



June 22, 2007

Docket Management Facility  
U.S. Department of Transportation  
400 Seventh Street, S.W.  
Nassif Building, PL-401  
Washington, DC 20590-0001

**RE:** Department of Transportation Docket Number OST-2007-26829

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comment on the U.S. Department of Transportation's (DOT) Notice of Proposed Rulemaking (NPRM) concerning Transportation for Individuals with Disabilities: Passenger Vessels, published January 23, 2007, at 72 FR 2833.

### ***About APTA***

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including transit systems; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems. Our member transit systems provide the vast majority of public transit ferry trips throughout the nation.

### **The Rulemaking Should be Deferred until Physical Accessibility Requirements are Established**

The preamble language in this NPRM acknowledges the ongoing work of the Access Board in establishing physical accessibility requirements for the vessels affected by this proposed rule and DOT's intent to cooperate in the Access Board's process. We believe it is impractical to attempt to establish operational rules in advance of those accessibility requirements. The industry cannot reasonably foresee all the operational issues likely to grow from the final physical accessibility requirements until we know what those physical requirements are, since the issues are inextricably intertwined. DOT should defer this rulemaking until the accessibility requirements are established and Passenger Vessel Operators (PVO) can provide informed comments on those issues. This deferral would be relatively short since the Access Board is reviewing comments

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based on its July 7, 2006 draft. The fact that DOT has not issued regulations in this area during the more than sixteen years that have passed since passage of the Americans With Disabilities Act makes the delay even less substantial.

Additionally, we find it inappropriate for DOT to assert that the proposed rule “does not impose significant costs” since it is impossible to calculate the magnitude of likely cost impacts until physical accessibility implications are factored in. A comprehensive regulatory assessment is required before making any conclusion on the likely costs of implementing this proposed regulation. DOT cannot simply conclude compliance costs would be insignificant without conducting an objective, auditable analysis of those costs.

### **Reasonable Modification Should be Excised from the Proposed Rule**

Proposed section 39.21(b) introduces the concept of ‘reasonable modification’ into the obligations of PVO. The preamble language discussing this significant obligation merely states it is “parallel to the general nondiscrimination requirements in the Department’s other disability-related rules.” This statement is inaccurate and misleading. The Department first introduced the concept of reasonable modification in its February 27, 2006 NPRM related to public transit and rail systems. That rulemaking drew over 300 comments that evidenced strong opposition to the proposed introduction of the term into a long-standing rule. Moreover, review of the Department’s historical enforcement of 49 CFR Part 37 finds only one instance where the phrase is even used. In fact, reasonable modification is not part of the Department’s other disability-related rules and should not be portrayed as such.

Administration of the concept of reasonable modification, enforced by the Federal Transit Administration despite the fact that the February 27, 2006 rulemaking has yet to be completed, has proven an onerous task. Public transit systems have spent excessive time and resources demonstrating that patently unreasonable modifications are “unduly burdensome or require a fundamental alteration in the nature of the ... service.” We believe overlaying this poorly-defined standard on other portions of the public transportation sector will draw precious public transit dollars from service provision to administrative tasks with no real improvement in the services provided to passengers with disabilities. Moreover, it will limit public transit agencies’ ability to take advantage of funding available through the New Freedom program to improve transportation opportunities for those riders since use of New Freedom funds is limited to service improvements beyond the requirements of the Americans With Disabilities Act.

