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The US Government Prepares to Make Non-US Airlines Subject to New Rules Regarding the Transportation of Disabled Passengers

The US Department of Transportation (DOT) is expected shortly to issue a proposal to make non-US airlines subject to detailed regulations governing the carriage of disabled persons. The regulations may prove to be controversial due to their substantive and geographical scope, as DOT has indicated that it may seek to impose a wider range of disabled passenger-related requirements than those to which carriers are subject in any other country. The regulations could require carriers to absorb the extraordinary cost of configuring new, and retrofitting existing, aircraft and acquiring new or adapting existing ground facilities to comply with specific disabled passenger accessibility standards. In addition, carriers may have to assign staff to serve disabled passengers and conduct extensive employee training. If DOT proposes to make the new requirements applicable both within the United States and abroad (e.g., at foreign airports for flights operating to or from the United States and with respect to flights between foreign points operated by foreign carriers while displaying the designator code of a US carrier), that could create conflicts between US and foreign laws and revive arguments about the scope and limits of DOT's extraterritorial jurisdiction. Although foreign carriers will be the primary focus of the rulemaking, US carriers also may have a significant interest in the outcome because the regulations could impose new obligations on US carriers and expose them to additional enforcement liability arising from their code-share relationships with foreign carriers.

The European Commission also is preparing draft disabled passenger regulations. The staff of the Commission's Directorate-General for Energy and Transport (DG-TREN) has issued a working paper intended to provide a basis for a formal proposal of draft regulations, which is expected to be issued in mid-June 2004. As discussed further below, the staff working paper suggests

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that the Commission's proposed regulations may apply only within the territory of the EU Member States and may be drafted to avoid conflicts with the laws of non-EU nations.

I. Background

US air carriers have been subject to specific regulations prohibiting discrimination against disabled persons for more than 20 years. In 1982, DOT's predecessor agency, the Civil Aeronautics Board, adopted a relatively limited set of regulations intended to prohibit US airlines from discriminating on the basis of handicap, which (as subsequently amended) are codified as Part 382 of DOT's regulations.[2] In 1986, Congress passed the *Air Carrier Access Act* (ACAA), which amended the *Federal Aviation Act* to incorporate disabled passenger-specific anti-discrimination prohibitions – again, only applicable to US, not foreign, air carriers – and directed DOT to promulgate implementing regulations.[3] Accordingly, in 1990, after a lengthy rulemaking process, DOT issued a final rule substantially revising and expanding Part 382.[4]

Part 382 incorporates detailed requirements regarding airport and aircraft accessibility, and non-discrimination by carriers against disabled persons in all aspects of air transportation services. Carriers may not refuse, restrict or condition air transportation provided to a disabled individual because of his or her disability (unless safety or DOT regulations dictate otherwise). Carriers are required to furnish a wide range of services and assistance to disabled passengers (at no extra charge), provide training for their employees and agents who deal with the travelling public, and develop a written program documenting their disabled passenger-related policies, procedures and employee training schedule, all of which are subject to DOT review. In addition, carriers must establish procedures and mechanisms for recording and responding to complaints from disabled passengers, including designating complaints resolution officials at each US airport they serve and periodically providing DOT with summary reports of all complaints received.

II. Applying the ACAA to Foreign Air Carriers

In April 2000, President Clinton signed into law the *Wendell H. Ford Aviation Investment and Reform Act* for the 21st Century, known as AIR-21, which, among other things, made the requirements of the ACAA applicable to foreign

2. 14 C.F.R. Part 382.
3. Pub. L. No. 99-435, 100 Stat. 1080, *codified at* 49 USC. § 41705.
4. *Nondiscrimination on the Basis of Handicap in Air Travel*, Final Rule, 55 Fed. Reg. 8008 (Mar. 6, 1990).

air carriers.[5] In response to AIR-21, DOT issued a notice stating that, although Part 382 does not explicitly apply to foreign carriers, DOT would use Part 382 as 'guidance in investigating any complaints it receives of non-compliance by foreign air carriers with the ACAA.'[6] DOT also stated that it would institute a rulemaking proceeding to revise Part 382 to apply to foreign carriers. Four years later, that proceeding has not yet begun, but DOT staff have prepared draft regulations, which they expect to publish shortly. DOT staff informally have indicated that the draft proposes to make most of the provisions of Part 382 applicable to foreign carriers.[7]

III. Issues of Potential Controversy in the Forthcoming Regulations

If, as anticipated, DOT proposes to make foreign carriers subject to most of the disabled passenger-related requirements currently applicable to US carriers under Part 382, that may prompt objections from foreign carriers (and possibly their governments) that at least some of the requirements would impose unreasonable cost burdens, constitute extraterritorial regulatory overreaching by DOT in violation of US law and the United States' obligations under international aviation treaties and agreements, and conflict with foreign laws. These arguments are discussed further below.

5. Pub. L. No. 106-181, 114 Stat. 61 (106th Cong., 2d Sess.) (2000), § 707 (*amending* 49 USC. § 41705). Prior to the enactment of AIR-21, DOT occasionally took enforcement action against foreign carriers in response to allegations of discrimination against disabled passengers. In doing so, DOT, unable to rely on the ACAA or Part 382 for legal authority, invoked its general authority under 49 USC. section 41310(a) to prohibit 'unreasonable discrimination' by foreign air carriers. Although the standard DOT applied in those cases for establishing a violation of section 41310(a) was exacting (the discrimination against a disabled person must be 'egregious or unconscionable'), DOT did not impose severe penalties. *See* Order 2000-8-18 (Air Canada); Order 98-12-19 (Alitalia); Order 98-9-23 (Lufthansa). Although DOT determined that a violation of section 41310(a) had occurred in each of those cases, it merely directed each of the carriers to cease and desist from further violations, assessed USD 1,000 in civil penalties against Lufthansa and imposed no civil penalty on Air Canada or Alitalia.
6. *Notice: Applicability of the Air Carrier Access Act (49 USC. 41705) to Foreign Air Carriers Under a Recent Statutory Revision*, US Department of Transportation, 18 May 2000.
7. Although DOT has not yet revised Part 382 to make it applicable to foreign carriers, DOT has issued a final rule requiring both US carriers and foreign carriers operating to or from the United States to record complaints they receive from disabled passengers alleging discrimination and report those complaints annually to DOT. The first report, which is required to cover complaints received during calendar year 2004, is due to be filed with DOT no later than 25 January 2005. *Reporting Requirements for Disability-Related Complaints*, Final Rule, 68 Fed. Reg. 40488 (Jul. 8, 2003) (Docket OST-03-11473).

