation is not price regulation, experience shows otherwise. The prime example of this is the *Airline Deregulation Act* (the "Act") of 1978 in the United States (the "Act"). Prior to that, the Civil Aeronautics Board (CAB) determined which routes each airline could fly and effectively limited competitive pressures through means such as subsidies.

The Act freed the aviation industry from governmental control, allowing airlines to drop unprofitable routes and opening the door to new competitors which emerged to take advantage of new markets. This increased competition and freedom has led to lower fares and higher airline productivity.

Pricing freedom is thus an essential part of ensuring a viable and effective aviation market and is entirely consistent with the principles established by Section 5 of the *Canada Transportation Act*, notably that "competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and

3 Market forces should determine the price, quality, frequency and range of air services options., <https://www.tc.gc.ca/media/documents/policy/bluesky.pdf>.

4 <https://www.tc.gc.ca/eng/policy/air-bluesky-menu-2989.htm#types>.

5 European Union: "The Parties shall permit prices to be freely established by the airlines on the basis of free and fair competition. Neither Party shall take unilateral action against the introduction or continuation of a price for international transportation to or from its territory." https://ec.europa.eu/transport/sites/transport/files/modes/air/international_aviation/country_index/doc/canada_final_text_agreement.pdf.

The United States: "The Parties acknowledge that market forces shall be the primary consideration in the establishment of prices for air transportation. Intervention by the aeronautical authorities shall be limited to factors such as prevention of unreasonably discriminatory prices or practices, protection of consumers from prices that are unreasonably high or restrictive because of the abuse of a dominant position, protection of airlines from prices to the extent that they are artificially low because of direct or indirect governmental subsidy support; and protection of airlines from prices that are artificially low, where evidence exists as to an intent of eliminating competition." <https://treaty-accord.gc.ca/text-texte.aspx?id=105086>.



effective transportation services” and that “regulation and strategic public intervention [should only be] used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation”.⁶

In the event that the Agency chooses to proceed with 1P1F International which would infringe upon these international and legislative principles, Air Canada believes that the new regulations would be found to be illegal.

C. CONNECTIVITY FOR ALL CANADIANS WILL BE REDUCED, PARTICULARLY FOR TRANSBORDER AND INTERNATIONAL MARKETS, EVEN IF THE REGULATION IS APPLIED TO ALL CARRIERS

Air Canada is a Network carrier that is highly dependent on traffic flows. A key element of Air Canada’s international growth and its success over the last number of years has been the growth from its 6th freedom, or transit traffic (from a point outside Canada, to a destination outside Canada, but connecting in Canada⁷).

1P1F would increase the cost to operate 6th freedom itineraries, making some routes unsustainable. Air Canada operates numerous transborder and international routes that have very low or even negative margins that would be at risk should the profitability further decline. Air Canada does so to support its connecting traffic, which make up an important source of revenue for the company.

It is important to note that even if the regulation were to apply equally to all carriers, it is Canadian carriers that will be hardest hit, increasing costs on us disproportionately as our foreign competitors would be subject to the requirement only for a small sliver of their routes, only those touching Canada (and not those international routes not to or from Canada). This means a cost disadvantage to Canadian carriers flying internationally, impacting their competitiveness. To illustrate concretely, Air Canada competes with Delta for traffic between Detroit and Tokyo (as we sell Detroit-Toronto-Tokyo). For the very same origin and destination, Air Canada will be at a competitive disadvantage as US carriers will not be subject to this requirement on their routing while Canadian carriers would be.

A number of international routes are feasible *only because* of the feed Air Canada’s 6th freedom traffic provides. If these “feeder” routes suffer a drop in passengers because of the competitiveness with carriers who are not affected by the regulation, the very sustainability of the international route to/from Canada may be put in jeopardy, making Canadian airlines less able to develop and maintain an efficient international route infrastructure to the detriment of not only Canadian travelers but also of the Canadian economy as a whole and Canada’s international competitiveness. In addition, the ripple effect of route cancellations should also be considered. (Once a route is cancelled, it will not feed traffic to other routes which will also become more susceptible to cancellations.)

