

PUPS, PAPERWORK, AND PROCESS:
CONFUSION AND CONFLICT REGARDING
SERVICE AND ASSISTANCE ANIMALS
UNDER FEDERAL LAW

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INTRODUCTION

If an average person who lives with a dog were asked to describe the connection between “papers and dogs,” he or she may talk about American Kennel Club (AKC) registration.¹ Some people might also reference dogs who are “paper trained.”² However, individuals with disabilities, partnered with service or assistance dogs, may immediately think of the demands for documentation that they have been subject to when trying to enter businesses or rent housing.³ According to national surveys, the percentage of persons with disabilities in the United States is increasing.⁴ The number of persons with disabilities who

¹ *Frequently Asked Questions*, AM. KENNEL CLUB, https://www.apps.akc.org/apps/contact/answer_center/faq_dogreg.cfm [<https://perma.cc/PMK5-3JST>] (last visited Feb. 17, 2020) (listing a question, “My dog is a purebred, but it didn’t come with any papers. . . . Can I still register it with AKC?” and referring to “AKC papers”). AKC papers do not indicate quality, a dog with AKC-registered papers only means that the parents of the dog and litter are registered with the AKC. *American Kennel Club Registration*, LOUISVILLE KENNEL CLUB, <http://www.louisvillekennelclub.org/new-akc> [<https://perma.cc/GRL9-BQ97>] (last visited Feb. 17, 2020); *Dog Owner Runs into Problems over AKC Registration*, WRAL (Apr. 2, 2009), <https://www.wral.com/5onyourside/story/4879531/> [<https://perma.cc/BS63-XXZG>]. AKC papers do not guarantee a purebred dog, and there are no qualifications regarding the temperament or health of the dogs. *Id.* AKC registration also does not necessarily guarantee the welfare of the dogs used in breeding programs. Jeff Rossen & Avni Patel, *AKC-Registered Breeders Raising Dogs in ‘Miserable’ Conditions*, TODAY (May 1, 2013, 4:37 AM), <https://www.today.com/news/akc-registered-breeders-raising-dogs-miserable-conditions-6C9640008> [<https://perma.cc/7DB7-ABE4>] (discussing concerns over AKC-registered dogs from some breeders that in 2013 the AKC had only nine inspectors to cover the entire country). The AKC’s program does provide that an inspection can be triggered by complaints. *Inspection FAQs*, AM. KENNEL CLUB, <https://www.akc.org/inspections-and-compliance/inspection-faqs/> [<https://perma.cc/MKH8-XTFZ>] (last visited Feb. 17, 2020). The AKC’s inspection includes determining if the breeder is in compliance with its Care and Conditions of Dogs Policy, which provides guidelines for care, housing and operations. *Registration Policies: Care and Conditions of Dogs Policy*, AM. KENNEL CLUB, <https://www.akc.org/rules/policy-manual/policy-manual-registration/> [<https://perma.cc/BF37-WS6S>] (last visited Feb. 17, 2020).

² A “paper-trained” dog has been trained to eliminate waste on a pad or in a litter box designed for dogs. *See How to Paper Train Small Dogs*, ANIMAL PLANET, <http://www.animalplanet.com/pets/how-to-paper-train-small-dogs/> [<https://perma.cc/BL4J-DJYX>] (last visited Feb. 17, 2020) (discussing options and training).

³ *Fake Service Dogs, Real Problem or Not?: Hearing on the Possible Use of Fake Service Dogs and Fake Identification by Individuals to Obtain Special Access to Housing, Public Places or Airports/Airlines for Their Animal Before the S. Bus., Professions & Econ. Dev. Comm.* 10 (Cal. 2014) [hereinafter *California Senate Background Paper*] (Background Paper) (discussing confusion between emotional support animals and service animals partnered with individuals with psychiatric disabilities).

⁴ LEWIS KRAUS, 2016 DISABILITY STATISTICS ANNUAL REPORT 2 (2016) (reporting that “[t]he percentage of people with disabilities in the [United States] rose from 11.9 [percent] in 2010 to 12.6 [percent] in . . . 2015.”). The percentage of people with disabilities increases

choose to partner with service animals for assistance also appears to be growing.⁵ Even though the Americans with Disabilities Act (ADA) regulations regarding the permissible inquiries a public accommodation may make are straightforward, media reports and litigation, have made it clear that there is still widespread confusion.⁶ It is even more challenging for housing providers to determine their obligations under the Fair Housing Amendments Act (FHA).⁷ Although the Air Carrier Access Act (ACAA) regulations that became

with age; however, over half of the people with disabilities are in the eighteen to sixty-four age group. *Id.*; see also Elizabeth A. Courtney-Long et al., *Prevalence of Disability and Disability Type Among Adults—United States, 2013*, CDC: MORBIDITY & MORTALITY WKLY. RPT. (July 31, 2015) (reporting that, in a survey of U.S. households, 22.2 percent of adults reported a disability). This was a higher percentage than was reported when researchers began collecting data in 1998. *Id.*

⁵ *California Senate Background Paper*, supra note 3, at 7 (estimating the number of task-trained service dogs in the United States to be between 100,000 and 200,000); Barbara Handelman, *Service Dogs: Ethics and Education*, INT’L ASS’N ANIMAL BEHAV. CONSULTANTS J. (2016) (reporting on the demand for trained service dogs); see also Mariko Yamamoto et al., *Registrations of Assistance Dogs in California for Identification Tags: 1999–2012*, 10 PLOS ONE 1, 1 (2015), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0132820&type=printable> [<https://perma.cc/43CH-QZ4Y>] (analyzing registration information and finding there has been a sharp increase in the number of service dogs registered in the state).

⁶ *E.g.*, Andy Alcock, *Service Animal Thrown Out of Hospital*, WCTV (last updated Jan. 28, 2014, 8:32 PM), <http://www.wctv.tv/home/headlines/Service-Animal-Thrown-Out-Of-Hospital-242494921.html> [<https://perma.cc/GDB7-MJ9F>] (reporting on an individual who was visiting a friend, who was told by hospital personnel that her service dog posed a security risk). The service dog was described as a pit bull in the media report. *Id.* The Florida State Attorney at the time declined to prosecute the hospital personnel for violating the Florida law protecting individuals with disabilities, stating, “I don’t see how having a pit bull running loose with you qualifies as a service dog” (quoting Willie Meggs, Fla. State Attorney). *Id.*; see also Holly V. Hays & Vic Ryckaert, *Bias Claims Highlight Confusion Over Service Dog Law*, INDYSTAR (Oct. 11, 2017, 5:51 PM), <https://www.indystar.com/story/news/2017/10/11/accusations-discrimination-highlight-confusion-over-service-dogs-and-law/753655001/> [<https://perma.cc/8ZZF-5S6K>] (reporting on conflict at an apple picking orchard). As discussed below, the ADA regulations and guidance applicable to public accommodations require a case-by-case determination over whether an individual service dog poses a direct threat before it can be excluded, regardless of the dog’s breed. *Infra* note 48 and accompanying text (setting forth applicable language in regulations and guidance); see also Rebecca J. Huss, *Hounds at the Hospital, Cats at the Clinic: Challenges Associated with Service Animals and Animal-Assisted Interventions in Healthcare Facilities*, 40 U. HAW. L. REV. 53, 63–75 (2018) [hereinafter Huss, *Hounds at the Hospital*] (analyzing disputes regarding service animal access involving healthcare facilities).

⁷ *E.g.*, Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD Approves Discrimination Agreement Between California Fair Housing Group and Marin County Landlords (Aug. 8, 2017) (reporting on a conciliation agreement resolving a dispute over a service animal in housing); Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD Charges Massachusetts Housing Providers with Discriminating Against Residents with Disabilities (Aug. 20, 2018) (reporting on HUD charging property owners and their management company with housing discrimination on the basis of disability relating to not allowing dogs in properties); Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD Charges Oklahoma Landlords with Discriminating Against Veteran with Disabilities (Feb. 7, 2017) (reporting on a dispute with an Oklahoma landlord who refused to waive a pet fee in connection with an assistance animal);

effective in 2009 were drafted in a way to facilitate a layperson's use, problems that arose in recent years triggered a recent rulemaking process.⁸ There are important distinctions among these statutes regarding what animals qualify as service or assistance animals and how to determine whether a person should be granted an accommodation.⁹

Complicating the issue is the perception by some that there is pervasive fraud being perpetrated by persons who are not entitled to have their dogs with them in public accommodations, housing, and on aircraft.¹⁰ There is regular media speculation that an increasing number of people misrepresent companion animals as service or assistance animals.¹¹ Entities that are required to allow

Nick Ferraro, *West St. Paul Apartment Owner Sued Over Bias Against Army Vet, His Support Dog*, PIONEER PRESS (Oct. 9, 2017, 7:26 PM), <https://www.twincities.com/2017/10/09/west-st-paul-apartment-lawsuit-army-veteran-support-dog/> [<https://perma.cc/34FA-CLYL>] (reporting on filing of complaint with the U.S. Department of Housing and Urban Development by a veteran alleging discrimination by a landlord over his emotional support dog).

⁸ Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27,614 (May 13, 2008) (to be codified at 14 C.F.R. pt. 382), as corrected by Nondiscrimination on the Basis of Disability in Air Travel, 74 Fed. Reg. 11,469 (Mar. 18, 2009) (to be codified at 14 C.F.R. pt. 382) [hereinafter 2009 Final Rule] (setting forth the effective date in May 2009 and discussing the question-answer format); *see also* Traveling by Air with Service Animals, 83 Fed. Reg. 23,832 (May 23, 2018), (to be codified at 14 C.F.R. pt. 382) (seeking comment on ACAA regulations); Lauren Etter, *Opening Statements: When Dogs and Cats and Horses and Pigs Fly*, A.B.A. J. 10, 10, 12 (Apr. 2014) (discussing media attention paid to issues arising under the Air Carrier Access Act but stating there are “more disputes over the use of service animals are related to housing, partly because housing law is more diverse.”).

⁹ *See infra* Parts I and II (discussing definitions and process to determine whether an individual with a disability accompanied by an animal should be accommodated). During the ACAA Reg-Neg process, discussed *infra* Section III.C, the working group of individuals focusing on service animal issues developed a definition matrix setting forth their view of the different definitions and other issues relating to the various acts. *Service Animal Definition Matrix—Air Carrier Access Act vs. Americans with Disabilities Act*, U.S. DEP'T TRANSP. 1 (July 1, 2016), https://www.transportation.gov/sites/dot.gov/files/docs/P3.SA_HUD%20Matrix.6-28-6.pdf [<https://perma.cc/NLR3-WHWL>]. Note that although there are similarities in the Department of Transportation's (DOT) Americans with Disabilities Act regulations and the regulations promulgated by the DOJ relating to Title II and Title III of the ADA for public accommodations and public entities, there are some distinctions. *See infra* note 26 and accompanying text.

¹⁰ *See California Senate Background Paper, supra* note 3, at 11–12; Beth Teitell, *Service Dogs Barred, Doubted, and Deeply Treasured*, BOS. GLOBE (Sept. 18, 2013, 1:28 AM), <https://www.bostonglobe.com/lifestyle/2013/09/18/the-growing-number-dogs-assisting-people-with-invisible-conditions-causing-conflict-and-some-cases-confrontation/igPnUBYHa97K07ccBGJJVJ/story.html> [<https://perma.cc/4HK6-FHJU>] (discussing conflicts between persons with less apparent disabilities being partnered with service animals and conflicts occurring with people who are skeptical over the need for the service animal); *infra* Part IV (discussing the issue of misrepresentation).

¹¹ *See, e.g., California Senate Background Paper, supra* note 3, at 11–13 (reporting on issues relating to fraud); Hal Herzog, *Service Animal Scams: A Growing Problem*, PSYCHOL. TODAY (June 11, 2014), <https://www.psychologytoday.com/us/blog/animals-and-us/201406/service-animal-scams-growing-problem> [<https://perma.cc/FN3E-7TPN>] (reporting on

access to persons utilizing service animals are apprehensive about problems with persons without disabilities using “‘fake’ service dogs” on their premises.¹² Persons with disabilities raise concerns that they have more difficulty obtaining access to businesses and housing when they are accompanied by legitimate service or assistance animals.¹³ Based on recent legislation introduced in several states, the current federal system is not addressing these concerns.¹⁴

This Article begins by providing background information on the current ADA regulations governing public accommodations and public entities’ interaction with persons with disabilities who utilize service animals.¹⁵ The issue of service animals under Title I of the ADA, protecting persons with disabilities in the area of employment, is also considered.¹⁶

The Article then contrasts the language of the ADA regulations with the guidance provided by the Department of Housing and Urban Development (HUD) for housing providers subject to the FHA.¹⁷ Recent relevant case law interpreting the guidance will be utilized to assist in providing context.¹⁸ The

ways that people misrepresent service and assistance animals and companies that sell certifications); *Laws Aim to Crack Down on Fake Service Dogs*, CBS NEWS (Apr. 11, 2017, 11:47 AM), <https://www.cbsnews.com/news/service-dogs-laws-imposter-pets-illegal/> [https://perma.cc/URW7-A4VV] (reporting on concerns and state laws addressing issue); Michael Ollove, *Several States Crack Down ‘Fake’ Service Animals*, USA TODAY (Oct. 29, 2017), <https://www.usatoday.com/story/news/2017/10/29/several-states-crack-down-fake-serviceanimals/807676001/> [https://perma.cc/H2EY-QTRT]. The issue has even arisen in a fictional television show when a character from the series *Madam Secretary* told his landlord that a friend’s dog he wanted to bring to his no-pets apartment was a support dog. Sarah Luoma, *Madam Secretary Recap 01/13/19: Season 5 Episode 12 “Strategic Ambiguity”*, CELEB DIRTY LAUNDRY (Jan. 13, 2019), <https://www.celebdirtylaundry.com/2019/madam-secretary-recap-01-13-19-season-5-episode-12-strategic-ambiguity/> [https://perma.cc/9K8G-Z7BB]. The reported health benefits resulting from interaction with animals has been called into question by some. Kate Thayer, *Despite the Popularity of Emotional Support Animals, Experts Say There’s Little Evidence They Work*, CHI. TRIB. (May 30, 2018), <https://www.chicagotribune.com/lifestyles/ct-life-emotional-support-animals-evidence-20180521-story.html> [https://perma.cc/PX3H-7UCG] (reporting that studies have had mixed results); see also Rebecca J. Huss, *Canines at the Company, Felines at the Factory: The Risks and Rewards of Incorporating Service Animals and Companion Animals into the Workplace*, 123 DICKINSON L. REV. 363, 388–89 (2019) [hereinafter Huss, *Company*] (discussing concerns over some of the methodology utilized to support claims of the benefits of interaction with animals).

¹² *California Senate Hearing Background Paper*, *supra* note 3, at 12. Entities also raise concerns that they could have possible liability due to a fake service animal causing harm while on the premises. *Id.* at 13.

¹³ *Id.* at 12; *Laws Aim to Crack Down on Fake Service Dogs*, *supra* note 11 (reporting on how fake service dogs can negatively impact the public’s perception of real service dogs).

¹⁴ See *infra* Section IV.A (discussing state laws intended to combat fraud).

¹⁵ See *infra* Section I.A–B.

¹⁶ See *infra* Section I.C.

¹⁷ See *infra* Sections II.A–B.

¹⁸ See sources cited *infra* notes 81, 84, 88–89.

next part of the Article focuses on the turmoil surrounding the ACAA regulations governing access for airline passengers with service animals.¹⁹

The Article considers ways in which some states have addressed the concern of misrepresentation of the status of service or assistance animals, focusing on the process of documenting the need for a service or assistance animal.²⁰ An analysis of the law in British Columbia, Canada, on service dog teams is included to illustrate how a formalized system of certification could be implemented.²¹ The Article concludes by providing recommendations for persons who are required to follow these laws and the beneficiaries of the protection of the laws to reduce the likelihood of conflict over access.²²

¹⁹ See *infra* Sections III.A–C.

²⁰ See *infra* Section IV.A.

²¹ See *infra* Section IV.B.

²² See *infra* RECOMMENDATIONS. Although ethical and welfare issues relating to an animal acting in the role of a service or assistance animal should always be considered, that topic is beyond the scope of this Article. The author has addressed these issues in previous articles. See, e.g., Rebecca J. Huss, *A Conundrum for Animal Activists: Can or Should the Current Legal Classification of Certain Animals Be Utilized to Improve the Lives of All Animals? The Intersection of Federal Disability Laws and Breed-Discriminatory Legislation*, 2015 MICH. ST. L. REV. 1561, 1565–67 (2015) [hereinafter Huss, *Conundrum*] (discussing some theoretical issues in the context of companion animals, including those serving as assistance animals); Huss, *Company*, *supra* note 11, at 404–05 (discussing some considerations relating to the treatment of animals and providing examples of philosophical work in recent years focusing on ethical issues involving companion animals); Huss, *Hounds at the Hospital*, *supra* note 6, at 108–12 (analyzing ethical and welfare concerns relating to animal-assisted interventions); Rebecca J. Huss, *Re-Evaluating the Role of Companion Animals in the Era of the Aging Boomer*, 47 AKRON L. REV. 497, 546–49 (2014) (raising ethical issues in connection with animal-assisted activities and service animals). Although commentators have proposed changing the status of animals as property—which results in humans determining if an animal will serve as an assistance animal—it does not appear that the legal status of animals is likely to change in the near future. Huss, *Conundrum*, *supra* note 22, at 1563–65 (considering the property status of animals); Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 68–71 (2002) (analyzing some of the theories regarding the status of animals as property).

I. AMERICANS WITH DISABILITIES ACT²³

A. Title II and Title III—Public Entities and Public Accommodations

It has been over ten years since the Department of Justice (DOJ) proposed new regulations amending Titles II and III of the ADA.²⁴ Titles II and III of the ADA provide rights relating to access to public entities (state and local) and places of public accommodations for individuals with disabilities.²⁵ The regulations governing Title I of the ADA (protecting individuals with disabilities in regards to employment) were not amended at the same time and will be covered separately.²⁶

²³ The ADA is a federal law that prohibits discrimination on the basis of disability in a variety of contexts. 42 U.S.C. §§ 12101–12213 (2018). Section 504 of the Rehabilitation Act of 1973 also prohibits discrimination and is applicable if an entity is receiving federal funding. 29 U.S.C. § 794 (2018). The Rehabilitation Act will not be analyzed separately in this Article. Recent case law has reiterated that the analysis of an individual’s right to be accompanied by a service animal under the Rehabilitation Act should utilize the language of the ADA service animal regulations. *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 120 (3d Cir. 2018) (stating that “logic dictates that the service animal regulations, although technically interpreting the ADA, are no less relevant to the interpretation of the RA.”); see also HENRY H. PERRITT, JR., 1 AMERICANS WITH DISABILITIES ACT HANDBOOK § 1.02 (5th ed. 2018) (discussing how cases interpreting the ADA have been used as guidance in Rehabilitation Act cases and vice versa).

²⁴ Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1174 (2010) [hereinafter Huss, *Context*] (providing a brief history of the rulemaking process for the ADA that resulted in the service animal regulations effective in March 2011).

²⁵ See 42 U.S.C. §§ 12131–12165, 12181–12189 (2018). Although generally it is uncontroversial whether an entity is considered a public accommodation, there still are situations where this factor can be important. *Compare* *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 176–78 (3d Cir. 2019) (discussing the circuit split regarding whether plasma donation centers should be considered public accommodations under the ADA and finding the center at issue should be considered a public accommodation), *with* *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325, 329–32 (5th Cir. 2018) (finding a plasma donation center would not be considered a public accommodation under the ADA). Note that in a subsequent hearing, the Texas Supreme Court held that the plasma facility was a “public facility” under the Texas Human Resources code. *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 60–64 (Tex. 2019) (holding a plasma collection center was a “public facility” under Texas law).

²⁶ See *infra* Section I.C (discussing Title I’s interactive process); see also Huss, *Company*, *supra* note 11, at 372–88 (analyzing issues relating to service animals under Title I of the ADA). Note that, although there are similarities in the Department of Transportation’s (DOT) Americans with Disabilities Act regulations and the regulations promulgated by the DOJ relating to Title II and Title III of the ADA for public accommodations and public entities, there are some distinctions. *Service Animal Definition Matrix*, *supra* note 9. The DOT issued guidance in 2011 and 2015 emphasizing that the DOT’s ADA regulations were unaffected by the DOJ’s adoption of regulations effective in March 2011. *DOJ Rule on Service Animals and Mobility Devices (Note)*, U.S. DEP’T TRANSP. (2011) (last updated Mar. 16, 2016), <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/doj-rule-service-animals-and-mobility-devices-note> [<https://perma.cc/T352-BFAM>] (advising the DOT did not change its ADA regulations applicable to private and public sector transportation); U.S. DEP’T TRANSP., AMERICANS WITH DISABILITIES ACT (ADA): GUIDANCE, CIRCULAR NO. FTA

The ADA's protection covers only those persons who are considered disabled.²⁷ The ADA defines disability as "with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual[.]"²⁸ An individual with "a record of such an impairment" or "being regarded as having such an impairment" is included in the definition of disabled.²⁹ "Major life activities" is defined by the ADA as "not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."³⁰

If an entity is covered by Title II and Title III of the ADA, it is required to make "reasonable modifications" in policies or procedures, if such modifications are required to "afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities."³¹ This may include permitting the use of a service animal in a location normally off limits to animals.³² Entities are not required to make a modification if it would "fundamentally alter" the nature of the services, accommodations, etc.³³

The ADA regulations under Title II and III now include a definition of "service animal."³⁴ Service animal is defined as "any dog that is individually

C 4710.1 (2015) [hereinafter 2015 DOT ADA GUIDANCE] (providing guidance and setting forth the relevant regulations). Relevant language in the DOT's ADA regulations will be provided as footnote references; however, this Article will not discuss the DOT regulations in depth.

²⁷ 42 U.S.C. § 12101(b) (2018). ADA, in this Article, refers to this law as amended by the ADA Amendments Act of 2008. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

²⁸ 42 U.S.C. § 12102(1)(A) (2018).

²⁹ *Id.* § 12102(1)(B)–(C).

³⁰ *Id.* § 12102(2)(A).

³¹ 28 C.F.R. § 36.302(a) (2019); *see also id.* § 35.130(b)(7)(i).

³² *Id.* §§ 35.136(a), 36.302(c)(1). Note even if an animal does not qualify as a service animal, a person may claim that the general obligation to make a modification should apply. *Mayle v. Chicago Park Dist.*, No. 18C6211, 2019 WL 2773681, at *4–5 (N.D. Ill. July 2, 2019) (finding that although a Guinea Hog would not be considered a service animal, an individual could pursue his claim that it was a reasonable accommodation to allow him to bring the animal into city parks).

