

## **GUIDANCE QUESTIONS AND ANSWERS CONCERNING 49 CFR PART 39, ADA RULES CONCERNING PASSENGER VESSELS**

The Department of Transportation's final rules applying the Americans with Disabilities Act (ADA) to passenger vessel operators' (PVOs') policies took effect January 3, 2011.<sup>i</sup> These questions and answers, responding to concerns expressed by passenger vessel operators, provide guidance on the Department's understanding of the meaning and application of 49 CFR Part 39. The date of this guidance is January 31, 2011.

Part 39 does not include requirements pertaining to the design and construction of passenger vessels. The Department anticipates proposing in the future, in cooperation with the U.S. Access Board, standards for the accessible design and construction of passenger vessels.

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 39.

### **SERVICE ANIMAL ISSUES**

#### **39.3, 39.91**

#### **QUESTION: WHAT KINDS OF ANIMALS ARE REGARDED AS SERVICE ANIMALS?**

#### **ANSWER:**

\* The Department intends that the service animal provisions of Part 39 be interpreted to be consistent with the service animal provisions of Department of Justice (DOJ) rules under Titles II and III of the ADA (as published in the Federal Register on September 15, 2010).

\* Consequently, the Department understands a service animal to be any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.

\* Other types of animals (e.g., cats, primates) are not considered service animals under DOJ rules.

\* Animals that are not trained to do work or perform tasks are not considered to be service animals. For example, emotional support animals, which provide emotional support, well-being, comfort, or companionship to an individual with disabilities but are not trained to do work or perform tasks, are not considered to be service animals.

**39.3, 39.91****QUESTION: WHAT LIMITATIONS CAN A PVO IMPOSE WITH RESPECT TO CARRYING A SERVICE ANIMAL?****ANSWER:**

\* A PVO may decline to carry a service animal if it is not housebroken or if it is not under the control of its user and the user does not take effective action to control it.

\* A PVO may impose legitimate safety requirements that are necessary for safe operation of the vessel and its facilities. Such safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

\* For example, a PVO could impose a legitimate safety requirement that a service dog not be permitted to enter a sauna or steam room, sit on any surface other than the floor, or join its user in the water of a pool or hot tub. The dog could accompany its handler to the vicinity of the pool, but would need to remain outside the pool, including the “beach” (i.e., the wet deck).

**39.3, 39.91****QUESTION: WHAT QUESTIONS IS IT PERMISSIBLE TO ASK OF A PERSON WITH A DISABILITY CONCERNING A SERVICE ANIMAL?****ANSWER:**

\* A PVO may not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A PVO may ask:

- (1) if the animal is required because of a disability, and
- (2) what work or task the animal has been trained to perform.

\* Generally, a PVO may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

\* In addition, a PVO cannot require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

**39.3, 39.91**

**QUESTION: HOW IS A SERVICE ANIMAL CARED FOR WHILE ON BOARD A VESSEL?****ANSWER:**

- \* The care of the service animal is the responsibility of its user. The PVO is not responsible for the care or supervision of a service animal.
- \* The PVO must permit the user to bring a reasonable quantity of food on board for the animal and, in the case of a vessel with overnight accommodations, provide reasonable refrigerator space for the animal's food that requires refrigeration.
- \* Where a service animal is not permitted to disembark with its user (e.g., because of quarantine restrictions at a foreign port), the regulation provides that the PVO must work with the animal's user to ensure that the animal is properly cared for during the user's absence.
- \* While the PVO is not responsible for the care or supervision of the animal, the PVO should communicate with the passenger so that the passenger understands his/her responsibility to meet the essential needs of the animal (e.g., food, water, elimination) during the passenger's absence. The PVO should also take additional steps to facilitate the accommodation of the service animal in the user's absence (e.g., placing a sign on a cabin door to tell cleaning personnel not to enter).

**39.3, 39.21(b), 39.91****QUESTION: MAY PVOs ESTABLISH POLICIES PROHIBITING OR LIMITING PASSENGERS WITH DISABILITIES FROM TRAVELING WITH ANIMALS?****ANSWER:**

- \*PVOs must permit passengers with disabilities to travel with service animals.
- \*This provision does not mean that PVOs have to allow passengers to bring pets with them on board a vessel. PVOs may establish policies prohibiting or limiting all passengers, including passengers with disabilities, from traveling with animals other than service animals. For example, a PVO could prohibit anyone from traveling with a pet, could decline to transport certain kinds of animals, or could impose conditions on the transportation of animals (e.g., requiring an animal to be on a leash or in a kennel).
- \*Such policies must be nondiscriminatory. For example, a PVO could not impose restrictions on animals accompanying passengers with disabilities that would not apply to animals accompanying other passengers.