Although foreign carriers will be the primary focus of the rulemaking, US carriers also may have a significant interest in the proceeding, for several reasons. First, if DOT were to attempt to apply Part 382 to carrier-provided services and equipment at foreign airports, that could impose new obligations on US as well as foreign carriers. Second, in certain circumstances, DOT may more readily regard non-compliance with the ACAA by a foreign carrier that code-shares with a US carrier as constituting non-compliance by the US carrier. If, for example, a US carrier holds out services on a code-share basis on flights operated by a foreign carrier, and the foreign carrier refuses to transport a disabled passenger travelling under the US carrier's code, in violation of the US carrier's conditions of carriage (which, of course, must be consistent with Part 382), DOT may take enforcement action against the US carrier as well as the foreign carrier, even though the US carrier may not have been directly involved in the incident.[8] Thus, to the extent that the forthcoming rulemaking may make explicit foreign carriers' specific obligations under the ACAA and prompt DOT to focus more closely on foreign carriers' compliance with the ACAA, it could result in increased enforcement liability for US carriers that code-share on flights operated by foreign carriers.[9] Third, if DOT attempts to

8. *See* Order 98-9-22, 98-9-23. DOT took enforcement action against both Lufthansa and its code-share partner, United Airlines, in response to an alleged incident in which Lufthansa refused to board a disabled United code-share passenger on a flight between New York and Frankfurt. DOT, having determined that Lufthansa's refusal violated 49 USC. § 41310(a) (which prohibits US and foreign air carriers from 'subject[ing] a person . . . in foreign air transportation to unreasonable discrimination') and was inconsistent with the requirements of Part 382, took the position that United had violated Part 382 because the disabled passenger was travelling on a United ticket subject to United's contract of carriage, which incorporated the terms of Part 382. (United and Lufthansa ultimately reached separate settlements with DOT whereby they agreed to pay USD 3,000 and USD 1,000 respectively in civil penalties in order to avoid litigation.) Thus, DOT effectively requires US carriers to ensure that their foreign carrier code-share partners comply with the requirements of Part 382 or risk enforcement liability. DOT, however, has discretion to decide whether (and, if so, to what extent) to hold a US carrier responsible for violations of Part 382 committed by a foreign carrier code-share partner. In another case, DOT did not pursue enforcement action against United when another of United's code-share partners, Air Canada, removed a United-ticketed passenger from an Air Canada flight from Montreal to Washington, D.C. Order 2000-8-18 (cease-and-desist order against Air Canada). Moreover, a US carrier should not be held liable for a foreign carrier code-share partner's violation of Part 382 if the violation involves a passenger who was not ticketed by the US carrier. *See* Order 98-12-9, at 1-2 & n.2 (cease-and-desist order against Alitalia in which DOT stated that it would not hold Continental Airlines responsible for Alitalia's refusal to transport a disabled passenger on a flight from Rome to Newark, even though Continental code shared on the flight, because '[a]ll actions relevant to the [disabled] complainant's experience . . . were directly attributable to Alitalia employees and [the complainant] was travelling on an Alitalia ticket').
9. In recent months, DOT has underscored its determination to enforce vigorously the

regulate extraterritorially or if its approach is perceived as exceeding the limits of its authority under US law and the United States' obligations under bilateral air transport agreements, US carriers could become the target of retaliatory action by foreign governments.

Among the requirements that DOT may propose, the more controversial are likely to involve aircraft accessibility, services and equipment provided by carriers at foreign airports, restrictions on a carrier's right to refuse to transport disabled passengers, and any requirement that carriers allow disabled passengers to bring service animals onboard the aircraft cabin. The degree of controversy may depend on whether DOT limits the scope of its regulations to its territorial jurisdiction or attempts to apply its regulations to flights operated by foreign carriers between airports outside the United States that either connect with flights to or from the United States[10] or on which the designator code of a US carrier is displayed,[11] and to carrier-provided services and equipment at foreign airports.

disabled passenger laws by issuing a series of consent orders in which it has assessed substantial civil penalties against US carriers for violations of Part 382. *See* Order 2004-4-22 (assessing USD 120,000 in civil penalties against ATA Airlines); Order 2004-3-4 (assessing USD 225,000 in civil penalties against Northwest Airlines); Order 2003-12-6 (assessing USD 1.1 million against United Airlines); Order 2003-11-4 (assessing USD 1.35 million against Delta Air Lines); Order 2003-9-4 (assessing USD 400,000 against Ryan International Airlines); Order 2003-8-28 (assessing USD 100,000 against JetBlue Airways); Order 2003-10-11 (assessing USD 125,000 against AirTran Airways); Order 2003-11-5 (assessing USD 100,000 against Frontier Airlines); *see generally Implementing the Air Carrier Access Act (ACAA): A Status Report From the Department of Transportation* (Jan. 2004), at 2 ('since 5 April 2000, the Department has assessed air carriers civil penalties totaling almost USD 7 million for violations of the ACAA as part of its ongoing effort to ensure nondiscrimination in air travel based on disability). Although DOT has not prioritized investigating foreign carriers' compliance with the ACAA, DOT staff have indicated that such investigations may well occur after new regulations specifically applicable to foreign carriers become effective.