The entire economy of a network carrier like Air Canada is founded on greater and more efficient air connectivity. Industries become more productive and it becomes more efficient to conduct business and attract investment, among many other benefits. A study by Intervistas assessed the total benefit of Air Canada’s connectivity to the Canadian economy. In 2017 alone, AC’s total economic impact from operations and connectivity- induced catalytic effects contributed over \$21 billion to GDP and supported the employment of close to 190,000 people across different sectors. Reduced connectivity jeopardizes these significant economic contributions.

⁶ *Supra*, note 1.

⁷ E.g. Europe to US, connecting in Canada. Because most routes from the US to Europe or the Pacific go through or next to the North Pole, Canada is “on the way”, so connections in Canada make sense.



Air Canada urges the Agency to assess the economic impacts of lost overall connectivity on the airline industry's contribution to GDP and total jobs supported, using, for example, Statistics Canada's Input-Output model.

Expanding 1P1F to international itineraries could jeopardise this key element of Air Canada's success, that has benefitted its passengers and the Canadian economy.

D. HIGH COST IMPACT WILL DISPROPORTIONATELY AFFECT CANADIAN INTERNATIONAL NETWORK CARRIERS

The Agency appears to be considering whether to impose the 1P1F international requirement on either Canadian carriers alone, or all carriers flying to and from Canada.

Imposing this requirement on only Canadian carriers will clearly put them at a significant competitive disadvantage, as passengers eligible for free seats will secure free seats on Canadian carriers rather than fly with their international competitors. This will magnify the impact and put Canadian carriers at a distinct disadvantage by reducing their seat inventory available for sales, for a reason that is not market-based, increasing their cost base compared to foreign competition. As such, all extra free seats given to passengers will result in displacement of revenue passengers which will cause net revenue loss for Air Canada.

The reality is that a free seat provided to a passenger with a disability could cause the displacement of revenue passengers from Air Canada to its competitors for many reasons, including: (1) The extra seat provided to the passenger may have been the last seat available for sale; (2) All subsequent fares on that flight will now be more expensive, which could incentivize an AC revenue passenger to fly to Paris with Delta airlines because of a lower cost; or (3) The revenue passenger could be tempted to drive across the border to fly with any airlines from the US.

Conceptually, the consequence of 1P1F seats driving up the price of all seats for a Canadian carrier, would cause other passengers to opt for seats on competitor airlines who don't have 1P1F seats driving up their prices and can offer cheaper fares. Those close to the border might opt to fly from cross-border airports, which is a trend that has been observed over the years.⁸ Air Canada cannot simply increase fares to account for losses. Even a small increase in price would make Air Canada uncompetitive on the market, driving passengers to foreign competitors.

The cost of such a rule will therefore significantly and disproportionately be borne by Canadian carriers, making them less internationally competitive and less able to effectively serve Canadians.

Furthermore, in addition to lost revenues, carriers will also face costs related to implementation and administration of 1P1F international. Phase I of the ATPDR assumed that the processing of requests would take an employee half an hour to "assess the accommodation needs, to verify the medical documents and information necessary for the provision of an additional seat and book an additional seat".

⁸ According to a study by the Conference Board of Canada (<https://www.conferenceboard.ca/topics/energy-enviro/drivenaway.aspx?AspxAutoDetectCookieSupport=1>), high taxes and fees imposed by governments already contribute to driving an estimated 5 million Canadians across the border to fly from US airports on US airlines every year. The report suggests that US airlines have a 30% cost advantage due to lower tariffs, fees, etc. over Canadian carriers. While it is true that the exchange rate plays a role, the trend is nonetheless concerning, and will be exacerbated with the impact of adding an additional regulatory burden like 1P1F on Canadian carriers, and its associated revenue and displacement costs and impact in driving up fare prices even further in Canada.



E. CARRIER-SUBSIDIZED SERVICES ARE NOT A SUBSTITUTE FOR A SUSTAINABLE, PUBLIC, SOCIETAL APPROACH TO MAKING SERVICES MORE ACCESSIBLE

The Agency has asked carriers to propose alternatives to 1P1F International.

The solution is clear: this is a social policy that should be funded by the Canadian Government for Canadian citizens.