\*PVO policies concerning the transportation of animals are, like PVO policies on other matters, subject to the reasonable modification provisions of section 39.21(b). In some circumstances, this may result in PVOs making exceptions to otherwise valid general policies (see next Question and Answer).

### **39.21(b)**

#### **QUESTION: SHOULD PVOs MODIFY POLICIES TO ACCOMMODATE REQUESTS BY PEOPLE WITH DISABILITIES TO TRAVEL WITH ANIMALS THAT DO NOT MEET THE DEFINITION OF SERVICE ANIMALS?**

#### **ANSWER:**

\*Section 39.21 of the rule provides that a PVO must make reasonable modifications to policies, practices, or procedures to avoid discrimination (public entities) or to afford goods, services, facilities, advantages, and accommodations to individuals with disabilities (private entities), unless doing so would fundamentally alter the PVO's services, programs, or activities (public entities) or the PVO's goods, services, facilities, privileges, or advantages (private entities).

\* On some occasions, a passenger with a disability may ask to travel with an animal that does not meet the definition of a service animal, for the purpose of helping the passenger deal with the effects of her or her disability.

\*If transporting such an animal would be inconsistent with the PVO's policies concerning the transportation of animals other than service animals (e.g., a "no pets" policy), the PVO should determine whether (1) it can make a reasonable modification these policies to permit the animal to accompany the passenger, or (2) whether doing so would create a fundamental alteration.

\* This is a case-by-case determination. If in the facts of the specific situation, the PVO can determine that it is able make the requested modification of its policies, practices, and procedures to allow the animal to accompany the passenger, without creating a fundamental alteration, the PVO should make the requested modification. If transporting the animal would result in a fundamental alteration in the situation, the PVO need not modify its policies.

\*The PVO may also, in order to determine whether a reasonable modification of its policies is appropriate, ask questions and seek information or documentation about the animal, its training, and the function it performs for the passenger that go beyond what is appropriate in the case of a service animal.

+ For example, the PVO could require the passenger to provide evidence or documentation that the passenger has a disability requiring assistance from the animal.

+ In the case of someone requesting the accommodation of an emotional support animal, this could include obtaining recent current documentation (i.e., no older than one year from the date of the passenger's scheduled initial flight) on the letterhead of a licensed mental health professional (e.g., psychiatrist, psychologist, licensed clinical social worker, including a medical doctor specifically treating the passenger's mental or emotional disability) stating the following:

- (1) The passenger has a mental or emotional disability recognized in the Diagnostic and Statistical Manual of Mental Disorders—Fourth Edition (DSM IV);
- (2) The passenger needs the emotional support animal as an accommodation for the voyage;
- (3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and
- (4) The date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.

\*A PVO also may require a passenger with a disability seeking to travel with an animal that does not fall within the definition of service animals to provide sufficient advance notice to allow the PVO to determine whether a reasonable modification the PVO's policies is appropriate.

+ The requested advance notice is intended to give the PVO adequate time to check any documentation requested by the passenger and to make the determination of whether granting the request would create a fundamental alteration of the PVO's services.

\*The Department believes that carrying certain kinds of animals (e.g., snakes, other reptiles, ferrets, rodents, and spiders) would create a fundamental alteration of a PVO's services.

\*In determining whether accommodating other animals that do not fall within the definition of service animal (e.g., miniature horses, monkeys) would create a fundamental alteration, a PVO may consider factors such as the type, size, and weight of the animal and whether the vessel can accommodate an animal with those characteristics; whether the passenger has sufficient control of the animal; whether the animal is housebroken or its elimination needs can otherwise be met without causing health or sanitation problems; and whether the animal's presence would compromise legitimate health and safety requirements that are necessary for safe operation of the vessel.

\*If reasonable conditions on the passenger's use of the animal (e.g., the animal could be in the passenger's room but could not accompany the passenger to the dining hall) can mitigate circumstances that would otherwise result in the exclusion of the animal on the

basis of fundamental alteration, the PVO should make a modification subject to those conditions.

### **COVERAGE/APPLICABILITY ISSUES**

#### **39.5**

**QUESTION: ARE PASSENGERS WHO TRAVEL ON A PVO'S VESSEL ONLY BETWEEN TWO FOREIGN PORTS PROTECTED BY THE REQUIREMENTS OF THE RULE?**

**ANSWER:**

\*Such passengers are not covered by the protections of the rule.