³³ 28 C.F.R. § 35.130(b)(7)(i); *see id.* § 36.302(a).

³⁴ *Id.* §§ 35.104, 36.104. The DOJ dealt with the issue of limiting the species of service animals by using dogs in the definition but allowing for miniature horses. *Id.* §§ 35.136(i), 36.302(c)(9)(i) (2019); *see also* Huss, *Context, supra* note 24, at 1181–82 (discussing the issue of species in the rulemaking process). Religious organizations and entities controlled by religious organizations will generally be excluded from the coverage of Title III of the ADA. 28 C.F.R. § 36.102(e) (2019) (excluding religious entities from Title III); 42 U.S.C. § 12187 (2018). As an example, an entity such as a hospital—which would normally be a public accommodation—controlled by a religious organization would not be covered under the ADA. 28 C.F.R. § 36.102(e); 42 U.S.C. § 12187. Whether an entity is controlled by a religious organization is a question of fact. *See Reed v. Columbia St. Mary's Hosp.*, 236 F. Supp. 3d 1091, 1104 (E.D. Wis. 2017) (determining the hospital fell within the exemption under Title III of the ADA through an analysis of the organizational structure). A state law may provide more expansive coverage of religious entities given the exemption in the ADA.

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.”³⁵ The definition of service animal specifies that “the provision of emotional support, well-being, comfort, or companionship do[es] not constitute work or tasks for the purposes of this definition.”³⁶ Under certain circumstances, entities may need to make reasonable accommodations to permit the use of a miniature horse as a service animal.³⁷

The current regulations do not allow entities to require documentation supporting an animal’s status as a service animal or inquire “about the nature or extent of a person’s disability.”³⁸ Entities may only “ask if the animal is re-

Stevens v. Optimum Health Inst., 810 F. Supp. 2d 1074, 1078, 1081, 1097–98, 1100 (S.D. Cal. 2011) (holding the ADA did not preempt California’s more expansive Unruh civil rights law where a holistic health program of a religious organization allegedly denied an individual access regardless of whether the individual was accompanied by her guide dog).

³⁵ 28 C.F.R. §§ 35.104, 36.104. The definition continues:

Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.

Id. §§ 35.104, 36.104. There is limited case law interpreting the training component of the definition. *Cf. Waddell v. Walt Disney Parks & Resorts, U.S., Inc.*, No. G054614, 2018 WL 4042670, at *2 (Cal. Ct. App. Aug. 24, 2018) (analyzing the training requirement under California law); Huss, *Company*, *supra* note 11, at 377–78 (discussing the training requirement in the context of Title I of the ADA utilizing information relevant to Titles II and III of the ADA). A recent California case found that a plaintiff did not meet her burden of showing that her service dog was trained, relying in part on the fact that a training school the plaintiff utilized did not certify the plaintiff and animal as a team. *C.L. v. Del Amo Hosp.*, No. SA CV 18-0475-DOC (DFMx), 2019 WL 4187848, at *6 (C.D. Cal. Sept. 3, 2019). It is clear that a request to allow a service animal *in training* on premises may be denied under the ADA, though state laws may allow such access. Huss, *Hounds at the Hospital*, *supra* note 6, at 83–87 (discussing issues relating to state laws providing for access for service animals in training).

³⁶ 28 C.F.R. §§ 35.104, 36.104; *see also* Amanda M. Foster, *Don’t Be Distracted by the Peacock Trying to Board an Airplane: Why Emotional Support Animals Are Service Animals and Should Be Regulated in the Same Manner*, 82 ALB. L. REV. 237, 263–65 (2018–19) (arguing the definition of service animal in the ADA should be expanded to include emotional support animals).

³⁷ 28 C.F.R. § 35.136(i)(1); *see also id.* § 36.302(c)(9)(ii)(A–D) (setting forth factors to assess whether an entity must accommodate an individual who is partnered with a miniature horse acting as a service animal). There is no species limitation in the DOT’s ADA regulation. 49 C.F.R. § 37.3 (2018) (including “or other animal” in the definition).

³⁸ 28 C.F.R. §§ 35.136(f), 36.302(c)(6). Even though it has been over a decade since the ADA regulations clarified the limited inquiries that can be made, some public accommodations continue to ask for documentation. *E.g.*, *Smith v. Morgan*, No. 5:18-cv-01111-AKK, 2019 WL 1930764, at *2–3 (N.D. Ala. May 1, 2019) (analyzing a case where employees of a

quired because of a disability and what work or task the animal has been trained to perform.”³⁹ However, those two inquiries generally should not be made by an entity “when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability,” with the regulations using as examples “providing assistance with stability or balance to an individual with an observable mobility disability.”⁴⁰

B. Title II and Title III—Rulemaking Process

During the rulemaking process, the DOJ addressed the idea of mandating certification or licensing requirements for individuals with service animals.⁴¹ The DOJ acknowledged some commenters had suggested behavior and training requirements.⁴² Some commenters proposed detailed and lengthy options.⁴³ Although there are organizations that promote minimum training or testing before a service animal should have “public access,” the ADA regulations do not articulate any specific positive standards for behavior of service animals.⁴⁴ Instead the DOJ included language in the regulations clarifying that the handler of the service animal (generally the person with the disability) is responsible for controlling his or her service animal.⁴⁵ An entity governed by Title II or Title III of the ADA may exclude a service animal from the premises if: “(1) [t]he animal is out of control and the animal’s handler does not take effective action

convenience store requested documentation to support an individual with a hearing impairment who was utilizing a service animal).

³⁹ 28 C.F.R. §§ 35.136(f), 36.302(c)(6). The DOT’s ADA guidance provides that the same two questions can be asked. 2015 DOT ADA GUIDANCE, *supra* note 26, at 2-17.

⁴⁰ 28 C.F.R. §§ 35.136(f), 36.302(c)(6).

⁴¹ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,197–98 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35); *see also* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,271–72 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36) (providing guidance on and implementing the final regulations).

⁴² Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,198; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. at 56,272.

⁴³ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,198; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. at 56,272.

⁴⁴ *E.g.*, *IAADP Minimum Training Standards for Public Access*, INT’L ASS’N OF ASSISTANCE DOG PARTNERS, <http://www.iaadp.org/iaadp-minimum-training-standards-for-public-access.html> [https://perma.cc/68HC-TU8U] (last visited Feb. 19, 2020) (setting forth minimum training standards for assistance dogs working in public places and providing an example of a public access test utilized by another organization).

⁴⁵ 28 C.F.R. §§ 35.136(d)–(e), 36.302(c)(4)–(5). The handler of the service animal may control the animal through voice control or other signals or can be tethered to or have physical control over the animal. 28 C.F.R. §§ 35.136(d), 36.302(c)(4).

to control it; or (2) [t]he animal is not housebroken.”⁴⁶ Furthermore, the DOJ’s guidance on the ADA regulations requires entities to make an individualized determination about whether an animal may be excluded.⁴⁷ The individualized analysis cannot be based simply on a generalized fear of animals or specific breed of dog.⁴⁸

One argument that was made was “that without such standards, the public has no way to differentiate between untrained pets and service animals.”⁴⁹ The DOJ expressed the concern that “[a] training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.”⁵⁰

The DOJ also articulated that a certification process “would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal[s] to perform tasks or do work to accommodate their disa-

⁴⁶ *Id.* §§ 35.136(b), 36.302(c)(2). An entity must still provide the individual with a disability the opportunity to obtain the services even if the entity has properly excluded a service animal. *Id.* §§ 35.136(c), 36.302(c)(3).

⁴⁷ *Id.* §§ 35.104, 36.104 (stating a direct threat is “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures”); *see also* Huss, *Company*, *supra* note 11, at 386–88 (analyzing direct threat language of the Title II and Title III ADA regulations).

⁴⁸ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,194; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. at 56,268.

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. . . . [Entities] have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal’s actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,194; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. at 56,268; *see also* Huss, *Conundrum*, *supra* note 22, at 1574–80 (analyzing case law and guidance relating to breed-discriminatory legislation and the ADA); *Frequently Asked Questions About Service Animals and the ADA*, U.S. DEP’T OF JUST.: CIVIL RIGHTS DIV. Q22–Q25 (July 20, 2015), [hereinafter DOJ FAQ], https://www.ada.gov/regs2010/service_animal_qa.pdf [<https://perma.cc/GD7N-J87T>] (last visited Feb. 19, 2020).

⁴⁹ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,198; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. at 56,272.

⁵⁰ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,198; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. at 56,272. A higher percentage of persons with disabilities live in poverty in comparison to people without disabilities in the United States. KRAUS, *supra* note 4, at 23; *see also* Huss, *Company*, *supra* note 11, at 365–66 (discussing the percentage of persons with disabilities who are employed compared with persons without disabilities).

bilit[ies].”⁵¹ The issue of concerns about misrepresentation regarding the status of an animal is discussed in Part IV below.⁵²

C. Title I—Employment Relationship

Title I of the ADA prohibits private employers, as well as state and local governments, from discriminating against employees or prospective employees who have disabilities.⁵³ Unlike Titles II and III of the ADA, there is no specific definition of service animal in the Title I regulations, although there are references to service animals in guidance provided by the Equal Employment Opportunity Commission (EEOC).⁵⁴ Because of this, there is a lack of clarity over whether animals who are not specifically trained to do work or perform tasks qualify as service animals under Title I.⁵⁵

Unlike the vagueness regarding the definition of service animal under Title I, there is widespread acceptance when employers determine whether an employee should be allowed to be accompanied by his or her service animal in the workplace, that the employer use the same process as other accommodation requests to determine whether such request is reasonable.⁵⁶

The employee has the burden to begin the process by requesting a reasonable accommodation.⁵⁷ In the event it is not obvious there is a need for an ac-

⁵¹ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,198; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. at 56,272.

⁵² *Infra* Part IV (discussing concerns about misrepresentation and fraud and how some states have proposed or passed legislation to address the issue).

⁵³ 42 U.S.C. §§ 12111–117 (2018). Additional covered entities under Title I include employment agencies and labor organizations. *Id.* § 12111(2). Individuals are limited in their ability to recover money damages from states; however, suits for injunctive relief are still possible. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 364, 374 (2001); *see also* Huss, *Company, supra* note 11, at 372–73 (discussing the scope of Title I of the ADA and the need for the employee or prospective employee to be a qualified individual under Title I).

⁵⁴ Huss, *Company, supra* note 11, at 374–79 (analyzing lack of definition of service animal in administrative guidance and cases involving Title I of the ADA); *Accommodation and Compliance: Service Animals as Workplace Accommodations*, JOB ACCOMMODATION NETWORK, https://askjan.org/topics/servanim.cfm?cssearch=1989944_1 [<https://perma.cc/4Y7G-WF7V>] (last visited Feb. 19, 2020) (stating there is no specific definition of service animal in Title I or its regulations and providing guidance on how employers should approach the issue of employees asking that their service animals be allowed to accompany them in the workplace). The EEOC and DOJ share jurisdiction over the enforcement of Title I of the ADA. *Fighting Discrimination in Employment Under the ADA*, ADA, <https://www.ada.gov/employment.htm> [<https://perma.cc/X6B5-9NVR>] (last visited Feb. 19, 2020).

⁵⁵ Huss, *Company, supra* note 11, at 376–79 (analyzing the issue of emotional support animals under Title I of the ADA).

⁵⁶ *Id.* at 379–88 (discussing application of Title I of the ADA).

⁵⁷ 29 C.F.R. § 1630.9 (2019); *see, e.g.,* *Connelly v. Wellstar Health Sys., Inc.*, No. 1:16-CV-2687-RWS, 2018 WL 1835582, at *2–3 (N.D. Ga. Feb. 28, 2018) (granting employer’s motion for summary judgment when the plaintiff stated she never requested an emotional support animal, although in her complaint she alleged the employer “fail[ed] to allow her to have a pet as an emotional companion”).

commodation, an employer may require that documentation be provided to support the request.⁵⁸ Guidance from the EEOC states, accommodation is best determined through “an informal, interactive process with the individual with a disability”⁵⁹ A party’s failure to engage in a good faith interactive process can be a consideration in determining potential liability for violation of Title I of the ADA.⁶⁰

Interpretive guidance provided by the EEOC recommends employers utilize a four-part approach for this process. Employers should:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.⁶¹

Employers are not required to provide an accommodation if doing so would create an “undue hardship” for the employer.⁶² Factors to determine whether an accommodation is an undue hardship include if such accommodation would be disruptive or would fundamentally alter the nature of the business.⁶³ The impact of an accommodation on other employees may also be considered if such accommodation would affect the other employees’ abilities to perform their duties.⁶⁴

An employee partnered with a service animal may pose a significant risk of substantial harm to other people at the workplace in a way that would support an undue hardship argument.⁶⁵ The focus is on whether an individual *employee*

⁵⁸ 29 C.F.R. § 1630.9(e).

⁵⁹ *Id.* § 1630.2(o)(3).

⁶⁰ *See, e.g.,* Assaturian v. Hertz Corp., No. 13-00299 DKW KSC, 2014 WL 4374430, at *9–10 (D. Haw. Sept. 2, 2014) (analyzing obligations of parties to engage in an interactive process where an employee allegedly requested permission to bring his service animal to work as an accommodation).

⁶¹ 29 C.F.R. § 1630 App. (2019). It is necessary to begin by determining the purpose and essential functions of a job because employers must only provide a modification if the person with the disability is a “qualified individual”—a person who “satisfies the requisite skill, experience, education and other job-related requirements of the employment position,” with a disability is a qualified individual if that person, “with or without reasonable accommodation, can perform the essential functions of the employment position.” 42 U.S.C. § 12111(8) (2019) (emphasis added); 29 C.F.R. § 1630.2(m).

⁶² 29 C.F.R. § 1630.2(o)(4); *see also* Huss, *Company*, *supra* note 11, at 383–88 (analyzing the issue of undue burden in the context of Title I and service animals).

⁶³ *See* 29 C.F.R. § 1630.2(p).

⁶⁴ *Id.* § 1630.2(p)(2)(v).

⁶⁵ *See id.* § 1630.2(r).

poses such risk, and like the lack of a definition for service animal under Title I, there is no specific language in the Title I regulations addressing under what circumstances a *service animal* constitutes a direct threat.⁶⁶ The general regulations do support that assessment of harm (presumably posed by the human-service animal team) must be made using objective evidence.⁶⁷

Issues relating to allergies have been the basis for an employer's claim that allowing a service dog in the workplace would be an undue hardship.⁶⁸ Although it may be possible to prohibit a service animal in some particular types of workplaces due to issues involving allergies, slight inconveniences to employees without disabilities is likely not sufficient to support an employer's argument that allowing a service animal would be an undue hardship.⁶⁹

Even if allowing the service animal on the premises is not considered an undue hardship, if there are options for the types of accommodation, employers have the ability to choose the accommodation that is easiest for them to provide.⁷⁰ This discretion is not without limit, however, as EEOC guidance provides "the preference of the individual with a disability should be given primary consideration" if more than one accommodation is available that would enable the employee to perform the essential functions of the job.⁷¹

Because of the lack of specific regulations regarding service animals under Title I of the ADA, employers and employees must rely on the general regulations governing the obligation of the parties to determine whether a requested accommodation is considered reasonable.⁷² The interpretation of Title I of the ADA generally provides that employees have the initial obligation to request an accommodation, documentation may be required, and an interactive process should be used.⁷³ It is less clear what type of process is required if an individual with a disability requests the ability to have an assistance animal in housing

⁶⁶ Huss, *Company*, *supra* note 11, at 383–88 (analyzing direct threat under Title I of the ADA).

⁶⁷ 29 C.F.R. § 1630(r) (the regulations continue by providing factors to consider including: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.").

⁶⁸ *E.g.*, *Maubach v. City of Fairfax*, No. 1:17-cv-921, 2018 WL 2018552, at *6 (E.D. Va. Apr. 30, 2018); *see also* Huss, *Company*, *supra* note 11, at 384–85 (analyzing issue of allergies in the context of an employment environment).

⁶⁹ *See* Huss, *Company*, *supra* note 11, at 384–85 (analyzing issue of allergies in the context of an employment environment).

⁷⁰ 29 C.F.R. § 1630 App. (stating "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose . . . the accommodation that is easier for it to provide.").

⁷¹ *Id.*

⁷² *Supra* notes 56–61 and accompanying text (analyzing Title I of the ADA).

⁷³ *Supra* notes 57–60 and accompanying text (analyzing the process under Title I of the ADA).

that does not allow animals.⁷⁴ The next Part of this Article will explore the ambiguities surrounding this issue under the FHA.⁷⁵

II. FAIR HOUSING ACT⁷⁶

Under the FHA, housing providers (and others) are not allowed to refuse “to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”⁷⁷ A waiver of a no-pet provision may be one of the modifications required.⁷⁸

A. Assistance Animals Under the FHA

Unlike Titles II and III of the ADA, the FHA’s regulations do not contain a definition of service or assistance animal; however, HUD has issued guidance to assist in interpretation of the law.⁷⁹ This guidance makes it clear that, although “service animals” as defined by the ADA regulations would be included

⁷⁴ *Infra* notes 106–12 and accompanying text (analyzing the process under the FHA).

⁷⁵ *Infra* notes 106–12 and accompanying text (analyzing the process under the FHA).

⁷⁶ 42 U.S.C. § 3601–3631 (2018). The Fair Housing Act was included as part of the Civil Rights Act of 1968 and was amended in 1988 with the Fair Housing Amendments Act to add persons with disabilities to the classes of persons to be protected from discrimination. *Fair Housing Act*, HISTORY, (Sept. 12, 2018) <https://www.history.com/topics/black-history/fair-housing-act> [<https://perma.cc/XAT8-8D7E>]. Although some commentators refer to this amended law as the Fair Housing Amendments Act, others continue to refer to it as the Fair Housing Act, and “FHA” will be used to refer to the amended law in this Article. For more background and discussion of the coverage of the FHA, see Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 73–90 (2005).

⁷⁷ 42 U.S.C. § 3604(f)(3)(B). “Necessary” in this context does not require that an individual is unable to function at all without the animal; instead, the animal can provide support or perform tasks that alleviate a symptom or effect of a disability. *E.g.*, *Hollandale Apartments & Health Club, LLC v. Bonesteel*, 173 A.D.3d 55, 65–68 (N.Y. App. Div. 2019) (analyzing “necessity” for emotional support animal under federal and New York law).

⁷⁸ 24 C.F.R. § 100.204(b) (2018) (providing an example of a manager of an apartment complex allowing a person with a visual impairment to live with a service animal despite a no-pets policy). Another example would be waiver of an ordinance limiting the number of animals at a residence. *Cartwright v. Bartling*, No. 8:14CV246, 2015 WL 3822362, at *7–8 (D. Neb. June 19, 2015) (denying a city’s motion to dismiss a case wherein a resident alleged discrimination when city denied request to have two service animals, which would result in the resident’s household exceeding the number of animals allowed per residence).

⁷⁹ U.S. DEP’T HOUS. & URBAN DEV., SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 4 (2013) [hereinafter 2013 HUD ASSISTANCE ANIMALS]; JOINT STATEMENT DEP’T HOUS. & URBAN DEV. AND DEP’T JUSTICE, REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 1, 6 (2004) [hereinafter 2004 JOINT STATEMENT] (setting forth technical assistance relating to the FHA). In addition to the discussion of the definition of assistance animal, documentation, and process analyzed herein, HUD guidance also provides that, although housing providers may require tenants to pay for the cost of any damage caused to a unit or common areas, they are not allowed to require deposits for assistance animals. 2013 HUD ASSISTANCE ANIMALS, *supra*.

in the definition of “assistance animals” (who may be required to be allowed to live with a person with a disability as a reasonable accommodation), other animals may also qualify.⁸⁰ Specifically, there is no species limitation under the FHA, and HUD has made it clear that nothing in the FHA requires an assistance animal be certified or have had individual training.⁸¹ Thus an animal who only provides emotional support (and does not perform tasks or do work) could qualify as an assistance animal under the FHA.⁸²

The distinction between a “pet,” or companion animal, and an assistance animal is that assistance animals must provide aid (through work, tasks, or otherwise) or emotional support “*that alleviates one or more identified symptoms or effects of a person’s disability.*”⁸³ For example, a landlord could reject the request from an individual with a physical disability who requests the ability to keep an assistance animal who solely provides emotional support.⁸⁴ Only if a

⁸⁰ 2013 HUD ASSISTANCE ANIMALS, *supra* note 79, at 2 (providing information on assistance animals and including in the definition animals who work or perform tasks).

⁸¹ *Id.* at 2, 7; *see, e.g.*, Anderson v. City of Blue Ash, 798 F.3d 338, 362–63 (6th Cir. 2015) (reversing lower court’s grant of summary judgment in favor of city in case involving a claim that a miniature horse should be allowed to be kept on the premises); Manzke v. Jefferson Cty., No. 18-cv-505-bbc, 2018 WL 3998035, at *1, 5 (W.D. Wis. Aug. 21, 2018) (denying motion for preliminary injunctive relief and discussing how the evidence provided by the plaintiff supporting her claim that she required a reasonable accommodation to keep goats and geese did not provide sufficient detail, or “provide[] any reason why plaintiff’s medical support animals must be farm animals rather than domesticated animals . . . which are allowed in her zoning classification.”); Castellano v. Access Premier Realty, Inc., 181 F. Supp. 3d 798, 806–08 (E.D. Cal. 2016) (finding defendants failed to provide a reasonable accommodation when they refused her permission to keep her cat, which served as an emotional support animal, in her apartment). Claims relating to the keeping of non-domesticated animals may be subject to the direct threat analysis discussed *infra* note 87 and accompanying text. *E.g.*, Baughman v. City of Elkhart, No. 6:17-CV-326, 2018 WL 1510678, at *1, 7 (E.D. Tex. Mar. 27, 2018) (granting summary judgment in favor of defendant because request for accommodation to keep lemur who had injured at least three people was not reasonable).

⁸² *See* 2013 HUD ASSISTANCE ANIMALS, *supra* note 79, at 2.

⁸³ *Id.* (emphasis added). This is viewed more generally as “an identifiable relationship, or nexus, between the requested accommodation and the individual’s disability.” 2004 JOINT STATEMENT, *supra* note 79, at 6–7 (providing example of tenant with a hearing impairment requesting that provider allow him to keep a dog in his unit to alert him to sounds).