10. In 2002, DOT adjudicated a third-party enforcement complaint filed by a disabled passenger alleging that British Airways (BA) violated the ACAA and 49 USC. § 41310(a) when a BA franchisee carrier, Cityflyer, refused to board the complainant on a flight from Cork, Ireland to London Gatwick, from which she was due to connect to a BA flight to Atlanta, Georgia. In response, BA argued that the ACAA does not apply to service operated by a foreign carrier without any code-sharing affiliation with a US carrier between two foreign points, such as the Cork-Gatwick segment of the complainant's itinerary. DOT dismissed the complaint 'without reaching a decision on whether the ACAA applied to the Cork-London flight at issue here. The applicability of the ACAA to the flights of foreign air carriers and their partner carriers that connect with flights to or from the USA will be considered in the [forthcoming] rulemaking.' Order 2002-11-11, at 5 & n.5.
11. *Implementing the Air Carrier Access Act (ACAA): A Status Report From the Department of Transportation* (Jan. 2004), at 3 (stating that DOT plans to adopt regulations that apply not only to 'foreign air carriers operating to and from the United States', but also to those that 'code shar[e] with US carriers).

A. Aircraft Accessibility Requirements

The forthcoming regulations may require foreign carriers to configure aircraft with specific disabled passenger-friendly facilities and features that are not currently included in many aircraft operated overseas. For example, Part 382 requires that large aircraft – including the majority of aircraft types used for long-haul international service – incorporate the following features:

– At least one wheelchair-accessible lavatory;
– Priority space for stowage of at least one folding wheelchair;
– Movable armrests; and
– An operable on-board wheelchair.

The history of DOT's application of Part 382 to US carriers suggests that DOT probably would allow foreign carriers time in which to comply with aircraft accessibility requirements that would necessitate reconfiguring aircraft, and may be willing to grant limited exemptions from some of those requirements, but ultimately foreign carriers may have to incur the substantial cost of configuring new, and possibly also retrofitting existing, aircraft to incorporate the required features.[12] In any event, DOT probably would require foreign carriers to comply with any service-related requirements immediately.[13]

1. How Broadly Will DOT Seek to Apply the New Regulations?

DOT has stated that it plans to adopt regulations that would apply not only to

12. The aircraft accessibility requirements of Part 382 only apply to new aircraft ordered by a US carrier anytime after (or delivered to a carrier more than two years after) those requirements became effective. 14 C.F.R. § 382.21(a). DOT exempted smaller-capacity aircraft (i.e., those with fewer than 100 seats) from some of the requirements (*id.* § 382.21(a)(1),(2),(4),(d)), but such exemptions would not apply to larger-capacity, long-haul aircraft that many foreign carriers operate on intercontinental routes to and from the United States. Although DOT required US carriers to comply within two years with some of the accessibility requirements applicable to aircraft with more than 60 seats, DOT otherwise did not direct carriers to retrofit aircraft 'for the sole purpose of enhancing accessibility.' *Id.* § 382.21(b). Nonetheless, DOT provided that if an aircraft lacking the requisite accessibility features 'undergoes replacement of cabin interior elements or lavatories, or the replacement of existing seats with newly manufactured seats,' the carrier must retrofit at that time to achieve compliance. *Id.* § 382.21(c). At a minimum, DOT could be expected to include similar limitations and exemptions in any new rule applicable to foreign carriers.
13. Under Part 382, carriers are required to provide such services as pre-boarding assistance, priority seating, assistance with enplaning and deplaning, moving around the aircraft cabin, stowing and retrieving wheelchairs and other personal equipment, and allowing disabled passengers to be accompanied in the cabin by a service animal – all at no additional cost to the disabled passenger.

'foreign air carriers operating to and from the United States,' but also to those that 'code shar[e] with US carriers.'[14] This statement could be interpreted to mean that DOT intends to regulate flights operated by foreign carriers between foreign points on which a US carrier displays its designator code.[15] If so, that would test the limits of DOT's extraterritorial jurisdiction.[16]

a. Overbroad Regulations Could Be Inconsistent with the ACAA and US Obligations under International Agreements

Congress has instructed DOT, when applying the ACAA to foreign carriers, to 'act consistently with obligations of the United States Government under an international agreement' and 'consider applicable laws and requirements of a foreign country.'[17] Thus, Congress anticipated the need for DOT to adopt a more limited regulatory scheme with respect to foreign carriers in order to ensure consistency with the United States' international obligations and take

14. *Implementing the Air Carrier Access Act (ACAA): A Status Report From the Department of Transportation* (Jan. 2004), at 3.
15. Major US carriers, in an effort to expand the global scope of their networks, display their designator codes on flights operated by foreign carriers between points in foreign countries that offer connections with flights to or from the United States. Many of those foreign carriers do not serve the United States; often, they are domestic or regional carriers that operate relatively small aircraft at foreign airports that are neither hubs nor international gateways. For example, United Airlines, in addition to code-sharing with Lufthansa on flights between the United States and Germany, displays its code on short-haul connecting flights operated by Lufthansa-affiliated European regional or commuter carriers (e.g., Lufthansa CityLine and Air Dolomiti) beyond European gateway airports to smaller European cities. (Similarly, Lufthansa code-shares on flights operated by United Express carriers to US cities beyond the US gateways at which Lufthansa-United operate transatlantic service.)
16. DOT already has asserted jurisdiction over such code-share arrangements in that DOT requires any foreign carrier that displays the designator code of a US carrier to obtain prior authorization from DOT, even if the carrier operates exclusively between foreign points. If, however, in the forthcoming rulemaking, DOT were to propose that all such foreign carriers must comply with the requirements of Part 382, that would elevate DOT's regulation of foreign carriers operating exclusively outside the United States to a new and more controversial level.
17. Pub. L. No. 106-181, 114 Stat. 61 (106th Cong., 2nd Sess.) (2000), § 707(a)(2), *codified at* 49 USC. § 41705(a) ('[i]n providing air transportation, an air carrier, including (subject to section 40105(b)) any foreign air carrier, may not discriminate against an otherwise qualified individual' on the basis of that individual's disability) [emphasis added]. Section 40105(b) requires DOT to 'act consistently with obligations of the United States Government under an international agreement' and 'consider applicable laws and requirements of a foreign country.' 49 USC. § 40105(b)(1)(A),(B).
18. Section III.C below provides examples of potential conflicts with foreign laws and requirements that may arise if DOT attempts to replicate the broad scope of the requirements of Part 382 in the forthcoming regulations.