\*For example, suppose Passenger X boards a vessel in Los Angeles and travels to Australia, with a stopover in Tahiti. Passenger Y boards the same vessel in Tahiti and travels to Australia. Both passengers disembark in Melbourne. Passenger X is covered by the protections of the rule, while Passenger Y is not.

\*The reason for this distinction is that it would not be appropriate to extend the Department's jurisdiction under the ADA to attempt to cover passengers traveling only between two foreign ports.

\*Nevertheless, to avoid the appearance or reality of unfairly disparate treatment of passengers with disabilities depending on where they board or leave vessels, the Department urges PVOs to treat all passengers equally with respect to disability nondiscrimination matters.

#### **39.5**

**QUESTION: DO THE PROVISIONS OF PART 39 APPLY TO PVOs WHOSE VESSELS PICK UP OR DISCHARGE PASSENGERS AT U.S. PORTS, OR ONLY TO PVOs WHOSE VESSELS PICK UP PASSENGERS AT U.S. PORTS?**

**ANSWER:**

\*There is a discrepancy between the language of the preamble to the Department's regulation and its regulatory text that may cause confusion on this point.

\*The preamble to the rule says that "coverage of foreign-flag vessels would be limited to those that pick up or discharge passengers in the U.S."

\*The regulatory text of section 39.5(b) says that “If you are the PVO of a foreign-flag passenger vessel, this Part applies to you only if your vessel picks up passengers at a [U.S] port...”

\*It is the rule text, rather than the preamble, that controls in terms of establishing legal requirements. Consequently, given the present rule text, a passenger who boards a vessel at a U.S. port and disembarks at a foreign port is covered by the protections of the rule, but a passenger who boards at the foreign port and disembarks at the U.S. port is not.

\*The Department is considering whether to amend the rule text on this matter.

### **39.9**

#### **QUESTION: HOW WILL THE DEPARTMENT IMPLEMENT THE CONFLICT OF LAW WAIVER REQUEST PROVISIONS OF PART 39?**

#### **ANSWER:**

\*Under section 39.9, a PVO may apply for a conflict of law waiver if the legal requirement of a foreign government to which the PVO is subject creates a conflict with the requirements of the Department’s rule.

\*To be considered a conflict under this section, the foreign provision must be legally mandatory (e.g., a statute or a rule) rather than guidance or a recommendation. It must explicitly prohibit something that Part 39 requires or explicitly require something that Part 39 prohibits.

\*The Department would consider, under this provision, conflicts arising from a binding treaty or international agreement as well as from the law of an individual foreign nation.

\*The Department recognizes that new laws are enacted and that existing laws change. The Department would consider future conflict of law waiver requests based on new or changed foreign legal requirements.

\*The Department has no objection to groups of PVOs submitting a joint conflict of law waiver request. For example, suppose six cruise lines are subject to a legal requirement of Country X. The six cruise lines, or a trade association representing them, could submit a single waiver request, rather than having to submit six individual requests. The Department’s response would apply to all six cruise lines.

#### **INFORMATION/COMMUNICATIONS ISSUES**

**39.51, 39.35, 39.37, 39.5**

**QUESTION: HOW IS IT DETERMINED WHAT KIND OF AUXILIARY AID OR SERVICE A PVO WILL PROVIDE TO A PASSENGER WITH A DISABILITY?**

**ANSWER:**

\*Under Part 39, a PVO has the responsibility to ensure effective communication with persons with disabilities, by use of auxiliary aids or services where needed. The ultimate decision about what means of communication to use rests with the PVO, as long as the method chosen results in effective communication.

\*The type of auxiliary aid or service needed to ensure effective communication will vary in accordance to with the method of communication used by the passenger; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.

\*The PVO should consult with passengers with disabilities whenever possible to determine what type of auxiliary aid or service is needed to ensure effective communication.

\*To facilitate arrangements, a passenger should notify the PVO as soon as possible if he or she seeks a particular auxiliary aid or service (e.g., a document in Braille or large print, use of a sign language interpreter or a TTY). The PVO and the passenger should consult about these matters so that a decision about what auxiliary aid or service to provide can be made in a timely manner.

\*Because locating a sign language interpreter to provide services to a passenger on some types of voyages can be time-consuming and difficult for PVOs, it is particularly important for passengers to make requests for this service as soon as possible,

**39.51, 39.35, 39.37, 39.5**

**QUESTION: WHAT ADVANCE NOTICE CAN A PVO REQUIRE IN ORDER TO PROVIDE A PARTICULAR AUXILIARY AID OR SERVICE?**

**ANSWER:**

\*A PVO may request that a passenger provide reasonable advance notice to obtain a particular auxiliary aid or service that the passenger wants. The purpose of the advance notice is to allow the PVO adequate time to consult with the passenger concerning the request and to make arrangements for the particular aid or service.