⁸⁴ Kennedy House, Inc. v. Philadelphia Comm’n on Human Relations, 143 A.3d 476, 491 (Pa. Commw. Ct. 2016) (reversing lower court order because the documentation provided by “physician described a disability related to mobility, and there was no evidence establishing a nexus between her mobility-related needs and the requested assistance animal.”). The judge dissenting in the *Kennedy House, Inc.* case would find that the record supported “numerous, significant medical conditions” and the assistance of the dog (*e.g.*, encouraging her to get out of bed and to remember to take medications), concluding “this type of support directly relates to [the prospective tenant’s] mobility disability.” *Id.* at 493 (J. McCullough dissenting).

person has a disability⁸⁵ and there is a disability-related need for the particular animal is it necessary for a housing provider to modify a no-pets policy.⁸⁶

Paralleling the guidance supporting the Title II and Title III ADA service animal regulations, an individualized assessment as to whether a specific assistance animal constitutes a direct threat to other people or property is required before a request to accommodate such assistance animal can be denied.⁸⁷ Similarly, “[b]reed, size, and weight limitations may not be applied to an assistance animal.”⁸⁸

B. Documentation Allowed to be Required to Support a Request Relating to an Assistance Animal

HUD guidance provides that “[h]ousing providers may ask individuals who have disabilities that are not readily apparent or known to the provider to submit reliable documentation of a disability and their disability-related need for an assistance animal.”⁸⁹ HUD guidance also states that housing providers “may

⁸⁵ Defined as “a physical or mental impairment that substantially limits one or more major life activities[.]” 2013 HUD ASSISTANCE ANIMALS, *supra* note 79, at 4.

⁸⁶ *Id.* A housing provider is not required to make such modification if “doing so would impose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider’s services.” *Id.*

⁸⁷ *Id.*; *see, e.g.*, *Borenstein v. Garden*, No. 2:19-cv-00482-RFB-NJK, 2019 WL 2062948, at *2–3 (D. Nev. May 9, 2019) (denying further preliminary relief when tenant with allegedly aggressive service dog did not comply with court order muzzling dog when the dog was outside the dwelling); *Roberts v. Veterans Vill. Enters., Inc.*, No. 17cv524-LAB (MDD), 2017 WL 1063477, at *2–3, 5–6 (S.D. Cal. Mar. 20, 2017) (denying temporary restraining order against a group home that denied a resident his request to keep a dog as an assistance animal when the dog had allegedly exhibited behaviors such as nipping and charging); *Washington v. Olatoye*, 173 A.D.3d 467, 470–71 (N.Y. App. Div. 2019) (setting forth the analysis for direct threat in finding that a hearing officer failed to address a reasonable accommodation request); *Gill Terrace Ret. Apartments, Inc. v. Johnson*, 177 A.3d 1087, 1092–93 (Vt. 2017) (affirming lower court decision concluding there was evidence that a dog posed a direct threat, including lunging and baring her teeth at people and other dogs, supported the decision by the landlord to deny the request to keep the dog on the premises); *cf. King’s Daughters & Sons Hous., Inc. v. Farrell*, No. NWHCV186003784S, 2018 WL 8642169, *3, 5 (Conn. Super. Ct. Dec. 6, 2018) (providing that in order to continue a tenancy an individual would need to obtain a new service dog due to safety issues posed by his existing service dog).

⁸⁸ 2013 HUD ASSISTANCE ANIMALS, *supra* note 79, at 4; *see also Warren v. Delvista Towers Condo. Ass’n*, 49 F. Supp. 3d 1082, 1089 (S.D. Fla. 2014) (determining that a local ordinance banning a specific breed of dog was preempted by the FHA); *Huss, Conundrum*, *supra* note 22, at 1581–87 (analyzing the interaction of the FHA and breed-discriminatory ordinances and policies). *But see Wilkison v. City of Arapahoe*, 926 N.W.2d 441, 451–52 (Neb. 2019) (distinguishing between a reasonable and necessary accommodation and finding in a case where an individual had multiple dogs in the home, it was not necessary for a city to waive a breed-specific ordinance).

⁸⁹ 2013 HUD ASSISTANCE ANIMALS, *supra* note 79, at 4. If a housing provider knows of the disability or disability-related need, or the need is readily apparent, a housing provider *may not* ask a tenant to provide documentation to support the need. *Id.* at 6. Cases have recognized that housing providers are not required to immediately grant a request, but may evalu-

not ask an applicant or tenant to provide access to medical records or medical providers or provide detailed or extensive information or documentation of a person's physical or mental impairments."⁹⁰

The issue of who can provide the documentation is also covered by HUD guidance.⁹¹ In situations where an individual is asking for an accommodation of an emotional support animal, that person can be asked "to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability."⁹² Other HUD guidance provides that determining whether an individual meets the FHA's definition of a person with a disability can be accomplished through verification by a "doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability."⁹³ The level of detail in any such documentation is also discussed in HUD guidance with the documentation deemed "sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance or emotional support" and "[i]n most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry."⁹⁴

Case law has also established that there are limits to the level of documentation that can be requested.⁹⁵ For example in *Bone v. Village Club, Inc.*,⁹⁶ in its

ate a request, investigate if necessary, and as discussed below, enter into an interactive process. *E.g.*, *Larosa v. River Quarry Apartments, L.L.C.*, No. 1:18-cv-00384-BLW, 2019 WL 3538951, at *6–7 (D. Idaho Aug. 3, 2019) (discussing the process in which an apartment engaged in to determine whether a request should be granted).

⁹⁰ 2013 HUD ASSISTANCE ANIMALS, *supra* note 79, at 6. It is an individualized assessment to determine whether the person requesting the accommodation has a disability-related need for an assistance animal. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ 2004 JOINT STATEMENT, *supra* note 79, at 13–14; *see infra* notes 344, 346 and accompanying text (discussing importance of this language in connection with legislation introduced in Virginia in January 2017).

⁹⁴ 2013 HUD ASSISTANCE ANIMALS, *supra* note 79, at 6; 2004 JOINT STATEMENT, *supra* note 79, at 14.

⁹⁵ *Infra* Section II.C (analyzing some case law addressing documentation issue); *e.g.*, *Castellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798, 806–08 (E.D. Cal. 2016) (rejecting defendants' arguments that repeated demands for more specific information to support the tenant's request was unnecessary given the information previously provided, and the court "cannot ascertain what information could ever satisfy the knowledge requirement were Defendants' position to be accepted"; in connection with the need for the assistance animal, given the provision of information from medical professionals, the tenant "need provide nothing more to meet the requirements of the FHA."); *cf.* *Dep't of Fair Emp't & Hous. v. Patlan*, No. E069793, 2019 WL 3955868, at *4 (Cal. Ct. App. Aug. 22, 2019) (finding as a matter of law a prospective tenant did not have to present a letter designating her dog as an emotional support animal or formal statement of diagnosis to fall within the protection of the state law's protection). It may be reasonable for a housing provider to request documentation to support the accommodation again if there is a change in circumstance of the tenant.

analysis supporting a denial of summary judgment motions, the district court found the landlord's request for information overbroad in asking for a tenant's "medical records [] rather than simply asking for verification from a healthcare provider that [tenant] suffered from a disability."⁹⁷ The *Bone* court also found it was inappropriate for the landlord to ask for information to demonstrate that the dog, who was acting as an emotional support animal, had special skills, training, or certification.⁹⁸ The court in *Bhogaita v. Altamonte Heights Condominium Ass'n*, found that the information requested by a condominium board regarding a resident, including information concerning the resident's "medications, and the number of counseling sessions he attended per week; details about how the diagnosis was made; . . . and 'details of the prescribed treatment moving forward[,]'" exceeded the information that was essential for the condominium association's critical inquiries.⁹⁹

It is important to distinguish between the documentation that may be reasonable to request if an individual has an apparent disability versus a disability that is not obvious.¹⁰⁰ The court in *Sabal Palm Condominiums of Pine Island Ridge Ass'n, v. Fisher* found a condominium association constructively denied a request for a reasonable accommodation of a service dog made by a resident with multiple sclerosis who utilized a wheelchair.¹⁰¹ The *Sabal Palm* court found that the documentation the resident provided "unquestionably established that [the resident] was disabled within the meaning of the FHA," and it was "self evident that a person with such a severe disability and with these symp-

Peklun v. Tierra Del Mar Condo. Ass'n, No. 15-CIV-80801-BLOOM/VALLE, 2015 WL 8029840, at *14–15 (S.D. Fla. Dec. 7, 2015) (denying summary judgment where plaintiff initially provided documentation supporting dog's status as an emotional support animal but later refers to the dog's status as a service animal, acknowledging there was "a soft conflict between the [initial] 2011 accommodation and . . . 2013 request . . ."). The *Peklun* court also stated "[t]he Court is unable to locate any authority that categorically precludes a housing association from requesting additional documentation supporting the request for an accommodation, especially where there exists a substantial temporal disparity between the initial application and the requested update." *Id.* at *12. The *Peklun* court continued by providing a hypothetical to illustrate "[c]ountless scenarios can be envisioned where a reasonable accommodation is granted on the basis of a disability or handicap which is later eliminated through medicine, treatment, surgery, or other means." *Id.* at *13. Similarly, the need for a second assistance animal could also support a landlord's request for medical documentation. *Grier v. Bryden Mgmt., L.L.C.*, No. 2:17-cv-111, 2019 WL 1046083, at *5 (S.D. Ohio Mar. 5, 2019) (finding it was reasonable for landlord to seek medical verification when a tenant asserted she needed a second emotional support animal).

⁹⁶ *Bone v. Vill. Club, Inc.*, 223 F. Supp. 3d 1203 (M.D. Fla. 2016).

⁹⁷ *Id.* at 1215.

⁹⁸ *Id.* at 1207–08, 1215.

⁹⁹ *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1287 (11th Cir. 2014).

¹⁰⁰ See *infra* notes 101–05 and accompanying text (discussing case where individual had apparent disability).

¹⁰¹ *Sabal Palm Condos. of Pine Island Ridge Ass'n, v. Fischer*, 6 F. Supp. 3d 1272, 1277, 1290, 1292 (S.D. Fla. 2014).

toms” (that had been described in the medical documentation) would have difficulty with certain physical tasks.¹⁰²

In addition to medical documentation supporting the disability and its symptoms, the resident had also provided a letter from a dog trainer at the organization that trained the service animal detailing the tasks in which the dog was trained to assist the resident.¹⁰³ The *Sabal Palm* court highlighted that the condominium association had not pointed to any law that required the resident to “point to an express statement from a healthcare provider that she needs a dog to assist her with her disability. That’s because there is none.”¹⁰⁴ Instead the *Sabal Palm* court found that the documents describing the symptoms of the resident made it clear that a service dog trained in performing certain physical tasks “would help ameliorate the effects of her disability” and “she had amply established her disability-related need”¹⁰⁵

C. Issue of Interactive Process Under the FHA

The FHA does not mandate that the housing provider engage in an interactive process; however, HUD guidance states:

[a]n interactive process in which the housing provider and the requester discuss the requester’s disability-related need for the requested accommodation and possible alternative accommodations is helpful to all concerned because it often results in an effective accommodation for the requester that does not pose an undue financial and administrative burden for the provider.¹⁰⁶

HUD guidance also utilizes the word “should” when referencing what a housing provider “should” discuss with the requester in the event a request for an accommodation is denied.¹⁰⁷

Case law has split on whether an interactive process is required under the FHA.¹⁰⁸ There have been cases where courts have found that a failure to engage

¹⁰² *Id.* at 1289.

¹⁰³ *Id.* at 1276–77.

¹⁰⁴ *Id.* at 1289. Such a document would support an accommodation request but is not necessarily required. *Id.*

¹⁰⁵ *Id.* at 1290.

¹⁰⁶ 2004 JOINT STATEMENT, *supra* note 79, at 7. HUD answered the question, “[w]hat happens if no agreement can be reached through the interactive process?” by stating that such a failure is essentially a decision to not grant the requested accommodation. HUD also discussed the remedies available to the requester. *See id.* at 9, 14 (briefly describing the judicial review process available to those aggrieved).

¹⁰⁷ *Id.* at 7. The possibility of an alternative accommodation is the issue that should be discussed. If the requester’s accommodation is reasonable, a housing provider may still suggest an alternative accommodation; however, the individual is not required to accept such suggestion. *Id.* at 8.

¹⁰⁸ *See* Christopher C. Ligatti, *Cluttered Apartments and Complicated Tenancies: A Collaborative Intervention Approach to Tenant “Hoarding” Under the Fair Housing Act*, 46 SUFFOLK U. L. REV. 79, 89 (2013) (analyzing interactive process requirement and the FHA); Gretchen M. Widmer, *We Can Work It Out: Reasonable Accommodation and the Interactive Process Under the Fair Housing Amendments Act*, 2007 U. ILL. L. REV. 761, 782 (2007)

in an interactive process can be an independent basis for liability for disability discrimination in the housing context.¹⁰⁹ However, several courts have determined there is no duty to engage in an interactive process, or if a housing provider does not engage in such a process, such lack of action is not an independent basis for finding disability discrimination, pointing to the lack of interactive process language in the FHA or its implementing regulations.¹¹⁰

Regardless of whether there is an independent obligation to engage in an interactive process, the use (or lack thereof) of such a process has been used as part of the court's analysis in determining whether it was appropriate to deny an individual with a disability the ability to have an assistance animal in hous-

(discussing split in jurisdictions and arguing the FHA should be amended to specifically require housing providers to engage in an interactive process); *infra* notes 109–10, 112 (citing to recent cases discussing the issue). State laws may more clearly provide for a housing provider's obligation to engage in such a process. *E.g.*, VA. CODE ANN. § 36-96.3:2 (2017) (providing a person receiving an accommodation request “shall offer to engage in a good faith interactive process . . .”). It is not surprising that HUD's position is consistent with its guidance that a provider should engage in such a process. Administrative decisions have supported the imposition of an interactive process. *E.g.*, Archibald v. Riverbay Corp., Case No. HUDALJ 11-F-052-FH-18, 21 (Initial Decision & Order May 7, 2012), <https://www.hud.gov/sites/documents/HUD11-F-052-FH-18.PDF> [<https://perma.cc/8Q63-4FMQ>] (last visited Feb. 19, 2020) (stating “the FHA's statutory scheme imposes a requirement to engage in the interactive process to resolve requests for accommodation.”).

¹⁰⁹ *E.g.*, Montano v. Bonnie Brae Convalescent Hosp., Inc., 79 F. Supp. 3d 1120, 1128 (C.D. Cal. 2015) (stating a “Defendant's conduct, by failing to engage in the interactive process relating to the nature and scope of plaintiff's requested accommodations, also constitutes a violation of the FHA.”); Book v. Hunter, No. 1:12-cv-00404-CL, 2013 WL 1193865, at *4 (D. Or. Mar. 21, 2013) (stating the defendants “were required to engage in an interactive process . . . [i]nstead, they immediately denied her application to rent, and effectively denied her request for reasonable accommodation.”); *see also* Widmer, *supra* note 108, at 770 (discussing a few cases that found an interactive process essential).

¹¹⁰ Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Scotch Plains, 284 F.3d 442, 454–56 (3d Cir. 2002) (rejecting argument that, because the reasonable accommodation requirement parallels the Rehabilitation Act's language, the interactive process requirement should also be applied); Howard v. HMK Holdings, L.L.C., No. CV 17-5701-DMG (JPRx), 2018 WL 3642131, at *9–11 (C.D. Cal. June 11, 2018) (acknowledging a split on the issue citing to the lack of specific language to decline to follow cases that provide for lack of engagement in an interactive process as an independent basis for liability but finding the failure to engage in such process is a factor in determining whether there has been a failure to accommodate). Note the *Howard* case and the *Montano* case were both decided by the federal district court for the central district of California. *See* Doe v. Hous. Auth. of Portland, No. 3:13-cv-1974-SI, 2015 WL 758991, at *7 (D. Or. Feb. 23, 2015) (comparing the requirement of an interactive process in the employment context with the lack of one under the FHA); Nikolich v. Vill. of Arlington Heights, 870 F. Supp. 2d 556, 566 (N.D. Ill. 2012) (following analysis of *Lapid-Laurel* case and finding no interactive process is required of municipalities under the FHA despite language in the 2004 Joint Statement discussed above); Rodriguez v. Morgan, No. CV 09-8939-GW (CWx), 2012 WL 253867, at *8 (C.D. Cal. Jan. 26, 2012) (reviewing cases and finding that an interactive process is not a separate requirement under the FHA, though it can be considered as part of the determination as to whether the landlord has failed to grant a reasonable accommodation request).

ing.¹¹¹ For example, in the *Bone* case, the district court stated “if a housing provider is skeptical about an alleged disability or its ability to provide an accommodation, the provider is required ‘to request documentation or open a dialogue’ in what is known in the ADA-context as the ‘interactive process.’”¹¹²

D. Possibility of Revised Guidance

There have been reports that HUD is planning on issuing revised guidelines regarding the documentation required to support a request to allow an assistance animal in housing.¹¹³ Disability rights advocates expressed concerns

¹¹¹ See *infra* note 112 and accompanying text (discussing recent assistance animal cases referencing an interactive process).

¹¹² *Bone v. Vill. Club, Inc.*, 223 F. Supp. 3d 1203, 1213 (M.D. Fla. 2016) (citing *United States v. Hialeah Hous. Auth.*, 418 F. App’x 872, 877 (11th Cir. 2011)). In the *Bone* case, the district court again referred to the interactive process in its discussion about the timing of granting or denying a reasonable accommodation by stating that “a housing provider is not permitted to ‘short-circuit’ the interactive process.” *Id.* at 1214 (citing to other FHA cases, including a case relating to the denial of a request to allow an assistance animal); see also *Bhogaita v. Altamonte Heights Condo. Ass’n*, 765 F.3d 1277, 1287 (11th Cir. 2014) (referencing the opening of a dialogue but cautioning that such dialogue does not entitle housing providers to request extraneous information); *Carlson v. Sunshine Villas HOA, Inc.*, No. 2:18-cv-1-FtM-99MRM, 2018 WL 2317820, at *4 (M.D. Fla. May 22, 2018) (citing *Hialeah Hous. Auth.*, 418 F. App’x. at 875) (referencing language regarding obligation of landlord to open a dialogue in determining the plaintiff’s allegations regarding constructive denial of her accommodation request were sufficient to state a claim); *Nelson v. Long Reef Condo. Homeowners Ass’n*, No. 2011-0051, 2016 WL 4154708, at *25 (D.V.I. Aug. 5, 2016) (concluding that there was effective denial of request for a reasonable accommodation “by failing to engage in the required ‘interactive process’ to determine if the request was reasonable and necessary.”); *Chavez v. Aber*, 122 F. Supp. 3d 581, 598–99 (W.D. Tex. 2015) (discussing constructive denial and the interactive process); *Peklun v. Tierra Del Mar Condo. Ass’n*, No. 15-CIV-80801-BLOOM/VALLE, 2015 WL 8029840, at *14–15 (S.D. Fla. Dec. 7, 2015) (denying summary judgment motion and reiterating a condominium association had the obligation to “open a dialogue” regarding the purpose of a purported assistance animal); *Or. Bureau of Labor & Indus. v. Hous. Auth. of Douglas Cty.*, No. 6:13-cv-01205-MC, 2014 WL 5285609, at *9–10 (D. Or. Oct. 15, 2014) (denying summary judgment motion on claim based on failure to engage in an interactive process).

¹¹³ Roberto C. Blanch, *HUD Expected to Issue Revised Guidance on Requests for Emotional Support Animals*, FLA. HOA LAW. BLOG (May 25, 2018), <https://www.floridahoalawyerblog.com/hud-expected-to-issue-revised-guidance-on-requests-for-emotional-support-animals/#more-1381> [<https://perma.cc/Q8EQ-PXUB>] (quoting Senior Policy Representative Megan Booth) (reporting that a representative of the National Association of Realtors stated “HUD is willing to put a caveat [into their guidelines] that tenants must have a letter from a licensed health care provider that they have a demonstrated ongoing professional relationship with, not just on the internet . . .” (alteration in original)). The revised guidelines were expected later in 2018. *Id.*; see also Rachel M. Cohen, *Donald Trump’s Civil Rights Office for Housing Has Found the Real Problem: Pets*, INTERCEPT (Mar. 23, 2018, 6:51 AM), [[hereinafter Cohen, Real Problem](https://perma.cc/NN5T-UY4V)], <https://theintercept.com/2018/03/23/emotional-support-animals-housing-law/> [<https://perma.cc/NN5T-UY4V>] (reporting that HUD had meetings with representatives of housing industry groups but not fair housing and disability rights groups to discuss verification regarding assistance animals). The Cohen article also reported that “HUD may issue new guidance restricting access to emotional support animals as early

that they had not been allowed to provide input on new guidance.¹¹⁴ At least one meeting between HUD officials and disability rights advocates was scheduled and cancelled in the summer of 2018.¹¹⁵ However, HUD did meet with disability rights advocates in October of 2018.¹¹⁶ There have been reports that HUD has been circulating draft guidance to other federal agencies for review.¹¹⁷ In contrast, new regulations have been proposed that would change the obligations of air carriers under the ACAA.¹¹⁸

III. AIR CARRIER ACCESS ACT¹¹⁹

Aircraft transportation is specifically excluded in the definition of the type of transportation covered by the ADA.¹²⁰ However, the ACAA provides similar

as the beginning of April [2018].” *Id.* However, a spokesperson for HUD declined to comment on any plans to issue further guidance. *Id.*; see also Rachel M. Cohen, *A Federal Civil Rights Office Wants to Limit Access to Emotional-Support Animals that Can Help with Depression*, INTERCEPT (Mar. 19, 2019, 5:30 AM) [hereinafter Cohen, *Limit Access*], <https://theintercept.com/2019/03/18/hud-emotional-support-animal/> [<https://perma.cc/X36Y-CZCS>] (reporting that HUD met with disability rights advocates in October 2018, and HUD was submitting proposed guidance to other federal agencies for review).

¹¹⁴ Letter from Am. Ass’n of People with Disabilities et al. to Paul Compton, Gen. Counsel, Dep’t of Hous. & Urban Dev., and Anna Maria Farias, Assistant Sec’y for Fair Hous. & Equal Opportunity, Dep’t of Hous. & Urban Dev. (May 14, 2018) (available at <https://www.aapd.com/wp-content/uploads/2018/05/2018-05-14-Fair-Housing-and-Disability-Rights-Org-Letter-to-HUD-re-RA-Ve.pdf> [<https://perma.cc/5BK2-GLZR>]) (requesting a meeting between fair housing and disability rights organizations and HUD staff involved in any consideration of HUD guidance relating to assistance animals and stating “[w]e are aware that apartment management and real estate industry representatives have met with HUD in recent months to specifically discuss reasonable accommodation verification matters.”).