An Industry of Narrow Profit Margins and Bankruptcies

Air Canada fully supports the Agency's goal of increasing accessibility of air travel to Canadians, however it is convinced that the costs must be borne by the Government of Canada, as is the case with other policies aimed at increasing overall social welfare. It is unreasonable to require publicly traded companies, with a duty to their shareholders, to incur significant costs in order to accomplish this goal.

Furthermore, while the Canadian aviation industry has performed well in recent years, it is universally recognized that airlines operate in a particularly uncertain and burdensome market environment. In addition to external factors including the global grounding of the Boeing 737-MAX, the outbreak of the COVID-19 virus and an uncompetitive cost structure in Canada, the Government of Canada has subjected airlines to an unprecedented period of regulatory reform which is exacerbating competitiveness issues. The global air industry is highly competitive, and bankruptcies are common⁹. While Air Canada has worked hard to fulfill our obligations to shareholders and succeed in a fiercely competitive industry, the Agency must not negate our efforts by imposing costly, unsustainable, regulations that will hurt the Canadian aviation industry.

In the 11 years that 1P1F has been in place, this principle has not been adopted anywhere else in the aviation industry around the world or, to our knowledge, imposed in any other industry.¹⁰

Government Funds – Tax Credits or Free Flight Allotment.

If the Agency wishes to ensure free seats for travel internationally as a social policy, it should convince the Government of Canada to invest in a public policy that funds the objective from public resources, for Canadian travellers only and in partnership with the industry. For example, like many social-oriented policies, the Government of Canada could put in place refundable tax credits for extra seats required by attendants or for disability accommodation, that will be paid directly to the person paying for the additional seat. In a similar vein, the Government of Canada could fund a certain number of trips per year for Canadians who require additional seating to accommodate their disability.

This solution would allow the Government of Canada to meet its objective of increasing accessibility for Canadians, without negatively impacting the aviation transport for all Canadians. It would also have the benefit of limiting the application to Canadians travellers rather than subsidise foreign passengers at the expense of all Canadians.

This proposed solution is also consistent with the approach taken by the Government of Canada for all other accessibility-related needs of Canadians, such as housing adaptations, medical equipment, or adapted transportation: the Government of Canada recognizes that these services and accommodations are a matter of social policy and funds them through a combination of subsidies and tax credits.¹¹

⁹ Recent examples of airlines going bankrupt include Air Berlin, Thomas Cook, Monarch Airlines, Wow Air, among others.

¹⁰ Air Canada has performed significant research on this topic and has been unable to find any similar principle in any other industry in Canada.

¹¹ <https://www.canada.ca/en/employment-social-development/programs/disability/arc.html>; <https://disabilitycreditcanada.com/accessible-home-barrier-free/>; <https://disabilitycreditcanada.com/disability-tax-credit-ultimate-resource-guide/>; <https://sidewinderconversions.com/funding-options/government-funding/>; <https://www.wheel-chairvans.ca/funding/>; <https://silvercross.com/getting-funding-for-accessibility-equipment-in-canada/>; <https://www.sac-isc.gc.ca/eng/1579620079031/1579620259238>; <https://www.accessabilities.ca/advice/what-if-i-need-healthcare-equipment-funding/>; <https://www.malleyindustries.com/funding>.



There is no justifiable reason to treat transportation any differently from housing, medical equipment and local transportation. On this basis, this solution should be extended to both 1P1F international and domestic.

There may be other approaches that mitigate the adverse impact on Canadian air transport, but they still face the real issues of illegality and the adverse impact on Canada's bilateral air transport relations.

The Agency's present proposal, which is akin to carriers having their inventory expropriated, is not sound: no other industry in Canada or indeed the world has such a requirement.

Wanting passengers with disabilities to have access to transportation is laudable; if it is to be accomplished through the provision of free seats for air travel, the Government of Canada should recognize this as a social decision which requires governmental financial support.

F. A MINIMUM 1P1F FEE WOULD DISINCENTIVIZE MISUSE

Air Canada foresees a significant risk of misuse of free seats as part of ATPDR (both 1P1F and Emotional Support Animals (ESA), which will be further elaborated below). Our assessment is based on the U.S. experience with ESAs. According to Airlines for America, "The availability of fraudulent ESA credentials online has enabled people who are not truly in need of animal assistance to abuse the rules and evade airline policies regarding animals in the cabin" (Airlines for America).