account of applicable foreign laws.[18] Congress also directed DOT to pursue a multilateral consensus approach (rather than attempting unilaterally to impose US requirements on foreign airlines within the territory of other nations) when it instructed DOT to 'work with appropriate international organizations and the aviation authorities of other nations to bring about the establishment of higher standards for accommodating handicapped passengers in air transportation, particularly with respect to foreign air carriers that code-share with [US] air carriers.'[19]

International agreements that impose obligations on the United States include the Chicago Convention (of which the United States is a contracting State),[20] Annexes implementing the Convention adopted by the Convention's contracting States through the International Civil Aviation Organization (ICAO), and the United States' many bilateral air transport agreements with other nations. One of the founding tenets of the Chicago Convention, consistent with US and international law, is the 'complete and exclusive sovereignty' of each contracting State with respect to its territory and airspace.[21] The United States' model 'open skies' bilateral air transport agreement text also reflects this sovereignty principle.[22]

Article 37 of the Chicago Convention obligates each contracting State to eschew unilateral, extraterritorial lawmaking and instead to 'collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and

19. Pub. L. No. 106-181, 114 Stat. 61 (106th Cong., 2nd Sess.) (2000), § 707(c); *see also* Conf. Rep. 106-513, 8 March 2000, Joint Explanatory Statement of the Committee of Conference, § 128. A working paper recently issued by the staff of the European Commission (DG-TREN) similarly emphasizes the importance of working 'through internationally recognised recommendations.' 'Rights of Persons With Reduced Mobility When Travelling By Air,' *European Commission Staff Working Paper (Jan. 22, 2004*) (EC Staff Working Paper), § 28, 29; *see also id.*, § 27 ('[a]ir transport is a highly internationalised industry, so that differences between national rules can cause serious difficulties').
20. Convention on International Civil Aviation done at Chicago on 7 Dec. 1944, 61 Stat. 1180, T.I.A.S. No. 1592 (Chicago Convention).
21. *Id.*, Arts. 1, 11. This is consistent with the well-settled general principle of US and international law that a nation may not make its laws applicable in the territory of other nations. *See* Rest. 3rd., Restatement of the Foreign Relations Law of the United States, §§ 402, 403.
22. *See* Model Open Skies Agreement Text (updated 13 April 2004), Art. 5 ('[w]hile entering, within, or leaving the territory of one Party, its laws and regulations . . . shall be complied with by the other Party's airlines' and 'by, or on behalf of, . . . passengers, crew or cargo of the other Party's airlines'), available at <http:www.state.gov/e/eb/rls/othr/19514.htm>. The model agreement also requires parties to act in conformity with the Chicago Convention and ICAO Annexes. *See id.*, preamble, Arts. 6, 7(3), 11, 14, 15, 16.

improve air navigation.' In order to achieve such uniformity, Article 37 provides for the adoption by ICAO of 'international standards and recommended practices and procedures.'[23] Accordingly, ICAO has adopted Annex 9 to the Convention, which contains provisions on facilitation of the transport of passengers requiring special assistance, including 'two Standards and fifteen Recommended Practices that address accessibility to all elements of the air transport chain by persons with disabilities.'[24] Those Standards and Recommended Practices reflect undertakings by contracting States to collaborate and seek to achieve the 'highest practicable degree of uniformity' in the implementation of measures to ensure adequate access for disabled passengers to air services and airports. In other words, while general principles and standards are established at ICAO, each contracting State should establish more detailed rules to implement those general instructions within its territory.

Because unilateral DOT action to regulate the activities of non-US airlines that occur within the territory of other nations would be inconsistent with US obligations under the Chicago Convention, ICAO Annex 9, and dozens of bilateral air transport agreements, such action necessarily would violate section 40105(b) of the Aviation Code, which Congress expressly incorporated by reference into the ACAA. Under the US constitutional scheme, such US treaty obligations and statutes take precedence over executive branch regulations.[25] Thus, under US law, DOT does not have authority unilaterally to impose disabled passenger regulations on foreign carriers on an extraterritorial basis. Rather, DOT's mandate from Congress is to work with foreign governments to achieve uniformity (or at least mutual consistency) of regulation among nations.[26]