¹¹⁵ Letter from Neil Romano, Chairman of the Nat’l Council on Disability, to Anna Maria Farias, Assistant Sec’y for Fair Hous. & Equal Opportunity, Dep’t of Hous. & Urban Dev. (July 12, 2018) (available at <https://nacd.gov/publications/2018/letter-hud-assistant-secretary-farias-urging-meeting-proposed-revisions-guidance> [<https://perma.cc/666E-UW7P>]) (writing on behalf of the “independent, nonpartisan federal agency[,]” the National Council on Disability, urging Assistant Secretary Farias to reschedule a meeting with disability rights advocates that had been scheduled for June 11, 2018, but had been cancelled). The National Council on Disability letter also offered to meet separately from disability rights advocates in its role “as a sister federal agency” but encouraged HUD to meet with disability organizations regarding proposed revisions to assistance animal guidance. *Id.*

¹¹⁶ Cohen, *Limit Access*, *supra* note 113.

¹¹⁷ *Id.* Disability rights advocates are reportedly considering ways to challenge any new HUD guidance that could be inconsistent with the FHA and its regulations. *Id.*

¹¹⁸ See *infra* Section III.E (describing proposed rulemaking process).

¹¹⁹ 49 U.S.C. § 41705(a) (2018). Although generally referred to as the Air Carrier Access Act, the official title of the legislation is Nondiscrimination on the Basis of Disability in Air Travel. 14 C.F.R. § 382 (2019).

¹²⁰ 42 U.S.C. § 12141(2) (2018). Air terminals are covered by the ADA. 14 C.F.R. § 382.51 (2019) (setting forth the rules applicable to carriers for terminal facilities under their control); see also *Traveling by Air with Service Animals*, 83 Fed. Reg. 23,832, 23,834 (May 23, 2018) (to be codified at 14 C.F.R. pt. 382) (stating the DOJ’s Title II rules “govern airports owned by . . . public entit[ies]” while the DOJ’s Title III rules govern privately owned air-

protection by prohibiting air carriers from discriminating against persons with disabilities.¹²¹ There has been considerable media attention on purported fraud and conflict arising out of service and emotional support animals traveling with airline passengers.¹²² In early 2018, Delta Airlines announced changes to its service animal policy that increased the documentation required for passengers traveling with service animals.¹²³ Other airlines followed by amending their own policies.¹²⁴ In its announcement, Delta Airlines reported that since 2016 there had been an 84 percent increase in reported incidents involving animals.¹²⁵ There was swift reaction by disability rights activists concerned with the impact of the changes on persons with disabilities.¹²⁶ This Part of the Arti-

ports and facilities); 2009 Final Rule, *supra* note 8, at 27,636 (discussing the application of “Title III rules for places of public accommodation” applying to airport concessions, stating the DOJ rule would allow these entities to accept an emotional support animal, and urging “all parties at airports to be aware that their services and facilities are intended to serve all passengers.”).

¹²¹ 49 U.S.C. § 41705 (2018) (prohibiting discrimination against an otherwise-qualified individual if the “individual has a physical or mental impairment that substantially limits one or more major life activities.”). A qualified individual is essentially a passenger with a ticket who meets the other contract of carriage requirements that are applied to all passengers. 14 C.F.R. § 382.3 (2019).

¹²² David Heffernan, ‘Comfort Animals’ Do Not Belong in an Aircraft Cabin; Regulators May Act Soon to Address the Problem, FORBES (Nov. 13, 2018, 2:38 PM), <https://www.forbes.com/sites/davidheffernan/2018/11/13/comfort-animals-do-not-belong-in-an-aircraft-cabin-regulators-may-act-soon-to-address-the-problem/#2087d0034aba> [<https://perma.cc/HB65-BMEF>] (discussing proposed rulemaking and issues involving fraud and passengers attempting to fly with exotic animals); Mark Osborne, *Airline Passenger Punches Deaf Pregnant Woman, Service Dog: Police*, ABC NEWS (May 19, 2018, 2:20 AM), <https://abcnews.go.com/beta-story-container/US/airline-passenger-punches-deaf-pregnant-woman-service-dog/story?id=55279503> [<https://perma.cc/HK3E-RZQ9>] (describing altercation involving passenger traveling with a service dog and another passenger).

¹²³ *Delta Introduces Enhanced Requirements for Customers Traveling with Service or Support Animals Effective March 1*, DELTA NEWS HUB: BUSINESS, [hereinafter *Delta Introduces*], <https://news.delta.com/delta-introduces-enhanced-requirements-customers-traveling-service-or-support-animals-effective> [<https://perma.cc/LW23-HUWN>] (last visited Feb. 19, 2020); Allison Prang & Doug Cameron, *Delta to Require Advance Documentation for Service, Support Animals to Fly*, WALL ST. J. (Jan. 19, 2018, 4:00 PM), <https://www.wsj.com/articles/delta-to-require-advance-proof-of-need-for-service-support-animals-to-fly-1516372227> [<https://perma.cc/3P4Y-JA5M>] (reporting on Delta’s announcement).

¹²⁴ Bart Jansen, *Following Peacock Fiasco, United Airlines Tightens Policy for Comfort Animals*, USA TODAY (Feb. 1, 2018, 1:00 PM), <https://www.usatoday.com/story/travel/2018/02/01/united-joins-delta-updating-policies-deal-flood-comfort-animals/1086683001/> [<https://perma.cc/RB4G-FUDG>] (reporting that the number of “comfort animals” flying on United increased from 43,000 to 76,000 from 2016 to 2017 and that there was “a significant increase in onboard incidents.”).

¹²⁵ *Delta Introduces*, *supra* note 123 (citing to increase in incidents as rationale for change in policy).

¹²⁶ See *American Airlines Announces Changes to Emotional Support Animal Policy*, AM. AIRLINES NEWSROOM (May 14, 2018, 10:00 AM), news.aa.com/news/news-details/2018/A

cle provides some background on the law applicable to air carriers and analyzes the rulemaking process.¹²⁷

A. 2009 ACAA Regulations

The Department of Transportation (DOT) is responsible for establishing the regulations and enforcing the ACAA.¹²⁸ The regulations in place at the beginning of 2018 became effective in May 2009 (the “2009 ACAA Regulations”).¹²⁹ The 2009 ACAA Regulations require air carriers to permit service animals to accompany passengers with disabilities, even if it “may offend or annoy carrier personnel or persons traveling on the aircraft.”¹³⁰ Although air carriers are not required to accommodate “certain unusual” animals, some other animals—such as miniature horses, pigs, and monkeys—may need to be accommodated.¹³¹ DOT guidance to the 2009 ACAA Regulations provides “[a] single passenger may have two or more service animals.”¹³²

Air carriers can refuse to accommodate service animals, including dogs, if certain factors would “preclude their traveling in the cabin as service animals.”¹³³ These factors include “whether the animal is too large or heavy to be accommodated in the cabin, whether the animal would pose a direct threat to

merican-Airlines-Announces-Changes-to-Emotional-Support-Animal-Policy/default.aspx [https://perma.cc/UB6T-NZUB] (announcing American Airlines will limit the species of ESAs and will enforce the forty-eight-hour advance notice provision except in cases of emergency); *We Update Our Policy Around Emotional Support Animals*, UNITED AIRLINES (Feb. 1, 2018), <https://hub.united.com/united-emotional-support-animal-policy-2530539164.html> [https://perma.cc/FPL5-EPMJ] (adding a documentation requirement to fly on United Airlines regarding the training and health status for ESAs but not making changes to requirements for service animals); Lauren Zumbach, *Southwest Joins Airlines Cracking Down on Emotional Support Animals*, CHI. TRIB. (Aug. 14, 2018), <https://www.chicagotribune.com/business/ct-biz-southwest-airlines-emotional-support-animal-restrictions-20180814-story.html> [https://perma.cc/YK4A-T3TF] (discussing Southwest’s new policy limiting the species of ESAs to dogs and cats and requiring the animal to be on leash or in a carrier).

¹²⁷ See *infra* Part III (discussing issues relating to the Air Carrier Access Act).

¹²⁸ *Traveling with a Disability*, U.S. DEP’T TRANSP., <https://www.transportation.gov/individuals/aviation-consumer-protection/traveling-disability> [https://perma.cc/6D5C-T5SJ] (last visited Feb. 19, 2020).

¹²⁹ 14 C.F.R. § 382.1 (2019) (describing the purpose of the rules and stating an effective date of May 13, 2009); see also Huss, *Context*, *supra* note 24, at 1203–08 (discussing the ACAA regulations and the reaction to those regulations).

¹³⁰ 14 C.F.R. § 382.117(a).

¹³¹ *Id.* § 382.117(f). The “certain unusual” animals that do not need to be accommodated include spiders, rodents, and reptiles. *Id.* In the guidance published with the 2009 regulations, the DOT downplayed the impact of passengers requesting to bring unusual service animals onto flights (“[b]ecause they make for colorful stories, accounts of unusual service animals have received publicity wholly disproportionate to their frequency or importance. Some (*e.g.*, tales of service snakes, which grow larger with each retelling) have become the stuff of urban legends”). 2009 Final Rule, *supra* note 8, at 27,636.

¹³² *Id.* at 27,661.

¹³³ 14 C.F.R. § 382.117(f).

the health or safety or others, [or] whether it would cause a significant disruption of cabin service”¹³⁴

Although direct threat and disruption are not further defined in the 2009 ACAA regulations, material produced by the DOT explains that if an animal is “barking or snarling, running around, and/or jumping onto other passengers, etc.[,] without being provoked,” the air carrier can refuse to accept the service animal.¹³⁵ DOT guidance published in 2009 also states that if an air carrier determines, because of behavioral issues, “a service animal cannot accompany a passenger[,]” before excluding the animal from the cabin, “[t]he carrier should first permit the passenger to try available means of mitigating the problem (e.g., muzzling a barking service dog).”¹³⁶

The 2009 ACAA Regulations distinguish between service animals assisting persons with physical disabilities and service animals assisting persons with psychiatric disabilities.¹³⁷ Psychiatric service animals (PSAs) and emotional support animals (ESAs) are treated as one category, with “service animals” (e.g., animals assisting persons with other disabilities) treated as a separate category.¹³⁸

For service animals, the evidence that an air carrier must accept to allow the animal on the flight includes “identification cards, other written documentation, presence of harnesses, tags, or the *credible verbal assurances*” of the individual with the animal.¹³⁹ Air carriers may require persons traveling with ESAs or PSAs to provide documentation no older than a year from the date of the initial flight, on “letterhead [from] a licensed mental health professional” stating:

- (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 or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger’s destination;
- (3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and

¹³⁴ *Id.* Another factor is whether the animal would not be allowed to “enter[] a foreign country [if] that is the flight’s destination.” *Id.*

¹³⁵ *Service Animals (Including Emotional Support Animals)*, U.S. DEP’T TRANSP., <https://www.transportation.gov/individuals/aviation-consumer-protection/service-animals-including-emotional-support-animals> [<https://perma.cc/KV9R-7VTD>] (last visited Feb. 19, 2020).

¹³⁶ *Answers to Frequently Asked Questions Concerning Air Travel of People with Disabilities Under the Amended Air Carrier Access Act Regulation*, U.S. DEP’T TRANSP., 15 (May 13, 2009), [hereinafter *ACAA 2009 Answers*], https://www.transportation.gov/sites/dot.gov/files/docs/FAQ_5_13_09_2.pdf [<https://perma.cc/7LNE-K9H8>].

¹³⁷ 14 C.F.R. § 382.117(d)–(e).

¹³⁸ *See id.*

¹³⁹ *Id.* § 382.117(d) (emphasis added).

- (4) The date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.¹⁴⁰

The 2009 ACAA Regulations provide that passengers with ESAs or PSAs (but *not* other service animals) may be required to provide up to forty-eight hours advance notice to the air carrier and check in earlier than the general public if they intend to travel with such animals.¹⁴¹

These regulations also provide that passengers cannot be required to sign a release or waiver of liability “for the loss of, death of, or injury to service animals,”¹⁴² and there are other requirements regarding transportation of service animals not relating to documentation, such as seat assignments.¹⁴³ If an air carrier does not allow a service animal to accompany a passenger, it is required to document the decision in writing and provide the rationale to the passenger.¹⁴⁴

B. Selected Activity Relating to the ACAA Between 2009 and 2016

In September 2009, the DOT published a request for comments on a petition for rulemaking in response to a request by the Psychiatric Service Dog Society (PSDS) for the DOT to eliminate the provision in the 2009 ACAA Regulations allowing air carriers to require documentation and advance notice for PSAs.¹⁴⁵ The DOT publication and petition illustrates some of the arguments made by disability rights advocates who are opposed to distinguishing between service animals used by persons with physical disabilities and service animals

¹⁴⁰ *Id.* § 382.117(e). The types of licensed mental health professionals consist of “psychiatrist, psychologist, licensed clinical social worker, including a medical doctor specifically treating the passenger’s mental or emotional disability” *Id.*

¹⁴¹ *Id.* § 382.27(c). Passengers traveling with emotional support animals or psychiatric service animals may be required to check in one hour before the general public. *Id.* If a flight segment is scheduled to take eight hours or more, advance notice may be required for service animals. *Id.* § 382.27(c)(9).

¹⁴² *Id.* § 382.35(b).

¹⁴³ *Id.* §§ 382.51(a)(5), 382.81(c), 382.91(c), 382.117(a)–(c) (providing for options for seat assignments, assistance in toileting an animal at an animal relief area at the airport, and allowing carriers to require documentation relating to toileting if a flight segment is over eight hours).

¹⁴⁴ *Id.* § 382.117(g). The documentation must be provided to the passenger within ten calendar days if not provided at the airport at the time the decision was made. *Id.*; *see also infra* notes 216–20 and accompanying text (discussing the controversy over whether there is a private right of action under the ACAA).

¹⁴⁵ Nondiscrimination on the Basis of Disability in Air Travel, 74 Fed. Reg. 47,902 (Sept. 18, 2009) (to be codified at 14 C.F.R. pt. 382) [hereinafter 2009 Petition for Rulemaking]. “[A]ny person may file a petition to . . . amend . . . a rule” under the DOT’s regulatory procedures. *Id.* at 49,904. This petition was one of the rationales for the proposed rulemaking in 2018. *See infra* note 237 and accompanying text.

used by persons with psychiatric disabilities.¹⁴⁶ It also provides insight into the possible counterarguments or questions that arise from such arguments.¹⁴⁷

The first argument is that service animals, whether accompanied by persons with physical or psychiatric disabilities, are trained and have handler-specific behaviors to mitigate an individual's disability.¹⁴⁸ In contrast, ESAs require "little or no training."¹⁴⁹ The DOT asked whether there was a clear distinction between PSAs and ESAs, given that any animal can be excluded if the animal is exhibiting behavior that is disruptive or a direct threat, it appears that some PSAs provide emotional support, and some people say their ESAs perform specific physical tasks for them.¹⁵⁰

The PSDS petition also raised concerns over the ability of airlines to require forty-eight hours advance notice for persons who are traveling on short notice, such as a personal or family emergency.¹⁵¹ The DOT queried whether its guidance, set forth below, was sufficient to address this problem—or if in fact there were actual problems implementing it.¹⁵²

Carriers must accommodate a passenger accompanied by an emotional support or psychiatric service animal who has not provided [forty-eight] hours' advance notice if the carrier can do so by making reasonable efforts, without delaying a flight. The carrier, at its discretion, may waive its [forty-eight] hours' advance notice requirement in order to expedite the emergency air travel of a passenger accompanied by an emotional support or psychiatric service animal.¹⁵³

PSDS also asserted that requiring the documentation for PSAs stigmatizes individuals with mental-health-related disabilities.¹⁵⁴ The PSDS petition argued that if it is necessary for persons with PSAs to provide documentation, persons with service animals should have similar requirements.¹⁵⁵

Other arguments related to the documentation requirement itself.¹⁵⁶ PSDS raised concerns about medical privacy, both that individuals are required to disclose confidential medical information and that there is no provision specifying how the air carriers are to keep such information confidential.¹⁵⁷ The DOT has

¹⁴⁶ See *infra* notes 148–150 and accompanying text (discussing arguments).

¹⁴⁷ 2009 Petition for Rulemaking, *supra* note 145, at 47,904–06 (discussing petition and questions). The DOT was clear that although it was seeking comments on the petition, the department had no obligation to make any changes to the regulations. *Id.* at 47,904–06.

¹⁴⁸ *Id.* at 47,904.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 47,905.

¹⁵¹ *Id.* at 47,904.

¹⁵² *Id.* at 47,906; *ACAA 2009 Answers*, *supra* note 136, at 4–5.

¹⁵³ 2009 Petition for Rulemaking, *supra* note 145, at 47,906; *ACAA 2009 Answers*, *supra* note 136, at 4–5.

¹⁵⁴ 2009 Petition for Rulemaking, *supra* note 145, at 47,904.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

issued guidance on the keeping of such information; however, it is very general and not in the regulation itself.¹⁵⁸

PSDS raised concerns over possible challenges associated with obtaining the required documentation, including financial hardship (especially if an individual does not have medical insurance).¹⁵⁹ The DOT asked for comments about whether this is a concern and pointed to guidance that encourages airlines to accept documentation that is more than one year old if the passenger provides written proof indicating that he or she no longer has health insurance or cannot otherwise afford treatment.¹⁶⁰

The PSDS contended that the DOT did not have “adequate evidence that there is a problem with people trying to sneak pets aboard,” although it did recognize it would be easy for someone to “cheat” the system by claiming a PSA actually was a service animal assisting with a physical disability, and thus not subject to the documentation requirements.¹⁶¹ The DOT asked for comments from airlines and others addressing whether there was evidence supporting the need for a procedural requirement at all.¹⁶² The DOT indicated it was open to identifying alternative ways to prevent fraud, and it stated that the DOT, “the service animal community . . . , and the airlines all share the goal of stopping the abuse of service animal access rights by passengers who fraudulently assert that their pets are service animals.”¹⁶³

The regulations requiring documentation and advance notice for PSAs and ESAs remained in place after the comment period relating to this petition ended, with the DOT stating in the request for comments in the petition for rulemaking it did not “believe that immediate action to change the final rule would be prudent prior to an opportunity to review comments on issues concerning which a wide variety of parties may have an interest in.”¹⁶⁴ And in July 2012, the DOT published a Draft Technical Assistance Manual (Draft TAM).¹⁶⁵ This draft manual was not ultimately adopted by the DOT, but the guidance provided therein is illustrative of the likely viewpoint of the DOT at the time.¹⁶⁶ The

¹⁵⁸ *Id.* at 47,905; *ACAA 2009 Answers*, *supra* note 136, at 4 (stating the DOT recommends “airlines not retain personal medical information that they require a passenger to provide as a condition for obtaining disability accommodations,” but that if they retain the information, it recommends airlines “take steps to safeguard it (e.g., maintaining the information in a separate confidential file for as long as they retain the passenger’s reservation records for the flights involved).”).

¹⁵⁹ 2009 Petition for Rulemaking, *supra* note 145, at 47,904.

¹⁶⁰ *Id.* at 47,906; *ACAA 2009 Answers*, *supra* note 136, at 16.

¹⁶¹ 2009 Petition for Rulemaking, *supra* note 145, at 47,904.

¹⁶² *Id.* at 47,905.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 47,904.

¹⁶⁵ Nondiscrimination on the Basis of Disability in Air Travel: Draft Technical Assistance Manual, 77 Fed. Reg. 39,800 (July 5, 2012) (to be codified at 14 C.F.R. pt. 382) [hereinafter Draft TAM].

¹⁶⁶ *Id.*; see also *Air Travelers with Disabilities: Technical Assistance Manual for Airline Employees, Contractors, and Travelers*, U.S. DEP’T TRANSP., <https://www.transportation.gov>

purpose of the Draft TAM was not to establish new requirements, but to assist airlines in their compliance with the ACAA.¹⁶⁷ The language in the Draft TAM paralleled the language of a 2005-adopted Technical Assistance Manual in most respects.¹⁶⁸ The Draft TAM included a new section addressing unusual service animals and also reiterated that foreign carriers had the ability to limit the species of accommodated service animals to dogs in certain circumstances.¹⁶⁹ Of particular relevance to this Article, the verification and documentation requirements discussed in the Draft TAM were consistent with the 2009 ACAA Regulations.¹⁷⁰

C. Failed Negotiated Rulemaking Process in 2016

A negotiated rulemaking process utilizing a committee (commonly referred to as Reg-Neg) is viewed as a more collaborative method to establish regulations compared with a traditional notice-and-comment process.¹⁷¹ Agencies determine whether a Reg-Neg process is appropriate utilizing several factors, including whether “there is a reasonable likelihood that a committee will reach a consensus on the proposed rule” and whether the “committee can be convened with a balanced representation of persons”¹⁷² Potential benefits to stakeholders of rules developed through a Reg-Neg process can include fewer ad-

v/airconsumer/air-travelers-disabilities-technical-assistance-manual-airline-employees [https://perma.cc/G3PB-U2WM] (last visited Feb. 19, 2020) (providing link to 2005 Technical Assistance Manual and stating it is a guide to the ACAA and its implementing regulations). The 2005 Technical Assistance Manual includes general advice regarding interacting with persons with disabilities and their service animals. Nondiscrimination on the Basis of Disability: Technical Assistance Manual, 70 Fed. Reg. 41,482, 41,485 (July 19, 2005) (to be codified at 14 C.F.R. pt. 382) [hereinafter 2005 TAM].

¹⁶⁷ Draft TAM, *supra* note 165, at 39,800.

¹⁶⁸ *Compare id.*, at 39,813–14, with 2005 TAM, *supra* note 166, at 41,491–92 (providing similar language).

¹⁶⁹ Draft TAM, *supra* note 165, at 39,815 (providing that foreign carriers on code sharing flights with U.S. carriers could not restrict the species in this manner).

¹⁷⁰ *Id.* at 39,814.