Under the proposed policy, with the value of the benefit to be derived, a similar but higher abuse of the 1P1F policy through fraudulent medical certificates and other documentation is highly likely. The situation is further exacerbated by extension of the policy to foreign nationals, as it becomes significantly more challenging to validate the legitimacy of documents and credentials, making the policy ripe for abuse. As such, appropriate risk mitigation measures must be explicitly built into the policy to ensure airlines are protected.

The risk of fraudulent claims is well-known to industries such as the insurance industry. Indeed, it is for that reason that policies typically include a deductible: the imposition of even small costs have proven to disincentivize misuse.

G. 1P1F MUST BE LIMITED TO ADJACENT SEATING

While Air Canada cannot support a requirement to provide additional seating for free on international, for the reasons stated above, a reasonable alternative would be a requirement to provide adjacent seating at no cost to passengers traveling with an attendant, or requiring an additional seat due to obesity or for a large service animal.

This provides customers with certainty that their required seating will be adjacent at no additional cost without unduly disadvantaging the Canadian aviation industry.

Indeed, in the absence of free seats, most passengers traveling internationally who require an extra seat due to obesity or for a large service animal choose not to purchase an extra seat, in which case Air Canada takes all reasonable measures to seat the passenger next to an empty seat on board if needed. If the flight is full and the passenger does not fit in the seat purchased, Air Canada moves the passenger to the next flight with sufficient space available. With this as practice, the absence of regulation on 1P1F does not cause any actual harm to passengers requiring an extra seat due to obesity or for a large service animal, given that most of these passengers are accommodated on board.



H. 1P1F MUST ONLY BE IMPLEMENTED THROUGH INTERNATIONAL ORGANIZATIONS

As explained above, the majority of Air Canada's cost impact comes from 6th freedom traffic and displacement of revenue passengers, which is mitigated if 1P1F international is applied across the entire industry, and not just carriers flying to or from Canada.

For all the reasons elaborated upon above, and because of the integrated international nature of the industry, such a rule can only be feasibly developed and applied as an international standard imposed across the industry.



II. Emotional Support Animals and Service Animals Other than Dogs Do Not Belong on Aircraft

Air Canada is firmly opposed to any requirement to carry ESAs onboard.

A. THE US ESA RULE HAS CAUSED NO END OF OPERATIONAL AND COMPLIANCE ISSUES

It is clear from the ongoing debate and controversy in the United States that the very existence of the DOT's rule is in question, as it has caused no end of unanticipated operational and compliance issues, such as increased incidents of animal misbehaviour on board, increased stigma and negative perception of all service animals traveling on aircraft, and rampant fraud.

Air Canada's experience establishes that many passengers try to pass off their pets as service animals or emotional service animals, producing fraudulent medical certificates. (The DOT recognizes having received similar comments consistently across the industry.)

Air Canada accepts ESAs on transborder itineraries (per US law) as well as domestic itineraries (to accommodate the high number of transborder passengers connecting onto domestic flights and who are traveling with ESAs on the transborder portion of their itinerary.

However, Air Canada has been exploring options to curb the number of fraudulent requests and safety-related concerns, including prohibiting ESAs on domestic itineraries.

Air Canada has itself experienced a number of instances of ESAs harming flight attendants and other passengers, urinating and defecating onboard (including on seats), and exhibiting other forms of misbehavior on board. Air Canada has also faced a number of instances of passengers refusing to follow Cabin crew instructions to control their animals and keep them on the floor off the seat or out of the aisle, creating significant safety concerns; unrestrained animals on a seat could injure others in the case of sudden turbulence, and unrestrained animals in the aisle could impede the evacuation of other passengers in the event of an emergency.

Similarly, when pet-owners who have followed the correct procedures see animals that are clearly untrained and are not recognizable service animals out of their carriers, these pet-owners often also remove their animals from their carriers, amplifying the potential safety risks. This has become a significant issue for Cabin Crew.

The operational and service impact of a requirement to transport ESAs on the mass of travelers will not be insignificant.