\*The amount of advance notice the PVO should request is not specifically stated in the rule. The 72-hour time period stated in section 39.37(b) with groups of 10 or more



persons with disabilities traveling together does not apply to requests for particular auxiliary aids and services. A PVO should ask for a reasonable amount of advance notice, meaning enough to determine what aid or service is most appropriate and to make sure that the aid or service is provided in a timely fashion.

\*Where the aid or service requested involves an additional person traveling on a cruise ship (e.g., a sign language interpreter), additional travel and security requirements (e.g., Transportation Security Administration rules) may need to be taken into account in determining the amount of advance notice that is needed in such a situation.

\*The Department urges passengers who request specific auxiliary aids and services to contact the PVO with their requests as soon as possible (e.g., at the time of reservation for a cruise). This will help the PVO arrange for effective communication with the passenger.

\*If sufficient advance notice is not provided, preventing a requested aid or service from being made available in a timely manner or at all, the PVO should still make its best effort to ensure that effective communication is provided.

### **39.53**

#### **QUESTION: WHAT INFORMATION ARE PVOs RESPONSIBLE FOR PROVIDING TO PASSENGERS WITH DISABILITIES CONCERNING ACCESSIBILITY MATTERS?**

#### **ANSWER:**

\*Before scheduling a trip or booking a cruise, passengers with disabilities should be able to know what barriers they may encounter. The accessibility of vessels and off-vessel activities are likely to be important factors in passengers' decisions about whether to take a particular trip.

\*PVOs are expected to know conditions on board their own vessels. For example, if a person with a disability asks about the dimensions or features of a cabin, whether there is accessible vertical access between the deck where his or her cabin would be located and a restaurant or theater, how assistance in boarding will be provided, or what portions or facilities of the vessel may not be accessible to a wheelchair user, the PVO should be able to provide this information readily.

\*If a PVO itself provides a shore excursion or activity, it is expected to know and provide information about accessibility related to that excursion or activity.

\*If, as more commonly is the case, the PVO advertises and/or sells a shore excursion or activity provided by a third party, the PVO is expected to know and make available, upon

request, basic information about accessibility related to that excursion or activity. For example, if there is an excursion involving a tour bus, the PVO is expected to be able to inform a passenger using a wheelchair whether the bus is accessible (e.g., is equipped with a lift and a securement area).

\*However, a PVO may well not know whether destinations on a shore excursion are accessible (e.g., whether a foreign tourist attraction or restaurant at which a tour bus is stopping makes adequate accommodations for passengers with disabilities). While it is not expected that PVOs have all this information readily available, PVOs should make their best efforts to inquire on behalf of passengers who ask about such accommodations.

\*PVOs should inform passengers with disabilities, especially those with mobility impairments, about ports of call on a trip where ship-to-shore transfers are made via tenders (i.e., smaller boats that shuttle passengers between ship and shore). This is because a transfer between the vessel and the tender is likely to be problematic for wheelchair users and other persons with significant mobility impairments.

\*Generally, PVOs should be in a better position than individuals with disabilities to obtain information about such matters as the accessibility of ports and the applicability of quarantine regulations to service animals. While PVOs can recommend resources to passengers to learn information about these matters, this does not discharge PVOs' duties to passengers with disabilities. Saying to a passenger "Go look it up yourself on the internet" is not an adequate response to a passenger's accessibility question.

\*For example, suppose a passenger asks about quarantine regulations at a foreign port. When the PVO knows this information (e.g., for a frequently-visited or major port at which the vessel will call), the PVO should provide the information to the passenger at the time of the passenger's request. The PVO may not know up-to-date quarantine regulations at every port, but can make a good faith attempt to learn requested information in response to the passenger's request, in addition to suggesting information sources that the passenger could attempt to access. In any event, the PVO would not be responsible for the application of quarantine requirements at a foreign port that limited the passenger's ability to bring his or her service animal ashore.

## **WHEELCHAIR ACCESS ISSUES**

**39.83**

**QUESTION: WHAT CONSIDERATIONS APPLY TO PVOs' OBLIGATION TO PROVIDE ASSISTANCE TO PASSENGERS WITH DISABILITIES WITH RESPECT TO BOARDING AND DISEMBARKING FROM VESSELS?**

**ANSWER:**

\*Passengers with disabilities should be able to experience all aspects of a cruise or other passenger vessel operation available to passengers without disabilities.