¹⁷¹ Administrative Conference Recommendation 2017-2: Negotiated Rulemaking and Other Options for Public Engagement, Admin. Conf. of the United States (June 16, 2017), <https://www.acus.gov/recommendation/negotiated-rulemaking-and-other-options-public-engagement> [https://perma.cc/H9BT-N3SX] (discussing the adversarial nature of notice-and-comment rulemaking); Jill Laptosky & Judith Kaleta, *The Pleasures and Pitfalls of Negotiated Rulemaking*, AM. BAR ASSOC. 1–3, https://www.americanbar.org/content/dam/aba/administrative/air_space/course/16-update/uc16-reg-pleasures-and-pitfalls-negotiated-rulemaking.pdf [https://perma.cc/DG8L-5VMQ] (last visited Feb. 27, 2020) (discussing the Reg-Neg process including the use of the process at the Department of Transportation).

¹⁷² 5 U.S.C. § 563(a)(3)–(4) (2018). “[T]here are a limited number of identifiable interests,” and there is an expectation that the process can be done in a timely manner in a way that will result in the agency being able to use the consensus of the committee as its proposed rule. *Id.* § 563(a)(2).

verse comments during the proposed rulemaking comment period and greater satisfaction with the final rule.¹⁷³

In late 2015, the DOT announced its intent to consider a Reg-Neg for six issues relating to air travel for persons with disabilities.¹⁷⁴ The DOT described the Reg-Neg process as working with representatives of interested parties and the agency to reach a consensus on specified issues.¹⁷⁵ For issues on which the advisory committee reached a consensus, the DOT would then issue a proposed rule for public comment based on that consensus.¹⁷⁶

After a public comment period, and the hiring of a neutral convener who prepared a report on the feasibility of conducting a Reg-Neg for the identified issues, the DOT established a committee to consider three of the issues, including “whether to amend the definition of ‘service animals’ that may accompany passengers with a disability on a flight.”¹⁷⁷ In regards to utilizing the Reg-Neg process on the service animal issue, the DOT stated “[c]oncerns expressed across interest groups about service animals on aircraft suggested that stakeholders would be motivated to come to agreement on their recommendations.”¹⁷⁸

The committee that was established for the Reg-Neg process was referred to as the ACCESS Advisory Committee.¹⁷⁹ Of the twenty-seven members of the ACCESS Advisory Committee, nineteen committee members identified themselves as having a stakeholder or expert interest in service animal issues.¹⁸⁰ There were seven plenary meetings of the ACCESS Advisory Committee beginning in May 2016 and ending in November 2016, although issues relating to service animals were not discussed at the final two meetings.¹⁸¹

¹⁷³ Laptosky & Kaleta, *supra* note 171, at 6 (discussing possible benefits of Reg-Neg).

¹⁷⁴ Nondiscrimination on the Basis of Disability in Air Travel; Consideration of Negotiated Rulemaking Process, 80 Fed. Reg. 75,953, 75,953–54 (Dec. 7, 2015) (to be codified at 14 C.F.R. pt. 382) [hereinafter Consideration of Negotiated Rulemaking Process]; *see also* Nondiscrimination on the Basis of Disability in Air Travel; Establishment of a Negotiated Rulemaking Committee, 81 Fed. Reg. 20,265, 20,266 (Apr. 7, 2016) (to be codified at 14 C.F.R. pt. 382) [hereinafter Establishment of a Negotiated Rulemaking Committee] (discussing background to formation of committee).

¹⁷⁵ Consideration of Negotiated Rulemaking Process, *supra* note 174, at 75,954.

¹⁷⁶ *Id.* at 75,954–55. The issuance and public comment process would be “under established rulemaking procedures.” *Id.*

¹⁷⁷ Establishment of a Negotiated Rulemaking Committee, *supra* note 174, at 20,265. In addition to the service animal issue, the committee was to consider accessibility of inflight entertainment and other communication as well as issues relating to accessible lavatories on certain planes. *Id.*

¹⁷⁸ *Id.* at 20,266. In contrast, the differences among stakeholders relating to inflight entertainment were greater, and the accessible lavatory issue was referenced as “perhaps the longest standing and the most controversial” of the three issues. *Id.*

¹⁷⁹ Traveling by Air with Service Animals, 83 Fed. Reg. 23,832, 23,835–36 (May 23, 2018) (to be codified at 14 C.F.R. pt. 362) (discussing the establishment of the Advisory Committee on Accessible Air Transportation—referred to as the ACCESS Advisory Committee).

¹⁸⁰ *Id.* at 23,836. These committee members were identified as working on these issues. *Id.*

¹⁸¹ ACCESS Advisory Committee, U.S. DEP’T TRANSP., <https://www.transportation.gov/>

1. *Advocates' Positions*

During the Reg-Neg process, committee members who are advocates for persons with disabilities provided a proposal for consideration.¹⁸² The initial proposal recommended the adoption of a mechanism that provided a decision tree to have passengers engage with the idea that such a process “is intended both to remedy ignorance and to ultimately be executed in a way that is easy to agree to for those who are doing the right thing, but might be imposing and dissuade those who aren’t.”¹⁸³ “[N]o other documentation would be required” if the decision-tree process resulted in a passenger determining he or she was traveling with a service animal or emotional support animal, with the passenger attesting to the truth of the statements and acknowledging that it is fraudulent to make false statements in order to obtain the accommodation.¹⁸⁴

The service animal category only included dogs “trained to behave properly in [a] public setting[.]” and “trained to do work or perform a task to mitigate a person’s disability on the flight or at the destination[.]”¹⁸⁵ Miniature horses and capuchin monkeys might also be granted access, though they were not included in the service animal definition.¹⁸⁶

The advocates also set forth a “behavior standard” for public access, which included being housetrained, generally controlled, and not disruptive or destructive.¹⁸⁷ Service animals in training would be allowed to travel as if they were service animals if they meet the behavior standard for public access.¹⁸⁸

access-advisory-committee [<https://perma.cc/EZP5-ZQA7>] (last visited Feb. 19, 2020) (providing information on and links to documents relating to the Reg-Neg process and the activities of the committee). The minutes of the final two meetings do not reflect any activity relating to service animals. *See* U.S. Dep’t. Transp. Minutes: Seventh Meeting of the DOT ACCESS Committee (Nov. 2, 2016), <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/285906/november-meeting-minutes.pdf> [<https://perma.cc/ZE9A-8X8H>]; U.S. Dep’t. Transp., Minutes: Sixth Meeting of the DOT ACCESS Committee (Oct. 12–14, 2016), <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/285901/october-meeting-minutes.pdf> [<https://perma.cc/8T5C-2DMW>].

¹⁸² *See* U.S. DEP’T TRANSP., ADVOCATES’ SERVICE ANIMAL PROPOSAL 1 (2016) [hereinafter ADVOCATES’ SERVICE ANIMAL PROPOSAL].

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 2, 10.

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.* at 3–4. Miniature horses would essentially be treated under the same standards as dogs, but capuchin monkeys would be “restricted to pet carriers while traveling” because “[t]hey are exclusively used for residential disability mitigation and are not intended to assist their users in public settings.” *Id.* at 4.

¹⁸⁷ *Id.* at 2. In addition, the dog cannot create “a threat to health or safety[.]” by aggressive behavior or otherwise, should not be placed on the seat, and should “not unduly encroach[] on another passenger’s space without permission.” *Id.* at 3.

¹⁸⁸ *Id.* at 4.

ESAs, including dogs and other species, would continue to need to be accommodated.¹⁸⁹ Dogs not trained to meet the public access behavior standard—as well as all other species—would have to be transported in a pet carrier.¹⁹⁰ Airlines would continue to have the ability to apply factors such as size or weight that would preclude the animal from traveling in the cabin.¹⁹¹ Under the proposal, airlines could also require a passenger to provide a “reasonable justification” if traveling with more than two animals.¹⁹²

Subsequent documentation indicated that there was not unanimous support for the positions initially proposed by the advocates.¹⁹³ Some advocates supported the concession to restrict the species that could qualify as service animals to dogs (with exceptions for miniature horses and capuchin monkeys) with the understanding that the issue would be revisited in the future.¹⁹⁴ Other advocates would include cats as allowable species of service animals, arguing that there is no “evidence that service cats present a safety risk in air travel [thus] there is no justification for removing access.”¹⁹⁵

The advocates also disagreed on whether the species of ESAs should be restricted. One group agreed that ESAs should be limited to dogs and cats, with the default rule that the animals would be contained in a pet carrier.¹⁹⁶ A second group argued ESAs should be limited to dogs, cats, and rabbits, with the default rule that the ESA must be contained in a pet carrier.¹⁹⁷ A third group of advocates would also allow ESAs who are household birds, with birds and rab-

¹⁸⁹ *Id.* at 3.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 4.

¹⁹² *Id.* at 4–5. The two animals can both be service animals, ESAs, or a combination of the two categories of animals. *Id.* at 4.

¹⁹³ See generally U.S. DEP’T TRANSP., SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING 1 (2016) [hereinafter SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING]; U.S. DEP’T TRANSP., ADVOCATE SERVICE ANIMAL PROPOSAL ADDENDUM 1–4 (2016) [hereinafter ADDENDUM].

¹⁹⁴ SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING, *supra* note 193, at 1; ADDENDUM, *supra* note 193, at 1.

¹⁹⁵ SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING, *supra* note 193, at 6 (quoting section of report discussing the low safety risk of cats and including them in the species of service animals); ADDENDUM, *supra* note 193, at 1 (setting forth cats as an additional service animal species).

¹⁹⁶ SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING, *supra* note 193, at 15. At one point, there was agreement among the advocates that ESA dogs with public access training would not be confined to a carrier. ADDENDUM, *supra* note 193, at 2. The concession of some advocates to limit the species of ESAs to dogs and cats came later in the process with the Addendum still listing other species as qualifying for inclusion in the ESA category. *Id.*

¹⁹⁷ SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING, *supra* note 193, at 7. If the ESA is needed for disability mitigation during the flight, the ESA can be out of the carrier so long as the ESA comports to the behavior standard for public access. *Id.*; ADDENDUM, *supra* note 193, at 2. The group of advocates who did not support including rabbits expressed concern about the unpredictability of rabbits’ behavior and the potential impact on the other animals most likely to be traveling (cats and dogs). SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING, *supra* note 193, at 15–16.

bits restricted to a pet carrier during the flight.¹⁹⁸ Dogs and cats serving as ESAs who have been trained for public access would not be restricted to a pet carrier.¹⁹⁹ How the decision-tree process would work, including the mandatory and voluntary nature of the process, also resulted in three-way split of opinion among the advocates.²⁰⁰

2. Air Carriers' Positions

The carriers' initial response to the advocates' service animal proposal did not reject the decision-tree documentation concept as a whole, but a later response indicated that some of the carriers were not supportive of the concept because of the reliance on passenger-generated (compared with third-party) documentation.²⁰¹ The carriers also were unable to support a voluntary (versus mandatory) documentation approach.²⁰²

The carriers' position was that the service animal species should be limited to "dogs, capuchin monkey [in carriers through flight] and, under certain circumstances, miniature horses" and rejected the addition of cats to the list of allowed species.²⁰³ The carriers would prefer to eliminate the requirement that they are required to accommodate passengers with ESAs.²⁰⁴ The carriers proposed that the approach of the ADA (not requiring the accommodation of persons with ESAs) should be applied to the ACAA.²⁰⁵

The carriers also had issues with the timing of the submission of the documentation.²⁰⁶ The carriers objected to how the current forty-eight-hour advance

¹⁹⁸ SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING, *supra* note 193, at 12.

¹⁹⁹ *Id.* At one point the advocates proposed that all ESA cats would be confined to carriers. ADDENDUM, *supra* note 193, at 2 (providing for cats to be confined to a carrier unless needed for disability mitigation during flight).

²⁰⁰ SERVICE ANIMAL ADVOCATE POSITIONS AND REASONING, *supra* note 193, at 16–27 (indicating a three-way split of opinion); ADDENDUM, *supra* note 193, at 2–3 (indicating a two- or three-way split of opinion).

²⁰¹ U.S. DEP'T TRANSP., CARRIER RESPONSE TO ADVOCATES' SERVICE ANIMAL PROPOSAL 1 (2016) [hereinafter CARRIER RESPONSE]; U.S. DEP'T TRANSP., CARRIER RESPONSE TO REVISED SERVICE ANIMAL PROPOSAL 1 (2016) [hereinafter CARRIER RESPONSE TO REVISED SERVICE ANIMAL PROPOSAL].

²⁰² CARRIER RESPONSE TO REVISED SERVICE ANIMAL PROPOSAL, *supra* note 201, at 1.

²⁰³ *Id.* at 3. The carriers referenced documentation that service animals are restricted to dogs in other countries. CARRIER RESPONSE, *supra* note 201, at 1.

²⁰⁴ CARRIER RESPONSE, *supra* note 201, at 2 (stating "[b]ottom line: the ESA aspect of the SAP is unacceptable to the carriers. It would exacerbate the entire ESA problem rather than mitigate it."); CARRIER RESPONSE TO REVISED SERVICE ANIMAL PROPOSAL, *supra* note 201, at 2–3.

²⁰⁵ CARRIER RESPONSE, *supra* note 201, at 2; CARRIER RESPONSE TO REVISED SERVICE ANIMAL PROPOSAL, *supra* note 201, at 2–3. In their initial response, the carriers stated that, although it would make carrier agreement less likely, "at a minimum[, the ESA] provision should have the same species limits as applies to service animals, and the ESA should be required to remain in a pet carrier during flight." CARRIER RESPONSE, *supra* note 201, at 2.

²⁰⁶ CARRIER RESPONSE, *supra* note 201, at 3 (initially stating "[p]assengers must complete the documentation at the time of ticketing absent some compelling reason not to . . .");

notice rule has been interpreted to allow for exceptions to be made, arguing that documentation should be provided a minimum of twelve hours prior to the flight.²⁰⁷ The carriers also proposed a limit of two service animals for each passenger, with a requirement that a passenger traveling “with more than one service animal may be required to provide ‘reasonable justification’ to the airline [to support] the need to do so.”²⁰⁸ Given the divergent viewpoints of the advocates and carriers it is not surprising that, unlike the other two issues it was considering, the ACCESS Advisory Committee was unable to reach consensus on the service animal issue.²⁰⁹

D. Selected Legislative Activities in 2017 and 2018

In 2017 and 2018 there were multiple pieces of legislation introduced to address the issue of service animals under the ACAA.²¹⁰ The Air Carrier Access Amendments Act (ACAAA) was introduced in 2017²¹¹ and 2018²¹² by members of the Senate and House of Representatives respectively.²¹³ The ACAA included congressional findings that individuals with disabilities continue to encounter significant barriers including “inequitable treatment of service animals[.]”²¹⁴

The ACAA would have provided that the Secretary of the DOT would be required to “issue revised regulations—(A) eliminating additional documentation for psychiatric service animals; (B) protecting the ability of travelers to use emotional support animals in air transportation; and (C) prohibiting air carriers from requesting medical documentation regarding the need for a service animal as a standard requirement for access.”²¹⁵

Another significant issue raised in the ACAA is the remedy available to individuals with disabilities who believe that an air carrier has discriminated

CARRIER RESPONSE TO REVISED SERVICE ANIMAL PROPOSAL, *supra* note 201, at 3 (concluding it was not feasible to have documentation be submitted at the time of ticketing).

²⁰⁷ CARRIER RESPONSE TO REVISED SERVICE ANIMAL PROPOSAL, *supra* note 201, at 3–4; *see also supra* note 141 and accompanying text (discussing forty-eight-hour rule and interpretation).

²⁰⁸ CARRIER RESPONSE TO REVISED SERVICE ANIMAL PROPOSAL, *supra* note 201, at 5.

²⁰⁹ Traveling by Air with Service Animals, 83 Fed. Reg., 23,832, 23,836, (May 23, 2018) (to be codified at 14 C.F.R. pt. 382). None of the representatives of the ACCESS Advisory Committee voted against discontinuing discussions of the service and support animal issue although a few members abstained. U.S. DEP’T TRANSP., ACCESS COMM., RESOLUTION 1, 18 (2016) (providing resolution including vote tally sheets).

²¹⁰ *See supra* note 209 and accompanying text; *infra* notes 211–25 and accompanying text.

²¹¹ Air Carrier Access Amendments Act of 2017, S. 1318, 115th Cong. (2017).

²¹² Air Carrier Access Amendments Act of 2018, H.R. 5004, 115th Cong. (2018).

²¹³ H.R. 5004; S. 1318.

²¹⁴ H.R. 5004, § 2(a)(2)(D).

²¹⁵ *Id.* § 6(a)(3).

against them in contravention of the ACAA.²¹⁶ Because there is no express language in the ACAA covering the issue, courts have split on whether an individual with such a claim may bring a private right of action against an air carrier in court, though recent court cases generally have determined there is no private right of action.²¹⁷ The ACAA's congressional findings stated “[u]nlike other civil rights statutes, the ACAA does not contain a private right of action, which is critical to the enforcement of civil rights statutes. Legislation is necessary to correct this anomaly.”²¹⁸

The ACAA would have resolved this issue by providing for persons, who believe that they have been injured by a violation of the ACAA, to have a right to “bring a civil action in an appropriate” United States district court.²¹⁹ In addition to compensatory and punitive damages, plaintiffs could have been

²¹⁶ See *supra* note 215 and accompanying text; *infra* notes 217–18 and accompanying text (discussing the portion of the legislation that would incorporate a private right of action into the ACAA).

²¹⁷ Compare *Bower v. Fed. Express Corp.*, 156 F. Supp. 2d 678, 690 (W.D. Tenn. 2001) (denying summary judgment motion to dismiss ACAA claims), with *Stokes v. Sw. Airlines*, 887 F.3d 199, 202–03, 205 (5th Cir. 2018) (finding the ACAA does not provide for a private right of action given the “comprehensive administrative scheme” provided in the ACAA) (emphasis omitted); *Mapp-Leslie v. Norwegian Airlines*, No. 19-CV-7142 (PKC), 2020 WL 264919, at *2 (E.D.N.Y. Jan. 17, 2020) (citing to *Stokes* and holding that an individual did not have a claim based on the ACAA because the ACAA does not confer a private right of actions). Although the remedies available to aggrieved passengers are important (as having a private right of action may incentivize carriers to be more cautious in their application of the ACAA), because the focus of this Article is on the “front-end” of the process, the issue will not be discussed in depth. The *Stokes* case provides a useful recitation of the administrative process relating to enforcement. *Stokes*, 887 F.3d at 203. As the *Stokes* case discusses: (1) passengers are to notify the DOT through a complaint process; and (2) the DOT investigates and if, after a hearing, there is a finding of an ACAA violation, the DOT must issue an order to compel the carrier to comply but *may* take further action through civil penalties of up to \$25,000, revocation of an air carrier certificate, or filing its own civil action. *Id.* (citing to ACAA). Aggrieved passengers can seek judicial review to compel the DOT to investigate, and there is a provision allowing for publication of disability-related complaint data. *Id.* (citing to ACAA). It is perhaps this lack of a clear private right of action that emboldened air carriers to make changes to their service animal policies that appeared to be in clear contravention of the provisions of the ACAA then in effect. See Alana Wise, *Delta Air to Tighten Rules for Onboard Service Animals*, REUTERS (Jan. 19, 2018, 5:07 AM), <https://www.reuters.com/article/us-delta-air-safety-animals/delta-air-to-tighten-rules-for-onboard-service-animals-idUSKBN1F81G9> [<https://perma.cc/CS56-KF3T>] (announcing Delta's new rules and stating “the carrier had been in touch with the U.S. Department of Transportation prior to issuing the new guidance . . .”); *supra* notes 123–26 and accompanying text (discussing air carriers' adoption of provisions, including initial provisions that increase the required documentation and notice in order to travel with a service animal).

²¹⁸ H.R. 5004, § 2(b)(6). The legislation also includes provisions that would allow individuals with disabilities to make complaints relating to discrimination by air carriers prohibited by the ACAA. *Id.* § 4(d).

²¹⁹ *Id.* § 4(e)(1)(A). The Attorney General may also bring a civil action on behalf of such persons. *Id.* § 4(e)(2)(A).

awarded reasonable attorney fees and other costs associated with the litigation if this legislation had been enacted.²²⁰

Another piece of legislation (“Behavior Training Legislation”) would have provided the definition of service animal under the ACAA to mirror the definition of service animal provided in Title II and Title III regulations of the ADA.²²¹ The Behavior Training Legislation also would have required the Secretary of the DOT, in consultation with others, to “establish a standard of service animal behavior training that an individual with a disability shall adhere to in seeking accommodation involving a service animal from an air carrier.”²²²

The Behavior Training Legislation would also have made it clear that a person who “knowingly and willfully makes a false statement for the purpose of seeking accommodation involving an animal from an air carrier” relating to the status of the animal as a service animal or that the animal meets the standard set by the animal behavior training may be punished pursuant to a general provision of the United States Code regarding false representations.²²³

The FAA Reauthorization Act of 2018, passed by the House of Representatives in April 2018 and enacted in October 2018, contains a section that required the DOT to engage in the rulemaking process and issue a new rule within eighteen months after the Act’s enactment, “to develop minimum standards for what is required for service and emotional support animals carried in aircraft cabins.”²²⁴ This Act required the Secretary of the DOT to consider “reasonable measures to ensure pets are not claimed as service animals,” where such measures might contain documentation such as photo identification and other measures related to the safety of all passengers, including the possibility of requiring “third-party proof of behavioral training for a service animal”²²⁵ In addition, the Secretary of the DOT was required to consider “whether to align the definition of ‘service animal’ with the definition of that term” used by the DOJ ADA regulations.²²⁶

The DOT announced the beginning of another rulemaking process in 2018.²²⁷ As seen in the discussion of the proposed rulemaking below, the DOT

²²⁰ *Id.* § 4(e)(1)(B).

²²¹ S. 2738, 115th Cong. § 1(d)(1)(B) (2018); *see also supra* note 35 and accompanying text (defining service animal under the Title II and Title III regulations of the ADA).

²²² S. 2738 § 1(d)(3).

²²³ *Id.* § 1(d)(2); *see also infra* note 275 (discussing 18 U.S.C. § 1001 (2018), the referenced section of the code prohibiting false statements or representations and providing for a penalty of a fine or imprisonment of not more than five years).

²²⁴ FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 437, 132 Stat. 3186, 3344 (2018).

²²⁵ *Id.* at 3344–45.

²²⁶ *Id.* at 3344.