B. THE US DOT HAS PROPOSED REMOVING ESAS FROM AIRCRAFT

It is as a result of its in-depth study of the 4,500 submissions received following its Advance Notice of Proposed Rulemaking published on May 2018 and to these significant, wide-spread and concerning safety, health and fraud concerns that it has identified through its analysis, that the US DOT has issued its Notice of Proposed Rulemaking (NPRM) in which it proposes to remove the requirement to carry ESAs in the aircraft completely.¹²

¹² <https://www.transportation.gov/sites/dot.gov/files/2020-02/Service%20Animals%20-%20NPRM.pdf>.



Airlines For America (A4A), the Association of Flight Attendants, NACC, Air Canada, and advocacy groups, such as veterans advocacy groups and service animal advocacy groups were united in their opposition to ESAs on board as they pose safety risks to other passengers, flight attendants, and legitimate service dogs.

Air Canada applauds this recognition by US regulators that its well intentioned attempt to include ESAs onboard has unequivocally failed and urges the Agency to heed the lesson and warning of the US DOT. It would be an unfortunate (and potentially embarrassing) misstep to fail to learn the lesson and misguided at best to adopt such a requirement just as the US is undoing its own mistake.

C. THE AGENCY'S RULE ON FREE SEATS FOR SERVICE ANIMALS CANNOT BE EXPANDED TO ESAS WITHOUT A SIGNIFICANT COST IMPACT

Even in the US where this controversial rule originated, there is no requirement to provide extra space. In fact, US DOT clearly recognizes that no free seats should be offered to accommodate ESAs and that these animals should fit in the footprint of the passenger. With this guidance, DOT addresses a real concern, as many animals simply do not fit in the individual floorspace available on an aircraft. The NPRM also specifically states that if a service animal does not fit in the individual floorspace and the flight is full, the passenger with the service animal is moved to the next available flight.¹³ There is a clear, unequivocal understanding that while the animal is accepted for travel, there is no guarantee of extra space unless it is purchased.¹⁴

A combination of the Agency's rule on free floorspace for service animals and a new ESA rule would not only deprive carriers of a legitimate source of revenue for the carriage of pets (as experience with high levels of fraud in this area has demonstrated that most ESA are, in fact, merely pets), but would also cause carriers to incur significant costs as a result of providing free extra floor space, losing inventory for sale to passengers, again burdening it with costs not (proportionately) affecting its global competitors. Air Canada already provides free floorspace for service animals on domestic itineraries, pursuant to the Agency's ruling. The concerns expressed above for 1P1F apply equally here, and the compounded impact of both rules would significantly and exponentially exacerbate cost-related concerns. As explained above in relation to 1P1F, Air Canada would be more impacted by the combination of the ESA rule and the free floorspace rule than any other international network carrier as a result of the impact 6th freedom traffic represents.

D. OTHER PASSENGERS COMPLAIN ABOUT ANIMALS BEING ONBOARD, SOME FACING ALLERGY ISSUES, OTHERS, FEAR AND DISCOMFORT

ESAs are not trained as service animals to behave in public spaces and have regularly shown that they do not behave onboard an aircraft in a way that does not interfere with other passengers. Many customers have expressed being uncomfortable and frightened of badly-behaved dogs traveling unrestrained in the aircraft.¹⁵ Incidents show that such a measure detracts from the comfort and convenience of improved service that the Agency is seeking through other measures it is imposing on carriers.

¹³ *Ibid.*

¹⁴ This is in clear contrast to the Agency's reasoning in Decision No. LET-AT-AC-A-39-2019.

¹⁵ For instance, in a recent example, one ESA bit a flight attendant, bit another passenger, and snapped at a flight attendant's heels. In another recent example, one ESA wandered the aisle, scaring and shocking other passengers. The ESA was clearly stressed, as it was shaking and panting. It also defecated in the cabin, leading to complaints about smell from other passengers.



Service dog users themselves are expressing ongoing concerns that the rampant fraud and misbehavior of ESAs on board is eroding their right to use legitimate service animals and, indeed, threatening the safety of their service animals.

E. LAP-HELD ESAs ARE A SAFETY RISK

ESAs that are lap-held also run the risk of becoming projectiles in the event of turbulence or a bumpy or difficult landing. This is an unacceptable risk to all other passengers onboard, and to Cabin Crew.