23. Chicago Convention, art. 37. The United States has invoked Article 37 in support of its objections to regulatory measures imposed on a unilateral basis by foreign authorities. *See* Memorial of the United States of America, 14 March 2000 (submitting for settlement by ICAO of a dispute regarding an allegedly discriminatory EC regulation prohibiting the use of hushkitted aircraft at EU airports).
24. Response of Mr. R.C. Costa Pereira, Secretary, International Civil Aviation Organization (ICAO), to the United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons With Disabilities (2nd Session, May 2003) (ICAO Response'), *citing* ICAO Annex 9, Ch. 8, available at <http:www.un.org/esa/socdev/enable/rights/uncontrib-icao.htm>. ICAO also 'has prepared guidance material . . . that elaborates on the Annex 9 Standards and Recommended Practices [SARPs] relating to persons with disabilities. The material is intended to assist the civil aviation community in the day-to-day application of these SARPs.' ICAO Response, *citing* ICAO Circular 274-AT114, Access to Air Transport by Persons With Disabilities (1999).
25. U.S. Const. Art. VI, § 2, cl. 2 (the Supremacy Clause, which provides that a treaty, such as the Chicago Convention, once ratified by the United States, becomes part of the supreme law of the United States, of equal status to a federal statute).
26. On occasion, the United States has attempted to apply certain of its aviation laws and regulations on an extraterritorial basis without offering a persuasive legal basis for such

b. Overbroad Regulations Would Not Serve the Interests of the Travelling Public

In addition to the legal impediments described above, commercial considerations, including the interests of the travelling public, should compel DOT to adopt a more narrowly tailored approach. If foreign carriers operating exclusively outside the United States were required to comply with DOT's disabled passenger regulations, they could be forced to choose between incurring the substantial expense involved in achieving compliance or terminating their code-share arrangements with US carriers altogether. While the former outcome could increase the cost of air travel generally, the latter could be even more deleterious to consumers because it could reduce significantly the international air travel options available to thousands of US and foreign passengers who rely on international code-share arrangements to deliver the benefits of

action. The most notorious recent such example was the Hatch Amendment (discussed in footnote [35], below). A less noteworthy but more immediately applicable case was DOT's rulemaking to require both US carriers and foreign carriers operating to or from the United States to record and report annually to DOT complaints received from disabled passengers. In that case, IATA questioned whether DOT intended to apply the rule on an extraterritorial basis (e.g., by requiring foreign carriers to document in their reports complaints relating to alleged incidents at foreign airports). *Comments of IATA*, 29 May 2002, at 3 (Docket OST-02-11473). In response, DOT confirmed that 'the rule would require complaints relating to events outside the USA to be reported' and rejected concerns about extraterritoriality, noting that 'most of the provisions of . . . Part 382 . . . have applied extraterritorially to US carriers for years and the only new feature about this proposal is its extraterritorial application to foreign carriers'. Final Rule, 68 Fed Reg. 40488, 40489 (July 8, 2003). DOT's comments failed to properly distinguish between territoriality and nationality as bases of jurisdiction. Under US and international law, a State has jurisdiction to prescribe law within its own territory with respect to both its own nationals and foreign nationals. In addition, a State may regulate 'the activities, interests, status or relations of its nationals outside as well as within its territory'. Rest. 3rd., Restatement of the Foreign Relations Law of the United States, § 402(1)(a)-(b),(2). By contrast, the authority of a State to regulate the conduct of foreign nationals outside its territory is limited to 'conduct outside its territory that has or is intended to have substantial effect within its territory' or is 'directed against the security of the State or against a limited class of other State interests.' *Id.* § 402(1)(c),(3). As DOT acknowledged, the provisions of Part 382 to which it referred were applicable on an extraterritorial basis only to US carriers, which are subject to DOT's jurisdiction even when operating outside the United States due to their nationality. By contrast, DOT, in order to justify application of its regulations to the conduct of foreign carriers outside the United States, would have to establish that such conduct has or is intended to have 'substantial effect' within the United States and, even then, DOT would have to demonstrate that its proposed exercise of jurisdiction would be 'reasonable'. *See id.* §§ 402(1)(c), 403. DOT, however, never offered any such justification. (The national security basis of jurisdiction provided for under section 402(3) of the Restatement would not apply here, nor did DOT claim otherwise.)

online, global network services in thousands of international city pairs on a daily basis.[27]

In sum, the preferable approach would be for DOT to apply its regulations to foreign carriers that operate to and from the United States, but refrain from attempting to regulate (or at least exempt from those regulations) foreign carriers that do not operate to and from the United States.[28] At a minimum, DOT, consistent with the exemptions already granted to US carriers, should exempt foreign carriers operating smaller-capacity aircraft from the aircraft accessibility requirements of Part 382. In fact, as explained above, such an approach is not a matter of discretion for DOT because Congress did not grant DOT the same broad authority to apply the ACAA to foreign carriers as it does to US carriers. Rather, Congress specifically directed DOT to apply the ACAA to foreign carriers in a manner consistent with the United States' international treaty obligations, to consider the applicability of foreign laws, and, 'particularly with respect to foreign air carriers that code-share with [US] carriers,' 'to work with appropriate international organizations and the aviation authorities of other nations to bring about the establishment of higher standards for accommodating handicapped passengers in air transportation.'[29]

B. Disabled Passenger-Related Services and Equipment Provided by Carriers at Airports

Part 382 requires US carriers to provide specific services and equipment for disabled passengers at US airports. These include, for example, providing assistance in enplaning, deplaning, and making flight connections, including transportation between gates. In that regard, carriers must make wheelchairs available as necessary, as well as suitably trained service personnel (who must

27. DOT itself has identified significant price and service benefits that such code-share alliances generate for passengers. *International Aviation Developments (Second Report): Transatlantic Deregulation, The Alliance Network Effect*, US Department of Transportation, Office of the Secretary (Oct. 2000); *see also International Aviation Developments: Global Deregulation Takes Off (First Report)*, US Department of Transportation, Office of the Secretary (Dec. 1999). Consequently, DOT should be reluctant to adopt overreaching, extraterritorial regulations that would undermine those benefits and reduce air travel options for able-bodied and disabled passengers alike.
28. In January 2004, the staff of the European Commission (DG-TREN) issued a draft working paper, including draft regulations, on the transportation by air of disabled passengers. Those draft regulations have no extraterritorial dimension: they would only apply to passengers travelling on reservations made in an EU Member State for flights departing from an EU airport and to passengers departing from, arriving at or transiting through an airport located in an EU Member State. *See* EC Staff Working Paper (draft regulations), Arts. 1, 3.
29. Pub. L. No. 106-181, 114 Stat. 61 (106th Cong., 2nd Sess.) (2000), § 707(c).