²²⁷ *See U.S. Department of Transportation Seeks Comment on Amending Regulations Concerning Service Animals on Flights*, U.S. DEP’T TRANSP. (May 16, 2018), <https://www.transportation.gov/briefing-room/dot3618> [<https://perma.cc/6N3C-AMCU>].

has incorporated many of the issues raised by the Reg-Neg process and legislation in its call for comments.²²⁸

E. Proposed Rulemaking in 2018

In May 2018, the DOT published an Advanced Notice of Proposed Rulemaking relating to traveling by air with service animals.²²⁹ The DOT cited to several rationales to support the need for proposed rulemaking.²³⁰ Consumer complaints, the majority from passengers whose PSAs or ESAs had not been accepted for transport, continued to be received by the DOT.²³¹ Concerns about the transportation of unusual species, including birds and pigs, have also been raised by airlines and disability rights advocates.²³² Airlines asserted they believe the increase in the number of service animals is due to people misrepresenting the status of pets as ESAs or PSAs.²³³ This is connected to the concern over untrained service animals causing safety issues.²³⁴ Airlines caution that the ability to assess the behavior of a service animal in a gate area may not be sufficient to determine an animal's behavior in the aircraft itself.²³⁵

Potential conflicts caused by the application of the DOJ's service animal definition under ADA Title II in airports is also raised as a rationale for the rulemaking.²³⁶ The DOT referenced the prior Request for Rulemaking by the

²²⁸ See *infra* notes 239–48 and accompanying text (setting forth issues on which the DOT is asking for comments and information from the public).

²²⁹ *Traveling by Air with Service Animals*, 83 Fed. Reg. 23,832 (May 23, 2018) (to be codified at 14 C.F.R. pt. 382).

²³⁰ *Id.* at 23,834–35. This section discusses the concerns relating to service animals. In addition, the DOT cited to its obligation under legislation enacted in 2016 that requires it to “issue a supplemental notice of proposed rulemaking on five issues[,]” including service animals. *Id.* at 23,835.

²³¹ *Id.* at 23,834. Complaints regarding service animals was the fourth highest area of complaints against airlines relating to disabilities in 2016 and 2017. *Id.*

²³² *Id.* Disability rights advocates question whether these animals can be trained to behave safely in a public setting and believe the use of such animals could “erode the public’s trust” in the use of more traditional service animals. *Id.* But see *supra* note 131 and accompanying text (discussing the DOT’s downplaying of concerns over the use of nontraditional species in the rulemaking associated with the 2009 regulations).

²³³ *Traveling by Air with Service Animals*, 83 Fed. Reg. at 23,834. Airlines also raised the issue of the ease with which physical indicators of the status of an animal as a service animal (such as a harness or vest) can be obtained online. *Id.*; see also *infra* Section IV.A (discussing concerns about misrepresentation and how some states are addressing the issue).

²³⁴ *Traveling by Air with Service Animals*, 83 Fed. Reg. at 23,834. One airline reported an increase of 84 percent in problems relating to the behavior of service animals including urinating and biting. *Id.* The DOT also referenced “a few highly-publicized reports of service animals biting passengers.” *Id.*

²³⁵ *Id.*

²³⁶ *Id.*; see also *supra* notes 34–37 and accompanying text (discussing definition of service animal under Titles II and III of the ADA).

PSDS and another request by Airlines for America to address the issues.²³⁷ Ten disability advocacy organizations also raised concerns with the DOT about the revised service animal policies announced by two airlines.²³⁸

The DOT solicited comments in the following areas:

- (1) Whether psychiatric service animals should be treated similar to other service animals;²³⁹
- (2) whether there should be a distinction between emotional support animals and other service animals;²⁴⁰
- (3) whether emotional support animals [and other service animals] should be required to travel in pet carriers for the duration of the flight;²⁴¹
- (4) whether the species of service animals and emotional support animals that airlines are required to transport should be limited;²⁴²
- (5) whether the number of service animals/emotional support animals should be

²³⁷ Traveling by Air with Service Animals, 83 Fed. Reg. at 23,835; Letter from Sharon L. Pinkerton, Senior Vice President Policy, Airlines for Am., to James Owen, Deputy Gen. Counsel, U.S. Dep't of Transp. (Jan. 31, 2018) (on file at <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0314> [<https://perma.cc/6CZ4-JFBW>]) (encouraging the DOT to amend the service animal rule and emphasizing its concerns over safety issues arising from passengers bringing untrained animals onto flights). As part of its December 2017 response to a different DOT proposal, Airlines for America raised the economic cost of passengers without disabilities bringing animals on flights purportedly as PSAs or ESAs evading airlines' policies. Comments of Airlines for America Part Two: Proposals for Repeal or Amendment of Specific DOT Economic Regulations at 27–28, No. DOT-OST-2017-0069 (U.S. Dep't Transp. Dec. 1, 2017), <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2751> [<https://perma.cc/XU2U-JSKU>] (last visited Feb. 27, 2020).

²³⁸ Traveling by Air with Service Animals, 83 Fed. Reg. at 23,835.

²³⁹ The DOT referenced the DOJ's ADA regulations that treat service animals accompanying people with physical and psychiatric disabilities the same but raised concerns over fraud if there was not documentation required. *Id.* at 23,838. The DOT raised the concerns of disability advocates about the stigmatization of persons with psychiatric disabilities due to the current distinction in the ACAA 2009 Regulations over service animals and PSAs and the cost associated with the requirement of third-party documentation. *Id.* The DOT cited to a report provided to it from three organizations that stated that the average time to obtain such documentation is thirty-one days with the average cost being over \$150. *Id.* The DOT also requested feedback on whether it would be rational to continue to allow airlines to require forty-eight hours advance notice for PSAs and ESA. *Id.* at 23,839.

²⁴⁰ The DOT asked whether ESAs should be included in the definition of service animals at all, and, even if included, whether and what type of documentation might be appropriate. *Id.* The DOT cited to the ability of housing providers to request documentation as an example of another circumstance when such documentation is required. *Id.*; see also *supra* notes 99–105 and accompanying text (analyzing documentation allowed under the FHA).

²⁴¹ The DOT focused on the containment of ESAs, citing to the belief by some organizations that the increase in ESAs is the reason for the increasing number of behavioral issues and the fact that some airports already require ESAs to be contained in a pet carrier. Traveling by Air with Service Animals, 83 Fed. Reg. at 23,839.

²⁴² One area that the major stakeholders appear to agree on is there should be some limitation of species. *Id.* However, there is not agreement on whether dogs should be the only species of service animal allowed or whether other species, including miniature horses and capuchin monkeys, should be allowed. *Id.* at 23,839–40; see also Huss, *Context, supra* note 24, at 1182–89 (analyzing the issue of miniature horses and capuchin monkeys when the DOJ was revising the ADA's Title II and Title III regulations). If ESAs are still allowed, the DOT inquired whether other species should be acceptable as ESAs. Traveling by Air with Service Animals, 83 Fed. Reg. at 23,839–40.

limited per passenger;²⁴³ (6) whether an attestation should be required from all service animal and emotional support animal users that their animal has been trained to behave in a public setting;²⁴⁴ (7) whether service animals and emotional support animals should be harnessed, leashed, or otherwise tethered;²⁴⁵ (8) whether there are safety concerns with transporting large service animals and[,] if so, how to address them;²⁴⁶ (9) whether airlines should be prohibited from requiring a veterinary health form or immunization record from service animal users without an individualized assessment that the animal would pose a direct threat to the health or safety of others or would cause a significant disruption in the aircraft cabin;²⁴⁷ and (10) whether U.S. airlines should continue to be held responsible if a passenger traveling under the U.S. carrier's code is only al-

²⁴³ The DOT asked whether individuals should have to justify being accompanied by more than one service animal or ESA. *Traveling by Air with Service Animals*, 83 Fed. Reg. at 23,840. The DOT referenced its guidance that recognizes that a passenger may have a legitimate need for more than one service animal, but the DOT's Office of Aviation Enforcement and Proceedings "has chosen not to pursue action against carriers that refuse to accept more than three service animals per person." *Id.*

²⁴⁴ The DOT raised the possibility of requiring documentation that would require passengers to attest that their animal is trained to behave appropriately (or alternatives to documentation) to address concerns about the difficulty in determining whether an animal can behave appropriately while on the aircraft and whether such a requirement would reduce the safety risk of such animals. *Id.* The DOT recognized the lack of a documentation requirement in the ADA's Title II and Title III regulations but queried whether the circumstance that "air travel involves people being in a limited space for a prolonged period without the ability to freely leave" may require greater assurances in this context. *Id.* As with other aspects of the proposed rulemaking, the DOT also raised the concern that such a requirement would serve as a barrier for persons with disabilities in travel. *Id.*

²⁴⁵ The DOT recognized that the 2009 ACAA regulations do not contain specific language regarding tethering, unlike the ADA Title II and Title III regulations, and asked for comments about whether such requirement could reduce the likelihood of problems with the service animal injuring others. *Id.*

²⁴⁶ The 2009 ACAA Regulations and related guidance already contain several provisions relating to seat location, but the DOT requested additional feedback regarding how it has handled the issue in the past given the concerns of airlines and other passengers (who may be requested to share foot space with service animals). *Id.* at 23,841. The DOT reported that "[s]ome airlines have urged the [DOT]" to adopt size or weight limitations for ESAs. *Id.*; see also *supra* note 88 and accompanying text (discussing the lack of a breed, size, or weight limitation for service animals under the ADA and assistance animals under the FHA).

²⁴⁷ The DOT recognized that a few airlines had adopted policies requiring additional forms to be provided regarding animals' health or behavior. *Traveling by Air with Service Animals*, 83 Fed. Reg. at 23,841. The DOT requested the airlines provide data on the number and types of incidents of misbehavior, in particular the number of incidents involving an animal biting a person, to support the claims of increasing incidents. *Id.* The American Veterinary Medical Association (AVMA) raised its concern that the forms required by airlines necessitating a veterinarian attest to an animal's behavior and health is of concern. *Id.* The AVMA articulated the limits of the ability of veterinarians to provide information regarding the behavior of animals in this specific environment. *Id.* It also voiced concerns by veterinarians that the information they are being asked to attest to on the forms may lead to veterinarians refusing to complete the forms. *Id.* The DOT asked for comments regarding whether alternatives to a veterinarian certificate (such as a rabies certificate) would be an alternative to such documentation. *Id.* at 23,841-42.

lowed to travel with a service dog on a flight operated by its foreign code share partner.²⁴⁸

On the same day that the DOT announced its advanced notice of rulemaking, it posted an Interim Statement of Enforcement Priorities Regarding Service Animals.²⁴⁹ The DOT recognized that a few airlines had adopted policies that added documentation or other requirements for passengers accompanied by service animals.²⁵⁰ In recognition of the length of time associated for the rulemaking process, the DOT's Office of Aviation Enforcement and Proceedings (the "Enforcement Office") issued the statement about its intended enforcement focus until the revisions are completed.²⁵¹ The Enforcement Office stated it would focus on "clear violations of the current rule that have the potential to adversely impact the largest number of persons."²⁵²

Although the Enforcement Office indicated it may take action against U.S. carriers for failing to transport any type of service animal, it stated it would concentrate its resources on ensuring that carriers continue to accept "dogs, cats, and miniature horses . . ."²⁵³ The Enforcement Office announced that, consistent with past guidance, it would not take action against airlines if they limit passengers to the transportation of no more than three task-trained service animals.²⁵⁴ However, the Enforcement Office stated it did "not intend to take action" against carriers that limit passengers to the transportation of only one ESA.²⁵⁵

The Enforcement Office articulated it would not use its "resources to pursue enforcement action against airlines for requiring proof of a [PSA's or ESA's] vaccination, training, or behavior . . ."²⁵⁶ Although the Enforcement Office stated it would continue to monitor the types of information airlines re-

²⁴⁸ *Id.* at 23,838. The DOT has not acted against U.S. carriers for foreign carriers' refusal to transport species other than dogs on code share flights, but the DOT asked whether the new regulations should explicitly state that U.S. carriers will not be held responsible in these circumstances. *Id.* at 23,842.

²⁴⁹ Nondiscrimination on the Basis of Disability in Air Travel, 83 Fed. Reg. 23,804 (May 23, 2018) (to be codified at 14 C.F.R. pt. 382).

²⁵⁰ *Id.* at 23,805. The DOT described some of these policies that added requirements for documentation supporting the health and vaccination status of animals and passenger attestations that the behavior of their animals would not pose a direct threat to persons aboard the aircraft. *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 23,805–06.

²⁵³ *Id.* at 23,806. The Enforcement Office articulated that this is because these "are the most commonly used service animals." *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* The Enforcement Office stated "it is less clear that passengers require more than one ESA for travel or at the passenger's destination." *Id.*

²⁵⁶ *Id.* at 23,807. The Enforcement Office referenced the fact that the regulations already allow for forty-eight hours of advance notice for passengers traveling with PSAs and ESAs which allows carriers to assess such documentation. *Id.* In contrast, travelers with service animals, other than PSAs and ESAs, should not be subject to such documentation requirements. *Id.*

quested to support travel for PSAs and ESAs, it did not believe such requirement “would make travel with those animals unduly burdensome or effectively impossible”²⁵⁷ The Enforcement Office also stated it “will not take action against carriers that impose reasonable restrictions on the movement of ESAs in the cabin,” including the requirement that an animal be confined to a carrier, or be on a leash.²⁵⁸

The Enforcement Office did announce it would continue to enforce some aspects of the 2009 ACAA Regulations.²⁵⁹ The Enforcement Office reiterated that the 2009 ACAA Regulations only allow carriers to require advance notice under limited circumstances and that it would use its resources to enforce such rules.²⁶⁰ The Enforcement Office also indicated it would continue to enforce the obligation of carriers to accept credible verbal assurances for service animals (other than PSAs and ESAs) if a passenger’s disability is unclear, rather than allowing them to impose a documentation requirement on everyone.²⁶¹ Airlines responded by revising their service animal policies to be consistent with the Enforcement Office’s guidance.²⁶²

²⁵⁷ *Id.*

²⁵⁸ *Id.* The reasonableness of the restriction is based on the size of the animal, so, in some cases, it would be reasonable to require the animal to stay on the floor at the feet of a passenger. *Id.* The 2018 Enforcement Priorities traced the history of the DOT interpretation that allowed for service animals to be carried on the lap of passengers so long as the animal did not weigh more than a child less than two years old. *Id.* This is based on a 2010 letter that interpreted the regulation as not allowing carriers to require the restriction of service animals. *Id.* at 23,807 n.6.

²⁵⁹ *Infra* notes 260–61 and accompanying text (discussing aspects of the regulations that would continue to be enforced).

²⁶⁰ Nondiscrimination on the Basis of Disability in Air Travel, 83 Fed. Reg. at 23,806; *see also supra* note 141 and accompanying text (discussing the ability of carriers to require advance notice for PSAs and ESAs and for all animals if a flight segment is scheduled to take over eight hours).

²⁶¹ Nondiscrimination on the Basis of Disability in Air Travel, 83 Fed. Reg. at 23,806. The Enforcement Office also reiterated that airlines should not require passengers traveling with service animals to check-in at a ticket counter rather than utilizing electronic check-in procedures. *Id.*

²⁶² *Emotional Support Animals*, SOUTHWEST AIRLINES, <https://www.southwest.com/html/customer-service/unique-travel-needs/customers-with-disabilities-pol.html?CLK=SITSEARCH> [https://perma.cc/R9WQ-5ZUL] (last visited Feb. 27, 2020); *Service and Support Animals*, DELTA AIRLINES, <https://www.delta.com/us/en/accessible-travel-services/service-animals> [https://perma.cc/QE97-T47K] (last visited Feb. 27, 2020) (describing Delta airlines’ policy including changes through 2018 and 2019); *Service Animals*, UNITED AIRLINES, https://www.united.com/web/en-us/content/travel/specialneeds/disabilities/assistance_animals.aspx?POS=US (last visited Feb. 27, 2020); *Trained Service Animals*, SOUTHWEST AIRLINES, <https://www.southwest.com/html/customer-service/unique-travel-needs/customer-s-with-disabilities-pol.html?CLK=SITSEARCH> [https://perma.cc/X6Z3-A8VD] (last visited Feb. 27, 2020).

F. Final Statement of Enforcement Priorities in 2019

In August 2019, the DOT issued a Final Statement of Enforcement Priorities (“Final Statement”) addressing comments and responses based on the May 2018 Interim Statement of Enforcement Priorities.²⁶³ Although many of the priorities were similar to those set forth in the Interim Statement of Enforcement Priorities, there were a few notable exceptions.²⁶⁴

The DOT reiterated that it would continue to focus its enforcement discretion on the most commonly used service animals (dog, cats, and miniature horses), allow for a limit of three service animals, and would consider containment of ESAs on a case-by-case basis.²⁶⁵ However, unlike the interim statement, in the Final Statement, passengers utilizing all categories of service animals, including passengers with apparent physical disabilities, can be required to provide additional documentation regarding an animals vaccination, training, or behavior.²⁶⁶

The DOT also provided guidance in the Final Statement on new restrictions announced by airlines.²⁶⁷ The DOT announced that although airlines may find any specific animal poses a direct threat based on behavior, “a limitation based exclusively on breed of the service animal is not allowed.”²⁶⁸ Similarly the DOT announced a categorical ban on service animals of a specific weight would be inconsistent with the ACAA.²⁶⁹ However, the DOT articulated that the age of a service animal could be taken into consideration, and it did not

²⁶³ Guidance on Nondiscrimination on the Basis of Disability in Air Travel, 84 Fed. Reg. 43,480, 43,481 (Aug. 21, 2019) (to be codified at 14 C.F.R. pt. 382).

²⁶⁴ See *supra* notes 249–61 and accompanying text (discussing the Interim Statement of Enforcement Priorities).

²⁶⁵ Guidance on Nondiscrimination on the Basis of Disability in Air Travel, 84 Fed. Reg. at 43,481–82, 43,484. Airlines are still subject to enforcement action if they refuse to transport any other species of animals, other than snakes, reptiles, ferrets, rodents and spiders. *Id.* at 43,481. The DOT indicated that airlines may also continue to limit the total number of ESAs per passenger to one but are not allowed to limit the total number of service animals on a flight. *Id.* at 43,482. The advance notice requirement and use of credible verbal assurances to prove a service animal’s status by a passenger with a clearly visible disability also remained unchanged. *Id.*

²⁶⁶ *Id.* at 43,484. The DOT also indicated it would not consider it a violation for airlines to require lobby check-in for passengers traveling with PSAs and ESAs. *Id.* at 43,483. However, the DOT also made it clear that any additional documentation requirement for non-PSA or ESA service animals could not result in an advance notice requirement for those passengers. *Id.* at 43,486.

²⁶⁷ *Id.* at 43,485.

²⁶⁸ *Id.* (citing to a June 22, 2018 DOT statement). As of February 2020, Delta Airlines’ policy was continued to deny access to passengers utilizing pit bull type dogs as service animals. *Service and Support Animals*, *supra* note 262.

²⁶⁹ Guidance on Nondiscrimination on the Basis of Disability in Air Travel, 84 Fed. Reg. at 43,485.

anticipate exercising its enforcement discretion if airlines would not accept any service animals under four months old.²⁷⁰

One of the policies that several airlines initially instituted was requiring passengers accompanied by PSAs or ESAs to use a specific form to prove the status of these animals.²⁷¹ The DOT made it clear that airlines were required to comply with existing regulations regarding this issue (which set forth the information that can be required but do not mandate a particular form).²⁷²

G. Notice of Proposed Rulemaking in 2020

The DOT announced a Notice of Proposed Rulemaking in January 2020.²⁷³ The Notice of Proposed Rulemaking (“2020 ACAA NPRM”) was published in the Federal Register on February 5, 2020 and provided for comments to be filed by April 6, 2020.²⁷⁴ The DOT set forth the statutory authority for the rulemaking and reiterated the compelling factors that would justify the revision to the regulations.²⁷⁵ The DOT set forth background on prior requests for rulemaking and referred back to the FAA Reauthorization Act of 2018 to support the rulemaking process.²⁷⁶

The 2020 ACAA NPRM proposes to use the DOJ’s ADA definition of service animal as “a dog that is individually trained to do work or perform tasks.”²⁷⁷ Emotional support animals would not be required to be accommodat-

²⁷⁰ *Id.* The basis for this is that all the animals covered under the ACAA “are expected to be sufficiently trained” for public access. *Id.*

²⁷¹ *Id.* at 43,486.

²⁷² *Id.* The DOT also reiterated that not allowing passengers to bring ESAs on flight segments lasting eight hours or more would be prohibited by the regulations but that the airlines could continue to follow the existing regulations and require passengers to provide documentation to support the ability of the animal to relieve him or herself in a manner that is not a health or sanitation issue (or not need to relieve him or herself). *Id.* at 43,485–86.

²⁷³ *U.S. Department of Transportation Seeks Comment on Proposed Amendments to Regulation of Service Animals on Flights*, U.S. DEP’T TRANSP. (Jan. 22, 2020), <https://www.transportation.gov/briefing-room/us-department-transportation-seeks-comment-proposed-amendments-regulation-service> [<https://perma.cc/7JMM-VQB5>].

²⁷⁴ *Traveling by Air with Service Animals*, 85 Fed. Reg. 6448 (Feb. 5, 2020) (to be codified at 14 C.F.R. pt. 382).

²⁷⁵ *Id.* at 6448–51. These included complaints about service animals, issues with the use of inconsistent definitions of service animal compared with the DOJ’s ADA Title I and II definition, passengers attempting to fly with unusual species of animals, concerns that passengers flying with pets may be misrepresenting the status of an animal, and misbehavior of service animals. *Id.* at 6449–50.

²⁷⁶ *Id.* at 6450–51; *see also supra* notes 224–26 and accompanying text (discussing the FAA Reauthorization Act of 2018).

²⁷⁷ *Traveling by Air with Service Animals*, 85 Fed. Reg. at 6454 (defining a “service animal as a dog that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”).

ed as service animals, but air carriers could transport them under the same terms as the air carriers transport pets.²⁷⁸

No species of animals other than dogs would be required to be transported.²⁷⁹ Similarly to the DOJ, the 2020 ACAA NPRM proposes that airlines would be allowed to deny transportation to an animal if the animal “poses a direct threat to the health or safety of others” through an individualized assessment, and took the position that airlines “should continue to be prohibited from restricting service animals based solely on the breed or generalized type of dog.”²⁸⁰ The 2020 ACAA NPRM also proposes that airlines could restrict the size of service animals to those who “can be placed on [a] passenger’s lap” or “fit within [a] passenger’s foot space.”²⁸¹

Under the 2020 ACAA NPRM air carriers would be allowed to limit the number of service animals traveling per passenger with a disability to two; however, air carriers would still not be allowed to limit the total number of service animals on a flight.²⁸² Passengers with disabilities would be required to maintain control over their service animals similarly to the DOJ’s Title I and Title II service animal regulations—“harnessed, leashed, or tethered unless the device interferes with the service animal’s work or the passenger’s disability prevents use of [those] devices.”²⁸³

The existing documentation requirement for PSA and ESA (pursuant to the 2009 Regulations) would no longer be applicable (as the proposed definition of service animal does not distinguish between passengers regardless of the type of disability), however the DOT has proposed three new forms that airlines could require passengers traveling with service animals to submit.²⁸⁴ All passengers with disabilities who wish to be accompanied by a service animal would be required to provide a “Service Animal Behavior and Training Attestation Form.”²⁸⁵ This form is executed by the service animal handler and sets forth the definition of service animal, reiterates the rules regarding control, and acknowledges that airlines can treat animals who exhibit disruptive behavior as

²⁷⁸ *Id.* at 6458.