F. IF ESAs ARE REQUIRED, THEY MUST BE DOGS ONLY, LIMITED TO ONE PER PASSENGER AND TRANSPORTED IN PET CARRIERS

In the event that the Agency decides despite the US experience and these serious concerns to require carriers to carry ESAs, Air Canada submits that the only acceptable solution to the well-documented issues of misbehaviour and fraud is to limit the acceptance to one dog that can be safely and comfortably transported in pet carriers at the passenger's feet.

This solves the two primary problems with ESAs:

- 1) The real safety risk to flight attendants, other passengers and legitimate service animals – animals in carriers cannot bite others; and
- 2) The impact of misbehaviour on other customers – animals in carriers cannot frighten others or soil aircraft facilities.

Air Canada strongly supports the US DOT's innovation in the NPRM to impose a Government-issued form.¹⁶ The reasoning is that use of this form will dissuade passengers from purchasing fraudulent letters online, as falsifying a government form comes with penalties. However, in order for this requirement to have the proper and needed effect, carriers must be allowed to refuse carriage in the event that passengers fail to provide the Government's form.

G. ESA RULES MUST BE IMPLEMENTED THROUGH INTERNATIONAL ORGANIZATIONS

The intention to impose requirements regarding ESAs onboard aircraft must be reconsidered. The matter should be deferred to ICAO to consider from an industry perspective. The global nature of this industry requires an international solution to any such changes that affect international flights, their safety, health, and competitiveness of carriers.

¹⁶ *Supra*, note 12.



H. SERVICE ANIMALS SHOULD BE LIMITED TO ONE PER PASSENGER AND RESTRICTED TO DOGS

Finally, Air Canada firmly opposes any obligation to carry more than one service (or ESA) animal per person and any such animal other than dogs.

While Air Canada has seen several requests for multiple ESAs, Air Canada has rarely, if ever, seen a justified request for more than one service animal. While it might be theoretically justified in the most exceptional of circumstances, it is so unlikely that it should not be the subject of regulation at all.

While Air Canada recognizes that the US DOT NPRM allows up to two service animals per passenger, the critical difference is that there is no requirement to provide additional space for service animals as there is in Canada. It is unfathomable that a carrier would have an obligation to provide two extra seats per large service animal to a passenger, for a total of 5 seats for the price of one, and this without contemplating the additional burden of a 1P1F requirement.

In addition, there are a number of significant issues with carrying other animals, including allergies, size and floor space availability, conflict with other animals, behavior, other passengers' discomfort or fear, and challenges with training and certifying animals other than dogs for public spaces.

To Air Canada's knowledge, no country (other than the US, which is reviewing the matter) requires the acceptance of service animals other than dogs. Through such a rule, the Agency would, once again, set unprecedented obligations with broad impact internationally, without international agreement, and without consideration for the complexity of transporting animals across borders.

Air Canada once again refers the Agency to the US DOT NPRM, which has chosen to restrict service animals to only dogs, for these very reasons.¹⁷

¹⁷ *Supra*, note 12.



III. Accessibility Plans, Feedback Processes and Progress Reports Must Be Reasonable and Measured

While Air Canada supports the objective sought by requiring accessibility plans, feedback processes and progress reports, the requirements must avoid imposing an undue burden on carriers.

A. ACCESSIBILITY PLANS

Air Canada cautions the Agency against creating unreasonable and unmet passenger expectations with respect to accessibility plans, specifically the amount and pace of improvement that should be expected.

ATPDR already contains detailed, stringent and prescribed requirements, and the penalties for non-compliance are severe. Carriers are only exempt from compliance with ATPDR if it would cause them undue hardship. It can thus be assumed that any barriers that passengers with disabilities experience will be extremely difficult, if not impossible, to remove without causing undue hardship to carriers.

Accessibility is a process and improvement occurs steadily, especially as new ideas and technology are developed, but progress will be slow.

Furthermore, as repeated many times to the Agency, the Canadian aviation industry has been inundated with major regulatory reforms over the past three years, along with a number of mobilizing events, most unplanned (Boeing 737-MAX ground and COVID-19), some planned but with great impact (the change of our reservation system), and resources are severely strained. Carriers urgently need the time to recover and take stock of the changes and adjustments that have occurred over the last 3 years before examining what else can be changed and adjusted to improve accessibility.