not leave a disabled passenger who is not independently mobile unattended for more than 30 minutes).[30] In cooperation with the US airports they serve, US carriers must arrange for aircraft boarding by means of level-entry loading bridges or accessible passenger lounges where such facilities are available and, if unavailable, by mechanical lifts, ramps or 'other suitable devices that do not require employees to lift or carry passengers up stairs.'[31]

These requirements (and Part 382 generally) currently only apply to US carriers at US airports,[32] but it is reasonable to anticipate that DOT, in the forthcoming rulemaking, will seek to make foreign carriers subject to similar requirements at US airports.[33] The more controversial question is whether DOT also may attempt to require carriers (presumably both US and foreign) to provide such services and equipment at foreign airports and, if so, how many foreign airports would be affected. If DOT were to attempt to apply the requirements only with respect to non-stop flights operated by US or foreign carriers to or from the United States, that would affect a large but limited number of foreign airports. If, however, the requirements were to apply to flights operated between foreign airports by foreign carriers displaying the designator code of a US carrier, the list could include almost any commercial

30. 14 C.F.R. § 382.39(a).
31. *Id.* §§ 382.39, 40a. (These boarding assistance requirements only apply with respect to aircraft with more than 30 seats at US airports with 10,000 or more annual enplanements.) Part 382 provides that 'air carriers and airport operators . . . are jointly responsible for meeting the boarding assistance requirements' (including 'ensur[ing] that all lifts and other accessibility equipment are maintained in proper working condition'). *Id.* § 382.40a(c)(1),(2),(6); *see generally id.* § 382.23(f) (requiring that contracts or leases between US carriers and US airport owners or operators delineate the parties' respective responsibilities for providing accessible facilities and services at US airports).
32. *Id.* § 382.3(c) (Part 382 generally 'does not apply to foreign air carriers or to airport facilities outside the United States, its territories, possessions, and commonwealths). Although DOT has not attempted to require US or foreign carriers to provide any such specific services and equipment for disabled passengers at foreign airports, DOT has asserted jurisdiction (and taken enforcement action) in two cases in which a foreign carrier refused to board a US-bound disabled passenger at a foreign airport for allegedly discriminatory reasons. *See* Order 98-12-9 (Alitalia refused to board a disabled passenger in Rome for a flight bound for Newark); Order 2000-8-18 (Air Canada removed a disabled passenger at Montreal from a flight bound for Washington, D.C.). Both of those incidents occurred before the ACAA was amended to make it applicable to foreign carriers, but DOT, in taking enforcement action, relied on its authority under 49 USC. § 41310(a) to prohibit foreign carriers operating in foreign air transportation from subjecting any person to 'unreasonable discrimination'.
33. Even today, DOT, using Part 382 as 'guidance' for determining foreign carriers' compliance with the ACAA (*see* note [6], above, and accompanying text), could decide that foreign carriers are subject to the same service and equipment requirements as US carriers at US airports. To date, however, DOT has not taken such action.

airport of any size[34] around the world. This more expansive form of extraterritorial regulation would appear to be inconsistent with the ACAA and the United States' commitments under international air transport agreements.[35]

If DOT were to propose to regulate the activities of foreign carriers at foreign airports located in the sovereign territory of another nation, that would test the limits of DOT's legal authority. DOT has no jurisdiction under US law with respect to foreign airports per se, either generally or, more particularly, under the ACAA (which applies only to 'an air carrier, . . . including any foreign air carrier'[36]). Moreover, even if, for the sake of argument, DOT were

34. Article 5(4) of the draft regulations contained in the EC Staff Working Paper includes a 'small airport' exemption applicable to airports with fewer than two million passenger movements per year. If DOT were to attempt to regulate carrier-provided service and equipment at foreign airports, at a minimum, its regulations should include a similar exemption.
35. Such a unilateral attempt to impose US disabled passenger requirements extraterritorially at foreign airports could be reminiscent of the Hatch Amendment, which provoked intense international controversy during the late 1990s. The Hatch Amendment required a foreign air carrier, 'in its operations to and from airports in the United States to adhere to the identical security measures that the [FAA] requires [US] air carriers serving the same airports to adhere to.' *Antiterrorism and Effective Death Penalty Act* of 1996, § 322, Pub. L. No. 104-132, 110 Stat. 1214, *amending* 49 USC. § 44906. Although the Amendment's language was somewhat ambiguous, it was widely interpreted as an attempt to legislate security requirements at foreign airports and to hold foreign carriers responsible for ensuring that those requirements would be met. In 1998, FAA initiated a rulemaking to implement the Hatch Amendment. 63 Fed. Reg. 64764 (23 Nov. 1998). This provoked vigorous objections from foreign carriers and their governments, which argued that the United States had no right to dictate security measures to other nations and, in any event, carriers generally are unable to control security measures at foreign airports. FAA never finalized the proposed rule. *See* 'Dear Senator Hatch', Editorial, *Aviation Security International* (Aug. 2000) (discussing the content of a 12 June 2000 letter from then-DOT Secretary Rodney E. Slater to Senator Orrin G. Hatch, Chairman of the Committee on the Judiciary, which 'signaled the death knell of the controversial Hatch Amendment'). Although foreign carriers and their governments objected strongly to the substance of the Hatch Amendment, their opposition was intensified by the widespread perception that the Amendment's real purpose was to impose additional costs on foreign airline competitors of US airlines. By contrast, there is no apparent anti-competitive motivation behind Congress's application of the ACAA to foreign carriers or DOT's anticipated promulgation of implementing regulations.
36. 49 USC. § 41705(a). Terminal facilities and services at US airports are subject to Part 382 when 'owned, leased or operated on any basis by an air carrier'. 14 C.F.R. § 382.23(a); *see also* note [31], above (citing multiple provisions of Part 382 that require US airports to cooperate with the US carriers that serve them to ensure compliance with US disability laws and regulations). If a US airport is owned, leased or operated by a non-carrier, that entity is responsible for compliance with the 'public accommodations' requirements of Section 504 of the *Rehabilitation Act*, Title III of the *Americans With Disabilities Act* and related, separate regulations promulgated by DOT and the US Department of Justice implementing those statutes. Those requirements are incorporated by