²⁷⁹ *Id.* at 6454. The DOT referenced the size limitations on an aircraft in determining whether to limit the definition of service animals to dogs—and not provide for miniature horses. *Id.*

²⁸⁰ *Id.* at 6454, 6476. The language of the proposed regulations refers to an individualized assessment to determine whether an animal poses a direct threat but does not specifically state that air carriers may not restrict based solely on the appearance of a dog. *Id.* at 6476.

²⁸¹ *Id.* at 6461.

²⁸² *Id.* The inability to limit the total number of service animals on a flight is based on the existing regulation that prohibits air carriers from restricting the total number of passengers with a disability on a flight. *Id.*

²⁸³ *Id.* at 6462. In the event the devices are unable to be used, “voice, signal[s] or other . . . means” can be used. *Id.* The DOT also solicited comments on the definition of service animal handler as it wanted to distinguish between individuals with disabilities who may be traveling with a safety assistant and trainers of service animals. *Id.* at 6463.

²⁸⁴ *Id.* at 6464–70.

²⁸⁵ *Id.* at 6465–66.

pets, airlines can charge for damage caused by service animals (if they similarly charge passengers without disabilities for such damage), and making false statements to secure disability accommodations is fraudulent.²⁸⁶ All passengers with service animals could also be required to provide an “Air Transportation Service Animal Health Form.”²⁸⁷ This form would be executed by a veterinarian and sets forth a description of the service animal as well as rabies vaccination information.²⁸⁸ Veterinarians would also be required to certify that the veterinarian inspected the animal for infectious, contagious, or communicable disease and either check a box stating that “[t]o my knowledge this animal described above has not exhibited aggressive behavior or caused serious injury to other persons or animals” or provide an explanation of why the veterinarian could not check that box.²⁸⁹ Air carriers may require a third form that would be completed by service animal handlers traveling on flight segments eight hours or longer and certifying how the animal would not be a health or sanitation risk on those flights.²⁹⁰

The editing process and publication of this Article will be completed prior to the enactment of any proposed regulatory language in the 2020 ACAA NPRM. However, it appears likely that based on the proposed regulatory language and DOT’s explanatory comments, passengers traveling with service animals by air will be subject to more documentation requirements and passengers utilizing emotional support animals may be required to confine their animals, as well as pay the fees generally applicable to pets, if they wish to bring their emotional support animals on flights.²⁹¹

Regardless of whether changing the definition of service animal under the ACAA and any imposition of new documentation requirements will alleviate concerns regarding misrepresentation about the status of animals in the air, in response to concerns raised by entities on the ground, states have not waited for other federal agencies to revise rules governing the application of the ADA or FHA.²⁹²

IV. MISREPRESENTATION AND FRAUD—RESPONSE BY STATES

The ADA, FHA, ACAA, and their respective regulations do not specify a penalty for misrepresentation of an animal as a service or assistance animal.²⁹³

²⁸⁶ *Id.* at 6466.

²⁸⁷ *Id.* at 6467–68.

²⁸⁸ *Id.* at 6468.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 6469–70.

²⁹¹ *See supra* Section III.G.

²⁹² *Infra* Section IV.A (analyzing state legislation).

²⁹³ In theory, a general fraud provision, such as 18 U.S.C. § 1001 (2018), providing for up to five years in prison for misrepresentation on matters within the jurisdiction of the United States, could be applied to an individual fraudulently asserting that he or she was entitled to access with an animal that does not qualify as a service or assistance animal. However, the

As discussed in Part II, the ADA allows entities to ask only two questions to persons who are accompanied by service animals and, if those answers are adequate, the entities must allow access.²⁹⁴ Similarly, under the 2009 ACAA regulations, air carriers could not ask an individual using a service animal to assist with a physical disability to provide documentation if the passenger can provide credible verbal assurances of the need to be accompanied by the animal.²⁹⁵ However, even when written documentation can be requested to support the request for an accommodation, there is continuing confusion over the nature and extent of such documentation.²⁹⁶

There are many media reports of persons being questioned about their use of service or assistance animals.²⁹⁷ The use of service animals by individuals who do not have apparent disabilities, such as individuals who are diagnosed with post-traumatic stress disorder or a traumatic brain injury, can also lead to conflicts with persons who are concerned about fraudulent conduct and a perception that the statutes are being misused.²⁹⁸

legislative history of that provision does not support that use and, as of the editing of this Article in November 2019, searches in the Westlaw case law database did not return any results utilizing this provision relating to the misrepresentation of a service or assistance animal. Search results on file with author; *see also supra* note 224–25 and accompanying text (discussing legislation that would specifically provide that misrepresentation of an animal’s status for purposes of obtaining access under the ACAA would be a violation of this section of the United States Code).

²⁹⁴ *See* 28 C.F.R. § 35.136(f) (2019); *id.* § 36.302(c)(6) (stating entities may only inquire whether “the animal is required because of a disability and what work or task the animal has been trained to perform”).

²⁹⁵ *Supra* notes 139, 266 and accompanying text (discussing 2009 ACAA Regulations and 2018 Enforcement Priorities); *see also supra* notes 284–90 and accompanying text (discussing additional documentation requirements in the 2020 ACAA NRPM; however, such documentation does not require a third party to attest that an individual is a person with a disability whose service animal assists the individual with such disability).

²⁹⁶ *See* 14 C.F.R. § 382.117(d)–(e) (2019) (analyzing documentation issue for access under the FHA and ACAA); *supra* Section II.B.

²⁹⁷ In addition to agents of entities questioning invitees about their service animals, members of the public may trigger incidents. For example, an individual was terminated from membership in a grocery store co-op due to her confrontations with other customers over animals in the store. *See* Taft v. Central Co-Op, No. 73917-4-1, 2016 WL 7470088, at *1–2 (Wash. Ct. App. Dec. 27, 2016). Ms. Taft was asked not to approach staff members about enforcing service animal regulations after making repeated complaints about animals in the store. *Id.* at *1. A complaint was also made by another shopper about a woman “angrily confronting him about his service animal” although Ms. Taft denied this incident occurred. *Id.*

²⁹⁸ The use of service dogs to assist individuals with disabilities such as PTSD appears to be increasing. Alma Nunley, Note, *Service Dogs for (Some) Veterans: Inequality in the Treatment of Disabilities by the Department of Veterans Affairs*, 17 QUINNIPIAC HEALTH L.J. 261, 271–75 (2014) (discussing Department of Veterans Affairs’ regulations allowing for the reimbursement of expenses for service animals utilized for visual, hearing, or substantial mobility impairment but not if a service animal is used for an individual with PTSD or other mental health conditions); *see also* Huss, *Hounds at the Hospital*, *supra* note 6, at 80, 83 (discussing controversy over the Department of Veterans Affairs’ hesitation to adopt the theory that service dogs should be paired with individuals with PTSD and its continued research

The DOJ acknowledged challenges that face entities in determining whether a dog fits within the service animal definition; however, it chose to retain language reflecting the inclusive nature of the services provided to disabled individuals by these animals.²⁹⁹ ADA regulations provide that an individual can be asked to remove a service animal from the premises if the “animal is out of control and the animal’s handler does not take effective action to control it”³⁰⁰ It has also been established under the FHA that only a reasonable accommodation must be made, so, if an assistance animal is displaying behavior that is out of control, and the handler does not address the issue, the animal would likely be able to be excluded from the housing.³⁰¹

It is not possible to determine the extent to which there actually is misrepresentation.³⁰² It is also unclear whether misrepresentation occurs because people are knowingly violating the law or mistaken in their understanding of their rights.³⁰³ One professor suggests some of the various reasons individuals might believe their animals should be allowed access, including:

[A] misunderstanding of the task or work requirement; an incorrect definition of disability; a confusion of laws; the belief that dogs coming from a service dog school or trainer always meet the ADA standards; and the mistaken beliefs of

into the issue); Elissa Koehl, *Watch Service Dog Calm War Vet’s PTSD Reaction*, USA TODAY (Sept. 16, 2014), <https://www.usatoday.com/story/news/nation-now/2014/09/16/inspiration-nation-service-dog-calms-ptsd/15729181/> [<https://perma.cc/F7Y3-BL72>] (discussing the K9’s for Warriors program placing service dogs with individuals with PTSD).

²⁹⁹ Huss, *Context*, *supra* note 24, at 1177–79.

³⁰⁰ 28 C.F.R. §§ 35.136(b)(1), 36.302(c)(2)(i) (2019).

³⁰¹ See e.g., *Friedel v. Park Place Cmty. L.L.C.*, 747 F. App’x. 775, 776, 778 (11th Cir. 2018) (affirming judgment in favor of housing provider that required the removal of a dog who allegedly exhibited aggressive behavior); *Woodside Vill. v. Hertzmark*, No. SPH9204-65092, 1993 WL 268293, at *5–6 (Conn. Super. Ct. June 22, 1993) (allowing a housing provider to evict a mentally disabled tenant when the housing provider made efforts to accommodate the tenant, but the tenant did not comply with the pet policy). Similarly, under the ACAA, air carriers are not required to transport an animal if the animal is a “direct threat to the health or safety of others [or if] it would cause a significant disruption of cabin service.” 14 C.F.R. § 382.117(f).

³⁰² Cohen, *Real Problem*, *supra* note 113 (stating in an article relating to possible revisions to HUD guidance on assistance animals, “[a]dvocates note that evidence for a supposed fake assistance animal crisis has been extremely limited, and many times outrage can be traced back to mental health stigma more generally” and “disability rights lawyers emphasize that there’s been very little proof of actual widespread fraud.”).

³⁰³ Tiffany Lee, *Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers?*, 23 ANIMAL L. REV. 325, 329 (2017) (discussing issue of misrepresentation and state laws addressing it); see also Regina Schoenfeld-Tacher et al., *Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*, 14 INT’L J. ENVTL. RES. & PUB. HEALTH 642 (2017) (reporting on survey finding the majority of people are not taking advantage of the laws allowing for access for persons with disabilities using assistance animals).

medical personnel who may ‘prescribe’ a service dog without a complete understanding of relevant service dog laws.³⁰⁴

Because the focus of these federal laws is on providing access for individuals with disabilities, it is not surprising that there is no penalty for misrepresentation in those laws.³⁰⁵ However, in response to concerns about the possible misrepresentation of the status of an animal as a service or assistance animal, several states have enacted legislative provisions.³⁰⁶

A. State Laws and Legislation

Initially the focus of many of these state laws was on misrepresentation of an animal as a service animal in order to have access to public entities or public accommodations covered by the ADA.³⁰⁷ It was not uncommon for state statutes to focus on the outward appearance of the purported service animal.³⁰⁸

³⁰⁴ Lee, *supra* note 303, at 329–30. Professor Lee further analyzed the reasons there could be a misunderstanding about the right to have access to public accommodations with an animal. *Id.* at 331–37.

³⁰⁵ See generally NAT’L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT (2010) (providing history of adoption of the ADA); Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J.C.L. & C.R. 187, 187–91, 239–40 (2008) (setting forth history of the ADA and the ADA Amendments Act of 2008).

³⁰⁶ *Fraudulent Service Dogs*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/content/fraudulent-service-dogs> [<https://perma.cc/36AE-QAC4>] (last visited Feb. 26, 2020) (providing a map showing state laws addressing the use of fraudulent service animals and reporting as of 2019, thirty-one states had “what can be termed true bans on the fraudulent representation of pets as service animals.”); *States Lead Efforts to Curtail Rampant Abuse of Emotional Support Animal Requests*, NAT’L APARTMENT ASS’N (Mar. 21, 2018), <https://www.naahq.org/news-publications/states-lead-efforts-curtailed-rampant-abuse-emotional-support-animal-requests> [<https://perma.cc/79UZ-FC6Y>] (discussing efforts by states including proposed legislation); see, e.g., CAL. PENAL CODE § 365.7(a) (West 2019) (providing that knowingly and fraudulently misrepresenting yourself as the owner or trainer of a guide, signal, or service dog is a misdemeanor); IDAHO CODE ANN. § 18-5811A (West 2019) (providing “[a]ny person, not being an individual with a disability or being trained to assist individuals with disabilities . . . us[ing] an assistance device, an assistance animal, or a service dog in an attempt to gain treatment or benefits as an individual with a disability is guilty of a misdemeanor.”); NEB. REV. STAT. ANN. § 28-1313 (West 2019) (providing it is a Class III misdemeanor for the unlawful use of a guide dog by an individual who is not blind); NEV. REV. STAT. ANN. § 426-805(1) (West 2019) (providing “[i]t is unlawful for a person to fraudulently misrepresent an animal as a service animal or service animal in training.”). This Article focuses on enacted legislation at the time of the writing of this Article. Several state legislatures had proposed legislation at the time of the writing of this Article. See, e.g., *infra* notes 311, 313.

³⁰⁷ ME. REV. STAT. ANN. tit. 17 § 1314-A (2016), (amended by H.P 1092, 127th Leg. (Me. 2016)) (initially adopting language providing it was a civil violation to represent a dog as a service dog, but in 2016 adopting language to address concerns regarding the misrepresentation of an animal as an assistance animal).

³⁰⁸ See, e.g., *id.* (initially providing it was a civil violation to fit “a dog with a harness, collar, vest or sign of the type commonly used by blind persons in order to represent that the dog is a service dog” and later adding other language); N.H. REV. STAT. § 167-D:8 (2019) (providing it is unlawful to misrepresent the status of a handler by fitting an animal with a

Language in these statutes focus on the use of a harness, collar, or vest commonly used to designate that a dog is acting as a service animal.³⁰⁹ For example, Michigan law initially provided persons who are not deaf, audibly impaired, or otherwise physically limited “shall not use or be in possession of a dog that is wearing a blaze orange leash and collar or harness in any public place.”³¹⁰ The Michigan statute was changed in 2015 to more simply provide it is unlawful for a person to “falsely represent that he or she is in possession of a service animal, . . . in any public place.”³¹¹

Other state laws initially targeted misrepresentations by individuals by word or action.³¹² An example is legislation enacted by the State of Kansas that provided that it is unlawful for any person to “represent that such person has a

collar, harness, or a tag representing an animal is a service animal); N.J. STAT. ANN. § 10:5-29.5 (West 2019) (providing a fine of not more than \$500 if an individual “fits a dog with a harness of the type commonly used by blind persons in order to represent that such dog is a guide dog when training of the type that guide dogs normally receive has not in fact, been provided . . .”); N.C. GEN. STAT. ANN. § 168-4.5 (West 2019) (providing “[i]t is unlawful to disguise an animal as a service animal or service animal in training” and stating the violation of the section constitutes a Class 3 misdemeanor); TEX. HUM. RES. CODE ANN. § 121.006(a) (West 2019) (providing if a “person who uses a service animal with a harness or leash of the type commonly used by persons with disabilities who use trained animals, in order to represent that his or her animal is a specially trained service animal when training has not in fact been provided,” the person can be punished with a fine and community service).

³⁰⁹ This type of gear is readily available online, and there are no restrictions on its purchase. See, e.g., *Service Dog Vests, Patches, Gear & Accessories*, SERVICEDOGVEST.COM, <http://servicedogvest.com/?gclid=ChC59j3mMECFWqCMgodciUAZw> [https://perma.cc/MVC3-4CJC] (last visited Feb. 19, 2020) (providing gear for service and assistance animals).

³¹⁰ H.B. 4527, 98th Leg., Reg. Sess. (Mich. 2015) (codified at MICH. COMP. LAWS ANN. §§ 752.61, 752.62, 752.63 (West 2016)) (knowing violation of the act was a misdemeanor offense). Because designating a specific colored collar, harness, or leash as indicating an animal is a service animal is not required by the regulations implementing the Americans with Disabilities Act, this type of language, while perhaps well-meaning would have limited effectiveness. See *supra* Section I.B (discussing language regarding ADA).

³¹¹ MICH. COMP. LAWS ANN. § 752.62 (West 2019). The Michigan Senate passed legislation in 2015 to provide for liability for misrepresentation of an emotional support animal in the context of housing similar to the language of the Indiana statute discussed herein. See H.B. 4527, 98th Leg., Reg. Sess. (Mich. 2015) (codified at MICH. COMP. LAWS ANN. § 752.62 (West 2016)) (providing language and legislative history of statutory provision on misrepresentation); *infra notes* 318–22 and accompanying text (discussing Indiana statute).

³¹² See, e.g., MO. ANN. STAT. § 209.204 (West 2019) (stating that the definition of “impersonates a person with a disability” includes “representation of a dog by word or action as a service dog”). Note that legislation was pre-filed in December 2018 to amend this Missouri provision to include language regarding assistance animals and housing. H.B. 107, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2018); see also UTAH CODE ANN. § 62A-5b-106(2) (West 2019) (providing it is a Class C misdemeanor if a person intentionally falsely “represents to another person that an animal is a service animal” or “intentionally misrepresents a material fact to a health care provider for the purpose of obtaining documentation from the health care provider necessary to designate an animal as a service animal . . .”). Legislation was introduced in Utah in 2018 to add language regarding the misrepresentation of assistance animals. H.B. 407, 62nd Leg., 2018 Gen. Sess. (Utah 2018) (providing additional language relating to misrepresentation of assistance animals).

disability for the purpose of acquiring an assistance dog unless such person has such disability.”³¹³

Examples of more recently-enacted legislation include that of Indiana, Pennsylvania, and Colorado.³¹⁴ The Indiana legislation, effective on July 1, 2018, defined an “emotional support animal” as a “companion animal that a health service provider has determined provides a benefit for an individual with a disability, which may include improving at least one (1) symptom of the disability.”³¹⁵ Health service provider is defined as a physician, psychiatrist, psychologist, advanced practice nurse, and certain therapists licensed under Indiana law and “who provides medical services and treatment to an individual.”³¹⁶ The definition of “health service provider” specifically excludes an individual “whose sole service to the individual is to provide a verification letter for a fee.”³¹⁷

Under the new Indiana law, landlords may require an individual with a disability that is not readily apparent to provide written verification from a licensed health service provider to support a request for accommodation for an emotional support animal.³¹⁸ The individual asserting he or she has a disability

³¹³ KAN. STAT. ANN. § 39-1112(b) (West 2019). The Kansas statute also states it “is a class A nonperson misdemeanor” for a person to “[r]epresent that such person has the right to be accompanied by an assistance dog . . . unless such person has the right to be accompanied in or upon such place by such dog” *Id.* § 39-1112(a); *see also* H.B. 2152, 2019 Leg., Gen. Sess. (Kan. 2019) (proposing legislation to address misrepresentation and documentation of assistance animals in housing).

³¹⁴ *See infra* notes 315–30 and accompanying text (discussing Indiana, Pennsylvania, and Colorado legislation).

³¹⁵ IND. CODE § 22-9-7-6 (2019); S.B. 169, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019) (legislation to address the misrepresentation of an animal as a service animal in a public place); S.B. 240, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018) (enacting a new chapter titled “Emotional Support Animals in Housing”). Another provision clarifies that an emotional support animal “does not need specific training” IND. CODE § 22-9-7-8.

³¹⁶ IND. CODE § 22-9-7-4 (listing individuals licensed under specific code provisions and including individuals licensed under Indiana Code § 25-23.6, including Marriage and Family Therapists). Indiana Code § 25-23.6 provides for licensing of several types of counselors including social workers and mental health counselors.

³¹⁷ IND. CODE § 22-9-7-4. A court may also consider the source of the documentation in its analysis of the validity of a claim that an animal is acting as an assistance animal. *Westchester Plaza Holdings v. Sherwood*, No. 1431-19, 2019 WL 4023655, at *2 (N.Y. City Ct. Aug. 23, 2019) (finding that an individual did not meet the burden of establishing that a dog was an emotional support animal and noting “that the registration of a dog with this entity can be completed by anyone after paying a fee and there is no case law or statute requiring this Court to accept this entities [sic] determination that a dog is deemed to be an emotional support animal.”).

³¹⁸ IND. CODE § 22-9-7-9. Landlords may also “evaluate any documents submitted with the request for a reasonable accommodation to verify the individual’s disability related need for an emotional support animal.” *Id.* § 22-9-7-11. An “individual who moves from another state” is allowed to provide documentation from similar medical professionals licensed in a previous state of residence “so long as the individual has an ongoing treatment relationship with the health service provider” beyond solely providing a verification letter for a fee. *Id.* § 22-9-7-10. “Landlords” is used to simplify the description of the law in this Article—the

commits a Class A infraction if there is a misrepresentation or material false statement regarding the status of the individual as a person with a disability requiring the use of an emotional support animal.³¹⁹ Health service providers who verify the need for an emotional support animal “without adequate professional knowledge of the individual’s condition to provide a reliable verification” or provide no other service other than charging a fee to provide such written verification also commit a Class A infraction.³²⁰ In addition, the Indiana law provides for immunity for landlords for injuries to another individual caused by a tenant’s emotional support animal.³²¹

The Indiana law includes provisions consistent with current HUD policy such as not allowing landlords to require a fee for an emotional support animal but allowing for the landlord to require a tenant to pay for the cost of any damage or repairs to the unit caused by an emotional support animal.³²²

The Pennsylvania Assistance and Service Animal Integrity Act became effective on December 24, 2018.³²³ The Pennsylvania law more closely tracks the language of HUD guidance allowing for landlords to request documentation that is “reliable and based on direct knowledge of the person’s disability and disability-related need for the assistance animal or service animal.”³²⁴ It is a misdemeanor for a person to intentionally misrepresent that he or she is entitled to have an assistance animal in housing.³²⁵ In addition, anyone who creates or provides a document misrepresenting the status of an assistance or service animal for use in housing may commit an offense punishable by a fine not exceeding \$1,000.³²⁶ Similar to the Indiana law, landlords are not liable for injuries caused by assistance animals of their tenants.³²⁷

provisions use the terminology a “person who offers to rent or otherwise make available a dwelling” and the definition of dwelling includes vacant land for construction of a residence and recreational vehicles. *Id.* §§ 22-9-7-2, 22-9-7-9.