### **The Definition of Wheelchair is Inconsistent with Other DOT Requirements**

The proposed definition of wheelchair essentially leaves the definition open ended, virtually assuring that no PVO will be confident of its compliance and that safety issues will further detract from the ability of public transit agencies to provide necessary transportation services. By adding the poorly-defined references to ‘assistive devices,’ DOT has removed all certainty and objectivity from the process of determining

compliance. With this expanded definition, a rider with a Segway or similar device could not reasonably be refused access to a vessel, regardless of the obvious dangers inherent in riding such a device aboard a ship or ferry, whether in port or under way. In addition, the PVO cannot ask a Segway rider seeking to board for documentation to establish whether the device is in fact being used as a *bona fide* mobility device at all. The failure of DOT to explore the safety aspects of allowing these non-wheelchair devices in public transportation vehicles will certainly lead to litigation and costs for public transit agencies. Moreover, the failure to align the definition with those applicable to land-based public transit and highways may well lead to a situation where a Segway user that leaves a ferry cannot lawfully operate the Segway on the public sidewalks at their destination. DOT should consistently use the wheelchair definition in 49 CFR Part 37 and the ADAAG.

Further, in light of the recent Access Board request for comments regarding potential revisions of the Accessibility guidelines for Buses and Vans, it is clear that additional discussion is needed on standards defining wheelchairs and other assistive devices suitable for safe transportation, their characteristics, size, maneuverability, and compatibility with restraint systems integral to safety.

### **The Lack of Facility Guidelines and Consistency and the Failure to Differentiate Between Ferries in Transit Service and Cruise Ships Will Further Complicate Accessibility**

As drafted, the rule would make ferry operators responsible for “facilities” based on its dominion over those facilities when the ferry is docked. While recognizing that entities subject to different regulatory schemes own, lease, or control those facilities, the proposed rule fails to foresee the impracticality of establishing ‘shared responsibility’ in the face of differing requirements. In its own rulemaking related to public transit and railroads, DOT has seen ample evidence of such impracticality concerning level boarding of passenger trains operating along freight rails. Those difficulties can only be magnified by the more attenuated relationship between Title II and Title III standards and less regulated nature of docks vis-à-vis rail facilities. The queries in the rulemaking concerning multiple PVOs and ‘infrequent’ facility use only demonstrate just how complicated these relationships will necessarily be. DOT should withdraw this proposed rule until such time as it is ready to offer concrete draft language for public comment. Open ended queries such as these are more appropriate for an *Advanced* Notice of Proposed Rulemaking (ANPRM) and, when used in an NPRM, effectively negate the opportunity for public comment.

Transit ferry operations must be differentiated from cruise ships and others. The fundamental differences in equipment, trip duration, and trip purposes must be accounted for. The proposed approach ignores these differences to the detriment of persons with disabilities and those public transit agencies that provide ferry service to them. Passengers taking a relatively brief commuter ferry trip have very different interests, needs, and expectations from those on a recreational cruise.

Moreover, true accessibility requires consistency – in this case a holistic approach that encompasses surface and air transportation, facilities, and public streets and sidewalks in addition to watercraft. DOT should work with the Access Board, DOJ, and the public to ensure this holistic approach is followed and the rules remain consistent across all applications. This is not to say that the rules must be identical. Differences will necessarily remain based on differences in equipment, purposes, and – as in the case of transit service ferries and cruise ships – trip duration.

It would be helpful if DOT better explained its anticipated enforcement strategy, standards, and mechanisms. The Federal Transit Administration, while responsible for public transportation, has no jurisdiction over any aspect of non-transit passenger vessel operations and the U.S. Coast Guard is no longer part of DOT. How does the Department propose to measure compliance with this proposed regulation?

### **Final Comment**

As reflected in the comments above, we believe this NPRM is premature. DOT should withdraw the proposal in favor of further progress by the Access Board, appropriate information gathering by ANPRM or otherwise, thorough vetting of the inconsistencies between this and other regulations of the Department, and coordination with rules applicable to facilities.

We appreciate the opportunity to assist DOT in this important aspect of providing reliable, consistent access to public transportation vehicles and facilities for passengers with disabilities and stand willing to participate in the discussions, research, and standards definition activities necessary to assure that access. For additional information, please contact James LaRusch of APTA's Executive Office at (202) 496-4808 or email [jlarsch@apta.com](mailto:jlarsch@apta.com).

Sincerely yours,



William W. Millar  
President

WWM/cbo