deemed to have statutory authority to impose extraterritorial regulations at foreign airports, (as explained in section III.A.1.a, above) such action would violate US obligations under the Chicago Convention, ICAO Annex 9, and applicable bilateral air transport agreements.

In sum, the forthcoming rulemaking is unlikely to be controversial if it extends the airport accessibility requirements of Part 382 to foreign air carriers when they operate at US airports. DOT, however, should recognize the territorial limits of its jurisdiction, particularly limits on its authority to impose obligations on foreign air carriers at foreign airports, and refrain from attempting to apply its requirements at foreign airports. Instead, DOT should adhere to Congress's instructions and work with foreign governments and the relevant international organizations to forge a multilateral consensus approach that would foster uniform standards of accessibility and service for disabled passengers at US and foreign airports.

C. Other Requirements That Could Give Rise to Conflicts with Foreign Laws

Part 382 contains numerous requirements that, if made applicable to foreign carriers, could give rise to direct conflicts with foreign laws. Such conflicts could arise as a result of different safety requirements and cultural norms. For example:

– Part 382 only permits a carrier to refuse to transport a disabled passenger under strictly limited circumstances, on the basis of safety or if the passenger has a communicable disease or infection that poses a direct threat to the health or safety of others.[37] Although international aviation laws and standards uniformly recognize carriers' rights to refuse transportation for safety reasons, foreign aviation authorities may have different rules that would afford carriers broader discretion to refuse transportation for safety, health or other reasons and could even require carriers to refuse transportation in some circumstances.[38] Thus, it might be impossible for carriers to reconcile

reference into Part 382. *See* 14 C.F.R. § 382.23(b)(d)-(f). Foreign airports, however, are not subject to any of these US laws and regulations.

37. 14 C.F.R. §§ 382.31(d), 382.51(b)(1).

38. Article 3(4) of the draft regulations contained in the EC Staff Working Paper provides that 'an air carrier . . . may refuse to . . . embark a person with reduced mobility in order to meet requirements established by international, Community or national law concerning safety, security, health, working conditions or other matters. It may also do so because the size of certain aircraft or the absence of cabin crew prevents the carriage of persons with reduced mobility, including their embarkation and disembarkation'. By contrast, Part 382 does not authorize a carrier to refuse to transport a disabled passenger for reasons of 'security, . . . working conditions or other matters . . .[,]' nor does Part 382

a foreign authority's requirement with a directly-contradictory DOT prohibition.

– Part 382 prohibits carriers from requiring that a disabled individual be accompanied by an attendant if he or she is able to assist in his or her own evacuation of the aircraft in an emergency.[39] DOT, applying this standard liberally, has found that persons with substantial disabilities, including the blind, the deaf, and paraplegics can 'assist in their own evacuation,' and that only the most severe forms of disability, such as quadriplegia, persons travelling in a stretcher or incubator, or persons with a mental disability of sufficient severity that they cannot comprehend safety instructions, would be subject to the attendant requirement.[40] Foreign laws, however, might require that persons suffering from a broader range of disabilities be accompanied by an attendant for safety reasons. Moreover, foreign authorities might determine that, even if a disabled person could assist in his or her own evacuation (with or without an attendant to provide further assistance), that person should be refused transportation because he or she could hinder efforts to evacuate an aircraft as efficiently as possible in a life-threatening emergency situation.[41]
– Part 382 requires carriers to allow properly documented guide dogs and other 'service animals' (potentially including, but not limited to, cats, monkeys, and even pigs and miniature horses[42]) to accompany disabled passengers in the cabin. Some foreign authorities, however, may prohibit the carriage of some or all service animals in the cabin due to quarantine policies or for other health-related reasons.[43] Moreover, because some cul-

allow a carrier to refuse transportation due to aircraft size limitations or absence of cabin crew.

39. 14 C.F.R. § 382.35(b)(3).
40. Final Rule, 55 Fed. Reg. 8008 (Mar. 6, 1990); *see also* Order 2001-8-17; Order 98-9-23.
41. *See*, e.g., EC Staff Working Paper, at 3 (§ 9) ('[t]he transportation of people with very severely limited mobility or of numerous passengers with reduced mobility on the same flight could conflict with safety requirements. For instance, it might make evacuation of a plane in an emergency unacceptably slow and difficult.').
42. US Department of Transportation, Notice of Policy Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 24874 (May 9, 2003) (Docket OST-03-15072) (DOT Guidance). DOT has stated that, in the past, 'most service animals were guide or hearing dogs', but today, 'a wider variety of [s]ervice animals may perform a much wider variety of functions than ever before (e.g., alerting a person with epilepsy of imminent seizure onset, pulling a wheelchair, assisting persons with mobility impairments with balance)'. *Id.* at 24875. By contrast, Annex 2 of the EC Draft Regulations provides for the carriage of 'certified service dogs in the cabin, subject to national regulations', but makes no reference to any other type of service animal.
43. Many countries impose stringent quarantine restrictions that apply to all animals. By contrast, DOT has stated that, under Part 382, public health and safety concerns may only prevent the carriage of service animals in the cabin in exceptional cases. DOT Guidance, at 24877 (carriers are not required to accommodate 'certain unusual service

tures may regard certain types of animals as unhygienic or offensive to religious practices or social conventions, other passengers may take offence at being obliged to travel in close physical proximity to a service animal.[44] Part 382 expressly provides that a carrier may not refuse to accommodate a service animal because of any consequential offence, annoyance or inconvenience to other passengers or crewmembers.[45] Foreign laws and cultural norms, however, may not be so accommodating, and, given the wide range of species that may be deployed as service animals, the risk of such a conflict of laws and cultures may be substantial.