³¹⁹ *Id.* § 22-9-7-12. Fitting “an animal that is not an emotional support animal with a harness, collar, vest, or sign that would cause a reasonable person to believe the animal is an emotional support animal” also is included in this subsection regarding false statements or misconduct. *Id.*

³²⁰ *Id.* A law in Wisconsin, which became effective in April 2018, includes similar coverage providing individuals and licensed health care providers will “forfeit not less than \$500” if there has been misrepresentation of the need for an emotional support animal in housing. WIS. STAT. § 106.50(2r)(br)(6) (2018).

³²¹ IND. CODE § 22-9-7-15.

³²² *Id.* §§ 22-9-7-13, 22-9-7-14.

³²³ 68 PA. CONS. STAT. § 405.7 (2019).

³²⁴ *Id.* § 405.3. The documentation also must be in writing and describe the disability-related need for the animal. *Id.* § 405.3(b). A landlord may only require the documentation if the disability-related need is not known to the landlord or readily apparent. *Id.* § 405.3(a).

³²⁵ *Id.* § 405.5.

³²⁶ *Id.* § 405.6. Maine legislation enacted in 2016 also does not limit potential liability to licensed health care providers, establishing that it is a civil violation for anyone to knowingly create or provide documents to another person that falsely represent or state an animal is a service or assistance animal. ME. STAT. tit. 17, § 1314-A (2019). Like the Indiana and Pennsylvania statutes, Maine law also provides it is unlawful to fit an animal with physical mani-

Colorado legislation, which became effective on January 1, 2017, appears to recognize that individuals may not be aware of the ramifications of misrepresenting the status of an animal as a service or assistance animal.³²⁸ A person commits the offense of intentional misrepresentation of a service animal or assistance animal only if he or she has previously received an oral or written warning that it is illegal to misrepresent a service or assistance animal respectively.³²⁹ The Colorado law also emphasizes the importance of public education by authorizing the state's division of civil rights to create and publicize signage for public accommodations and forms for housing providers to assist licensed health care providers in making a determination of whether an individual has a disability as well as the need for an assistance or service animal.³³⁰

As discussed above, the Michigan law was amended in 2015, but additional legislation was proposed in 2017 and passed by the state senate in December 2018, illustrating the rapid pace of change in this area of the law.³³¹ The more recent Michigan legislation also focused on the relationship of a licensed health care provider with the individual requesting access with a service or emotional support animal.³³² The Michigan legislation goes farther than the Indiana law and requires that the licensed health care provider must (a) "maintain a physical office space where [the provider] regularly treats patients," (b) document that the provider has treated the individual requesting the documentation for at least six months before the request for the documentation, and (c) upon request provide a notarized letter certifying the status of the individual "with [the] disability is disabled and that [the animal] is necessary to alleviate the effects of the disability" ³³³

Michigan law already provides for the state's department of civil rights telephone hotline to receive reports about persons falsely representing themselves as individuals in possession of service animals in training.³³⁴ The legislation

festations indicating the animal is a service animal if the animal is not. *Id.*; 68 PA. CONS. STAT. § 405.6(a)(3).

³²⁷ 68 PA. CONS. STAT. § 405.4.

³²⁸ H.B. 16-1426, 2016 Leg., Reg. Sess. (Colo. 2017).

³²⁹ COLO. REV. STAT. ANN. §§ 18-13-107.3(1), 18-13-107.7(1) (West 2019). The person must also know the animal is not a service or assistance animal. *Id.* §§ 18-13-107.3(1)(c); 18-13-107.7(1)(c).

³³⁰ *Id.* § 12-36-142, 12-38-132.5, 12-43-226.5 (providing a licensee should not make such a determination unless he or she "[h]as met with the patient[.]" though such meeting can occur through telemedicine); *see also* MONT. CODE ANN. § 49-4-221(3)(b) (2019) (providing that a complaint cannot be filed unless there is a "conspicuous public notice" posted that the location only allows service animals and the entity reserves the right to file complaints regarding misrepresentation in a provision that became effective on October 1, 2019). A person may only be found guilty of a misdemeanor under the new Montana provision if he or she has previously been provided a written warning of such offense. *Id.* § 49-4-222(1)(a).

³³¹ MICH. COMP. LAWS § 752.62 (2019); S.B. 663, 99th Leg., Gen. Sess. (Mich. 2017).

³³² S.B. 663, 99th Leg., Gen. Sess. § 2.

³³³ *Id.*

³³⁴ MICH. COMP. LAWS § 752.64.

would add reports regarding emotional support animals, or health care providers falsely certifying the need for such animals, to the types of complaints the hotline should receive.³³⁵

As states continue to adopt and revise these types of statutes, it will be important to ensure that they do not conflict with the protections set forth in federal law.³³⁶ In January 2017, an internal HUD memorandum (“2017 HUD Memorandum”) raised concerns about misrepresentation legislation proposed in Virginia.³³⁷ The 2017 HUD Memorandum did not announce any new guidance regarding service and assistance animals under the FHA, but utilized the existing guidance previously announced by HUD and the DOJ.³³⁸

For example, the 2017 HUD Memorandum cautioned that language in the proposed legislation allowing “any reasonable regulations applicable to pets” to also be applied to persons with assistance animals may be contrary to the FHA if it prevented those individuals the ability to use the premises.³³⁹ The 2017 HUD Memorandum also analyzed issues regarding who may provide the documentation to support an individual’s disability or need for an assistance animal.³⁴⁰ The ability under existing guidance for individuals to “provide reliable verifying information” about themselves or the utilization of a broader category of persons familiar with the need, such as an employer, was viewed as being inconsistent with the proposed legislation.³⁴¹ The Virginia legislation also included a provision that would have allowed housing providers to reject a reasonable accommodation request without doing a case-by-case assessment if there was a negative impact on the insurance coverage for the premises.³⁴² The 2017 HUD Memorandum argued that the case-by-case analysis would require the housing provider to first determine whether a different insurance provider could provide equivalent coverage.³⁴³

The Virginia legislature was responsive to the issues addressed by the 2017 HUD Memorandum, producing a law with language that in many cases mirrored the existing HUD guidance.³⁴⁴ Some of the recently proposed and adopt-

³³⁵ S.B. 663, 99th Leg., Gen. Sess. § 4.

³³⁶ See *infra* notes 337–43 and accompanying text (analyzing HUD internal memorandum raising issues about legislation in Virginia).

³³⁷ Memorandum from Allen W. Levy, Deputy Assistant Gen. Counsel for Fair Hous. Enforcement to Joseph A. Pelletier, Dir., FHAP Div., FHEO (Jan. 24, 2017) [hereinafter 2017 HUD Memorandum] (on file with author).

³³⁸ *Id.* at 1 n.2 (citing to 2004 JOINT STATEMENT and 2013 HUD ASSISTANCE ANIMALS).

³³⁹ *Id.* at 2.

³⁴⁰ *Id.* at 2 nn.2–3 and accompanying text.

³⁴¹ *Id.* at 3.

³⁴² *Id.* at 4.

³⁴³ *Id.*

³⁴⁴ VA. CODE ANN. §§ 36-96.3:1, 36-96.3:2 (2017); see also *Virginia to Require Therapeutic Relationship for Emotional Support Animal Requests*, NAT’L APARTMENT ASS’N (Apr. 11, 2017), <https://www.naahq.org/news-publications/virginia-require-therapeutic-relationship-emotional-support-animal-requests> [<https://perma.cc/M2CS-5ALB>] (referencing a comment

ed legislation appears to have provisions that are, at a minimum, inconsistent with the spirit of HUD guidance in place at the time they were proposed.³⁴⁵ Virginia law includes a clause specifically addressing the possibility of the unenforceability of any of its provisions if they are inconsistent with the FHA.³⁴⁶ However, states clearly have determined they are going to push forward notwithstanding the lack of new guidance by HUD.³⁴⁷

The effectiveness of state law provisions attempting to address the issue of misrepresentation and fraud will be difficult to measure.³⁴⁸ To date, there has been limited reported case law referencing these state misrepresentation statutes.³⁴⁹ A judge in one case questioned whether, given the limited inquires allowed under the ADA regulations, it would be possible to determine a violation of its state law.³⁵⁰ However, it is possible such state laws may deter the intentional misrepresentation of the status of an animal by at least some individuals.³⁵¹

letter submitted by HUD and the response by the Virginia General Assembly).

³⁴⁵ *E.g.*, *supra* notes 332–33 and accompanying text (discussing Michigan legislation with restrictive definition of persons who can provide documentation).

³⁴⁶ VA. CODE ANN. § 36-96.23 (providing if HUD determines any provision is substantially inconsistent with the FHA it shall not be enforceable).

³⁴⁷ *See supra* notes 113–16 and accompanying text (discussing reports that HUD is planning on issuing new guidance).

³⁴⁸ Huss, *Conundrum*, *supra* note 22, at 1590–91 n.150 (reporting on the lack of case law utilizing such state statutes); Lee, *supra* note 303, at 342–50 (raising concerns if such laws are enforced, and stating, “[i]t is too early to determine the frequency with which people may be arrested, tried, and possibly convicted under the increasing number of service animal fraud laws.”). Professor Lee also considers the likelihood of prosecution under these misrepresentation laws by analyzing the limited number of reported cases based on the denial of access to service animal handlers. *Id.* at 350.

³⁴⁹ *E.g.*, *Lerma v. Cal. Exposition & State Fair Police*, No. 2:12-cv-1363 KJM GGH PS, 2014 WL 28810, at *4 (E.D. Cal. Jan. 2, 2014) (providing example of an officer at a water park preparing a crime report charging a woman under California Penal Code § 365.7). In the *Lerma* case, an officer directed Ms. Lerma to remove a young dog from the park because the officer could not determine whether the dog was a service animal. *Id.* Ms. Lerma admitted during a deposition that the “dog was not individually trained to perform any task for her,” thus not meeting the definition of a service animal under the ADA. *Id.* at *5. The *Lerma* court granted the defendants’ summary judgment motion finding that the defendants were permitted to exclude the dog from the premises. *Id.* The relevant public safety office was contacted to attempt to determine the status of the charge against Ms. Lerma. E-Mail from Debra Denslaw, Faculty Servs. Librarian & Assoc. Professor of Law Librarianship, Valparaiso Univ. Law Sch., to author (Mar. 10, 2015, 12:33 PM CST) (on file with author). Based on the Sacramento county court database, there was no disposition indicated for the criminal misdemeanor cited in the case, typically indicating the police “declined to file,” which allows the misdemeanor to drop after the passage of 364 days. *Id.*

³⁵⁰ *Hurley v. Loma Linda Univ. Med. Ctr.*, No. CV12-5688 DSF (OPx), 2014 WL 580202, at *8 (C.D. Cal. Feb. 12, 2014) (discussing the difficulty of enforcing the California law).

³⁵¹ Sande Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 771, 796 (2016) (suggesting these state statutes may create a deterrent effect).

Alternatives to the state laws penalizing individuals who misrepresent the status of an animal have been suggested by a few commentators.³⁵² Increasing education about coverage of the current laws, along with modifications of state laws so that such provisions use terminology consistent with the ADA, has been proposed.³⁵³ Another suggestion is to amend the ADA to allow for entities to check identification issued by states with certification and licensing programs.³⁵⁴ The Province of British Columbia recently enacted a law that incorporates a certification and licensing requirement.³⁵⁵ That law is discussed in the following section to illustrate the way such a system could work.³⁵⁶

B. *British Columbia Guide Dog and Service Dog Act*

Similar to the United States, there is not a single definition of “service animal” used in Canada.³⁵⁷ The Canadian Human Rights Act does prohibit discrimination on the basis of disability.³⁵⁸ However, at the time of the writing of this Article, although there was legislation pending, there was no Canadian federal law equivalent to the ADA.³⁵⁹

Individual provinces have adopted their own laws that apply to situations involving persons with disabilities accompanied by service animals.³⁶⁰ As an example, the Guide Dog and Service Dog Act became effective in January 2016 in the Province of British Columbia.³⁶¹ This Act prohibits discrimination and provides access for service dog teams to public places as well as in hous-

³⁵² *Id.*; Lee, *supra* note 303, at 351.

³⁵³ *Id.* Professor Lee also suggested that revisions be made to definitions of service and assistance animals at the federal level to ensure consistency. *Id.* at 353–54.

³⁵⁴ Buhai, *supra* note 351, at 796. *But see supra* Section I.B (setting forth the DOJ’s position regarding certification and licensing requirements in the recent revision of the ADA regulations).

³⁵⁵ *Guide Dog and Service Dog Act Takes Effect*, BRITISH COLUMBIA GOV’T NEWS (Jan. 15, 2016), <https://news.gov.bc.ca/releases/2016PSSG0011-000041> [<https://perma.cc/U6GY-39V7>].

³⁵⁶ *Infra* Section IV.B (analyzing British Columbia’s law).

³⁵⁷ Kelly Doctor & Caitlin Meggs, *Lending a Helping Paw: An Overview of the Law of Service Animals in Ontario*, GOLDBLATT PARTNERS (May 29, 2017), <https://goldblattpartners.com/wp-content/uploads/LendingaHelpingPaw.pdf> [<https://perma.cc/KG34-XK9V>] (analyzing the law in Canada with a focus on Ontario law).

³⁵⁸ Canadian Human Rights Act, R.S.C. 1985, c. H-6.

³⁵⁹ David Lepofsky, *What Should Canada’s Promised New National Accessibility Law Include? A Discussion Paper*, 38 NAT’L J. CONST. L. 169, 207 (2018) (advocating for a strong accessibility law). The Accessible Canada Act was passed by the House of Commons of Canada in November 2018. Accessible Canada Act, Bill C-81, House of Commons of Can. (2018).

³⁶⁰ *E.g.*, Province of Alberta Service Dog Act, R.S.A. 2007, c S-7.5(3)(1) (Can.); Province of Ontario Blind Persons’ Rights Act, R.S.O. 1990, c. B.7 (Can.) (including definition of guide dog).

³⁶¹ *Guide Dog and Service Dog Act Takes Effect*, *supra* note 355.

ing.³⁶² A “service dog team” is “a person with a disability and service dog [who] are certified as a . . . team.”³⁶³

Under the British Columbian law, an individual with a disability must apply to the designated authority (the registrar) for a certificate which will only be issued if the individual and dog together have “successfully completed either (i) a guide dog or service dog training program, as the case may be, provided by an accredited training school, or (ii) a BC guide dog and service dog assessment”³⁶⁴ The assessment is modeled after existing tests and standards and focuses on appropriate public behavior and disposition of the dog.³⁶⁵ In public places, the dog must be “held by a leash or harness.”³⁶⁶ Individuals who do not complete a training program through an accredited school must also provide documentation supporting their disability completed by a medical practitioner.³⁶⁷ The law further encourages the obtaining of dogs through accredited schools by requiring the teams utilizing the alternative process to successfully complete a reassessment before a certification can be renewed.³⁶⁸ Renewal is required every two years.³⁶⁹

Emotional support animals and therapy animals are not covered by the Act.³⁷⁰ Individuals have an affirmative obligation to report any changes in their

³⁶² British Columbia Guide Dog and Service Dog Act, S.B.C 2015, c 17, §§ 2–3 (Can.). Dog-in-training teams are also protected, though certificates for these teams will only be issued if the applicant is a representative of an “accredited training school.” British Columbia Guide Dog and Service Dog Regulation, B.C. Reg. 223/2015, § 5 (Can.). These training schools must be accredited by Assistance Dogs International and/or the International Guide Dog Federation. *Id.* § 1. There are also provisions for retired teams to obtain a certificate so the dog can remain in housing, although it would not be eligible for public access. *Id.* § 5; *Dog-in-Training, Trainer & Retired Dog Certification*, BRITISH COLUMBIA <https://www2.gov.bc.ca/gov/content/justice/human-rights/guide-and-service-dog/certification> [<https://perma.cc/Y5EW-DM83>] (last visited Feb. 27, 2020).

³⁶³ British Columbia Guide Dog and Service Dog Act, S.B.C. 2015, c 17, § 1 (Can.).

³⁶⁴ British Columbia Guide Dog and Service Dog Regulation, B.C. Reg. 223/2015, § 2(2). The dog must also be spayed or neutered. *Id.*

³⁶⁵ BRITISH COLUMBIA & JUSTICE INST. OF B.C., BC GUIDE DOG AND SERVICE DOG ASSESSMENT 2 (2015) (stating it is “modeled after the Assistance Dogs International Public Access Test and the Security Dog Validation Standards from the Justice Institute of British Columbia.”).

³⁶⁶ British Columbia Guide Dog and Service Dog Act, S.B.C 2015, c 17, § 2.

³⁶⁷ British Columbia Guide Dog and Service Dog Regulation, B.C. Reg. 223/2015, § 2(6).

³⁶⁸ BRITISH COLUMBIA, APPLICATION FOR A GUIDE OR SERVICE DOG CERTIFICATE NEW OR RENEWAL (2016) [hereinafter BRITISH COLUMBIA, APPLICATION]. An exception is made to this reassessment requirement for teams grandfathered in from the prior system. BRITISH COLUMBIA, GUIDE DOG AND SERVICE DOG PROGRAM POLICIES AND PROCESSES § 2.9 (2017) [hereinafter BRITISH COLUMBIA, SERVICE DOG POLICIES].

³⁶⁹ BRITISH COLUMBIA, SERVICE DOG POLICIES, *supra* note 368, § 2.9.

³⁷⁰ British Columbia Guide Dog and Service Dog Act, S.B.C 2015, c 17, § 1 (including in the definition of “person with a disability” that the individual must require “as a result of the disability, the assistance of a service dog for daily living”); *see also* BRITISH COLUMBIA, APPLICATION, *supra* note 368 (requiring the applicant to list specialized tasks the dog per-

or their dogs' statuses.³⁷¹ In addition to the structure of the certification process, the British Columbia law also prohibits the false representation of a dog as a member of a certified team.³⁷²

The British Columbia system is much more extensive than anything currently required by U.S. federal law.³⁷³ In the absence of congressional action (and funding), it appears unlikely that such a system would be adopted in the United States in the near future.³⁷⁴

RECOMMENDATIONS

Given the recent legislative activities by the states, there currently appears to be less concern over the possibility of individuals misrepresenting the status of a dog in order to gain access to public entities and public accommodations compared to housing.³⁷⁵ Even if public entities and public accommodations would prefer a certification or licensing regime, the DOJ's Title II and Title III regulations are clear and, based on DOJ activity, there is no indication that the DOJ anticipates revising the regulations relating to service animals.³⁷⁶ There is also no indication that the EEOC will change the currently existing structure under Title I of the ADA, which requires an interactive process, allowing employers to request documentation to support any request for an accommodation involving a service animal.³⁷⁷

Even if a housing provider is in a jurisdiction where courts have held that the failure to engage in an interactive process is not an independent basis to establish liability, because such failure may be considered in determining whether there has been a denial of a reasonable accommodation request, risk-adverse housing providers should establish an internal process that includes an interactive dialogue with individuals who request an accommodation.³⁷⁸ This process should not require tenants or other requesters to provide documentation other than that necessary to make the minimal determination that an individual is a

forms to assist with day-to-day living, such as alerting to noise or picking up objects); *Guide Dog & Service Dog Certification*, BRITISH COLUMBIA, <https://www2.gov.bc.ca/gov/content/justice/human-rights/guide-and-service-dog> [<https://perma.cc/2JL5-RFCN>] (last visited Feb. 27, 2020).

³⁷¹ British Columbia Guide Dog and Service Dog Regulation, B.C. Reg. 223/2015, §§ 7–8 (requiring individuals to report to the registrar changes in name and mailing address or if the dog no longer meets the requirements of the act or regulations).

³⁷² British Columbia Guide Dog and Service Dog Act, S.B.C 2015, c 17, § 4. A person convicted of violating that clause can be fined up to \$3,000. *Id.* § 8.

³⁷³ *Supra* Section I.B (describing the DOJ's position on certification in prior rulemaking process).

³⁷⁴ *Supra* Section I.A (discussing the ADA's focus on reducing barriers to access).

³⁷⁵ *See supra* Section IV.A (providing examples of recent state law relating to housing).

³⁷⁶ *See supra* Section I.A (describing regulations).

³⁷⁷ *Supra* Section I.C (describing Title I regulations and EEOC guidance).

³⁷⁸ *See supra* notes 108–12 and accompanying text (discussing split in jurisdictions regarding issue of interactive process and the FHA).

person with a covered disability and the assistance animal is needed in order for the disabled person to use and enjoy the premises.³⁷⁹ Housing providers should ensure that they are acting on such requests in a timely manner as failing to make a timely determination of a request can serve as a constructive denial of a requested accommodation.³⁸⁰ In the absence of updated guidance from HUD, housing providers should be cautious of relying on any state law that purports to limit who can provide the third-party documentation to support an individual's request for an accommodation.³⁸¹

The forthcoming revision of the ACAA regulations is expected to clarify the issue of documentation for passengers and air carriers.³⁸² Even with such regulations, there will likely be incidents and concerns about fraud and misrepresentation.³⁸³ However, the DOT's regulations will need to remain consistent with the language of the ACAA, which is intended to promote access for persons with disabilities.³⁸⁴

It is a balancing act to ensure access for persons with disabilities partnered with service and assistance animals, with safeguards to ensure public safety and discourage fraudulent behavior. It appears the balancing act is tipping towards more formality, at least with regard to housing and air travel, which may or may not be effective in addressing the concerns raised by providers and the public. Unless and until Congress passes new legislation, the current hodgepodge of regulations will likely continue to cause confusion and conflict in this area of the law.

³⁷⁹ See *supra* Section II.B (discussing documentation requirement).

³⁸⁰ *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1286 (11th Cir. 2014) (discussing how an indeterminate delay after meaningful review is effectively the same as a denial of the request); 2004 JOINT STATEMENT, *supra* note 79, at 11 (stating that a housing provider has an obligation to provide a prompt response and an undue delay in such a response "may be deemed to be a failure to provide a reasonable accommodation.").

³⁸¹ See *supra* notes 303, 320–21 and accompanying text (discussing a state law and proposed legislation limiting the persons who can provide such third-party documentation).

³⁸² See *supra* Section III.G (discussing proposed rulemaking process).

³⁸³ See *supra* notes 122–25, 267–68 and accompanying text (discussing media attention and concerns over misrepresentation).

³⁸⁴ See *supra* notes 117–21 and accompanying text (discussing the ACAA).

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