\*Where this involves having to get on and off a vessel, the PVO has an obligation to provide assistance to the passenger to enable him or her to do so.

\*The Department recognizes that there may be occasional circumstances in which it is impracticable to ensure that a passenger can get on or off the vessel (e.g., because of adverse weather, tidal, or sea conditions). Part 39 does not require transfers to or from a vessel where a transfer would be contrary to legitimate safety requirements.

\*A PVO may use any method acceptable to the passenger to provide assistance in getting on and off the vessel (e.g., lifts, ramps, boarding chairs, assistance by PVO personnel in pushing a wheelchair or guiding a blind passenger).

\*The PVO should be sure to ask the passenger whether he or she wants or needs assistance and about the method of assistance the passenger prefers.

\*Except in emergencies, the Department strongly discourages hand-carrying (i.e., picking up a passenger physically in the arms of PVO personnel) as a means of providing assistance, since it raises serious safety and dignity concerns.

### **39.95**

**QUESTION: UNDER WHAT CIRCUMSTANCES IS A PVO REQUIRED TO COMPENSATE A PASSENGER WITH A DISABILITY FOR LOSS OF OR DAMAGE TO A WHEELCHAIR OR OTHER ASSISTIVE DEVICE?**

**ANSWER:**

\*Generally, a PVO must compensate a passenger with a disability for the full value (measured by the original purchase price) of a lost or damaged wheelchair or mobility device.

\*This obligation applies in any situation in which the device is under the control or care of the PVO or a party acting on behalf of the PVO (e.g., an agent or contractor).

\*However, there may be circumstances in which a wheelchair or mobility device is damaged as the result of action by the passenger, who is in control of the device at the time. For example, a passenger riding a scooter might run into a fixed object, damaging the scooter. In such a case, the PVO would not be responsible for compensating the owner.

**COMPLAINTS RESOLUTION OFFICIAL ISSUES**

**39.101****QUESTION: WHAT MEANS MAY BE USED TO COMMUNICATE WITH COMPLAINT RESOLUTION OFFICIALS (CROs)?****ANSWER:**

\*The regulation specifically mentions contacting CROs in person or via telephone.

\*Other equivalent means of communication are permitted, as long as they provide effective communication with the passenger with a disability. For example, a variety of electronic means of communication could work.

\*It should be emphasized that leaving a message for a CRO (e.g., voice mail, email) that the CRO would return only later is not sufficient. The means of communication provided must ensure direct, interactive contact between the passenger and the CRO.

**39.101****QUESTION: WHAT IS MEANT BY A “DISPOSITIVE” RESPONSE” FROM THE CRO TO A WRITTEN COMPLAINT?****ANSWER:**

\*The word “dispositive” is used in its dictionary sense: “[an action] that disposes of, or settles, a dispute, question, etc.; conclusive; decisive.” It is intended to be the PVO’s final word on the matter.

\*The dispositive response should summarize the facts of the matter, as the CRO understands them.

\*The dispositive response then says one of two things:

- (1) The PVO acted in accordance with the regulation, or
- (2) The PVO did not act in accordance with the regulation.

It is possible that, with respect to some complaints, the CRO will conclude that the PVO acted in accordance with the regulation in some respects but not in others. In any case, the CRO’s responses should explain why the PVOs actions were consistent with the regulation or not.

\*If the CRO concludes that the PVO did not act in accordance with the regulation, the response should offer appropriate redress to the passenger.

**39.103****QUESTION: MAY CROs MAKE INTERIM RESPONSES TO COMPLAINTS?****ANSWER:**

\*Complaints should be as detailed and specific as possible, and should be filed as soon as possible after the matter that gave rise to the complaint.

\*If a written complaint is filed more than 45 days after the matter giving rise to the complaint, the CRO is not required to respond.

\*If the complaint does not have enough information to permit the CRO to make a decision, or if the CRO needs to make an extended factual inquiry to determine the facts of the matter, the CRO may provide an interim response to the complainant, within 30 days of receiving the complaint.

\* The interim response should state the reasons for needing additional time and inform the complainant of when the CRO expects to issue a determination.

\*Overuse or abuse of interim responses (e.g., routine issuance of interim responses because of insufficient resources to respond in a timely manner) may result in a finding of noncompliance.

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<sup>i</sup> One section of Part 39, concerning reservations for cabin accommodations, does not take effect until January 3, 2012.