– Part 382 requires carriers to allow disabled passengers to carry on board assistive devices powered by non-spillable batteries, to the extent consistent with FAA safety regulations, even though such batteries may constitute hazardous materials.[46] Foreign authorities, however, might prohibit the carriage of such batteries for safety reasons.

DOT could avoid potential conflicts between US and foreign laws by requiring foreign carriers to comply with its disabled passenger regulations only to the extent permitted by applicable foreign law.[47] Moreover, such an approach would be consistent with both the express language of the ACAA and Congressional intent that DOT 'consider applicable laws and requirements of a foreign country.'[48] By contrast, if DOT were to disregard actual or potential conflicts

animals [that] pose unavoidable safety andor public health concerns, . . .[such as] [s]nakes, other reptiles, ferrets, rodents, and spiders').

44. For example, for Muslims, '[t]raditionally, dogs have been seen as impure, and the Islamic legal tradition has developed several injunctions that warn Muslims against most contact with dogs'. Dr. Ayoub M. Banderker, 'Animal Abuse and Welfare in Islam', available at <http:www.islamveg.comdogs.asp>. *See also id.* ('it is not hygienic to keep a dog in the house. . . . If the saliva of a dog touches you or part of your clothing, then it is required of you to wash the body part touched and the item of clothing touched by the dog's mouth or snout'); 'Iranian Cleric Denounces Dog Owners, BBC News World Edition, 14 Oct. 2002, available at <http:news.bbc.co.uk2himiddle_east2326357.stm> ([d]ogs are considered unclean in Islamic law).
45. 14 C.F.R. § 382.31(b).
46. *Id.* § 382.41.
47. The EC Staff Working Paper includes regulatory provisions drafted to avoid conflicts with foreign law. *See,* e.g., EC Staff Working Paper (draft regulations), Art. 3(4) (allowing carriers to refuse to transport a disabled passenger in order to meet requirements established by international, Community or national law . . .).
48. *See* 49 USC. § 41705(a) (making application of the ACAA to foreign carriers subject to 49 USC. § 40105(b)(1)(B) (quoted above in text)); *see also* Conf. Rep. 106-513, 8 March 2000, Joint Explanatory Statement of the Committee of the Conference, at 196 (§ 128). There is precedent for the United States to condition its aviation laws in order to avoid potential conflicts with foreign laws. For example, the *Foreign Air Carrier Family Support Act* of 1997, which requires foreign carriers serving the United States to prepare and, if necessary, implement a plan for assisting survivors and members of victims'

with foreign laws, that could galvanize opposition to the regulations and even provoke retaliatory measures by foreign governments against US airlines, thereby hindering the regulations' effective implementation.

IV. Timetable for Implementation of New Requirements

Even if DOT decides to limit the scope of the disabled passenger regulations it may seek to impose on foreign carriers, it should provide for a substantial transition period between the date on which it publishes a final rule and the date on which that rule becomes effective. The final rule could require foreign carriers, among other things, to revise current policies and practices, conditions of carriage, employee training manuals, and other documentation; acquire and deploy new, and refashion existing, equipment; and train employees and agents. Thus, the establishment of an extended transition period will be vital to afford carriers sufficient time to complete all of the steps necessary to comply.[49]

There is precedent for DOT to establish a transition period prior to any new rules becoming effective. In March 1990, when DOT substantially revised and expanded Part 382 in response to the enactment of the ACAA, DOT provided for the new rules to become effective one month after publication of the final rule. In response to a petition from the Air Transport Association (ATA), however, DOT agreed (over the objections of groups advocating for disabled persons) to delay the compliance deadline for up to six months.[50] At a minimum, DOT should afford foreign carriers a similar transition period.

V. Conclusion

DOT's soon-to-be-issued proposal to establish new regulations applicable to the transportation of disabled passengers by non-US carriers could prove to be controversial among the international aviation community. If DOT proposes

families in the event of an accident involving major loss of life, includes a qualification that foreign carriers are only required to comply with the Act ' . . . [t]o the extent permitted by foreign law which was in effect on the date of the enactment of this [Act], ...' 49 USC. § 41313(c).

49. Of course, the broader the scope of any new rule, the longer the transition period necessary to enable carriers to prepare to comply. In addition to establishing a grace period prior to the effectiveness of any final rule, DOT should exempt or 'grandfather' aircraft already in service from any regulation that otherwise would require such aircraft to be retrofitted for compliance.
50. 55 Fed. Reg. 23539 (11 June, 1990) (DOT, in partially granting ATA's petition, established different extensions of the compliance deadline for various provisions of the new rule, with the extensions varying from two to six months depending on the particular provision).

regulations that are broad in scope, and particularly if the regulations would be applied extraterritorially, that could prompt objections from foreign carriers and their governments that DOT's approach is inconsistent with US law, including US obligations under the Chicago Convention, ICAO Annex 9, and bilateral air transport agreements, and in conflict with the laws and sovereignty of foreign nations. US carriers also may have a significant interest in the outcome of the rulemaking if the proposed rules would subject them (directly or indirectly) to new requirements at foreign airports or with respect to their code-share arrangements with foreign carriers.