For this reason, a period of one year to draft and publish an accessibility plan is wholly inadequate. Air Canada submits that a minimum of 30 months is required, in the absence of any other major regulatory reform. If the Agency chooses to embark on additional parallel regulatory reforms at the same time as the development of the accessibility plans, carriers would require more time.

The timing of publication should be aligned with that required under other federal laws, in the spirit of efficiency and not imposing an undue burden on carriers.

Finally, while Air Canada agrees that carriers should consult with members of the disability community while preparing their accessibility plans, carriers should be free to carry out this consultation as they see fit, such as through their own Accessibility Committees.

In this age of digital communication and adaptive technology, all publication of accessibility plans should be done in an accessible digital format, either on a carrier's website or electronically with email distribution. Carriers should have no obligation to provide paper, video/audio or Braille copies of the accessibility plan.



B. FEEDBACK PROCESS

The Agency must recognize that any obligation to accept feedback by phone (including third-party telephone relay or video relay service) or by email would impose an unreasonable and disproportionate burden on carriers, as these forms of feedback would require significant human resources to receive, record, catalogue and analyze the feedback.

As such, carriers should be permitted to gather feedback by establishing a specialized Feedback Committee involving members of disability communities. These would collect and provide feedback in an efficient manner.

In the alternative, Air Canada would accept feedback by exclusive means of a specialized webform that would allow for efficient automated review and categorization.

While the time to set up feedback processes might not be that significant, the time needed to receive, record, catalogue and analyze the feedback would be astronomically higher with methods other than the Feedback Committee or the webform. Furthermore, as it is impossible to know the volume of feedback that Air Canada would receive, it is impossible to determine with any degree of accuracy the time and resources that would be necessary.

Furthermore, in light of the high standard already set by ATPDR, the removal of most additional barriers will entail undue hardship on the part of the carrier. As such, it must be clear that carriers are not obligated to take action on all feedback received from passengers.

Carriers must not be regulated by public opinion: regulation is the exclusive jurisdiction of the Regulator responsible for adopting balanced regulations that reflect the particular environment of an aircraft and account for the legitimate interests of all the interested stakeholders

C. PROGRESS REPORTS

As stated above with respect to accessibility plans, in this digital age, progress reports should be available solely by accessible digital means, either on the carrier's website or by email.

Given the high standard set by ATPDR, progress reports should only be mandatory every 3 years. Any more frequent and the exercise will be merely a paper one, as insufficient progress will have been made to justify a new progress report.

If there are publication requirements by a certain date, there should be no obligation to notify the Agency.

Same publication deadlines would be useful to avoid duplication of work effort.



IV. Guidance Materials

The issuance of practical, timely and well-reasoned guidance materials is essential for the proper implementation of any new regulations, particularly regulations as complex as ATPDR.

More time should be allocated to allow the Agency adequate time to provide full and clear guidance sufficiently in advance of the implementation of Phase I of ATPDR. To be useful to carriers, full guidance material needs to be available at least 12 months in advance of implementation to allow carriers to adapt and adopt conforming processes before implementation deadlines.

Just as the Agency has provided a detailed implementation summary for terminal operators, the same should be made available to air carriers.

Fulsome guidance provided sufficiently in advance is essential to the successful implementation of such a complex regulation.

Any uncertainty on implementation matters will inevitably result in confusion.¹⁸ Problems that are inevitable in the absence of clear guidance sufficiently in advance can be avoided to ensure a smoother process that serves the ends of all stakeholders. Delay and investment at the front end will ultimately save time and effort and avoid confusion that undermines the efficiency of implementation.

Therefore, we urge the Agency to postpone publishing Phase II of ATPDR in Gazette I until it has fully consulted and studied and assessed all impacts of the new requirements and has prepared draft fulsome and clear guidance materials. This would enable the Guidance Materials to be finalized in parallel with Phase II of ATPDR for Gazette II, and quick publication of the Guidance Materials.

¹⁸ For example, for APPR, the absence of guidance on the nature of delays that had to be announced at the time of delay (specifically, whether it is root cause or the most recent event), has resulted in avoidable passenger confusion and displeasure which has in turn resulted in the Agency's recently announced investigation into passenger complaints.