

GAO Finds that DOT's Enforcement Approach Lacks Transparency and Clarity (Oct. 2020)

On October 13, 2020, the Government Accountability Office ("GAO") issued a report ("Report") summarizing its review of the Department of Transportation's ("DOT") Office of Aviation Consumer Protection's ("OACP") enforcement activities under DOT's statutes and regulations and making related recommendations. The OACP is an office within DOT's Office of General Counsel, and has the authority to investigate and take enforcement action for violations of DOT's aviation consumer protection requirements. The GAO is a nonpartisan agency that, at the direction of Congress, reviews and reports on executive branch agencies' programs. The GAO's reviews can take the form of audits, investigations, studies of federal agency initiatives and recommendations for improving federal programs. In the Federal Aviation Administration Reauthorization Act of 2018, Congress directed the GAO to conduct a study to evaluate DOT's enforcement of aviation consumer protection requirements, focusing on (i) available enforcement mechanisms; (ii) any obstacles to enforcement, and (iii) trends in DOT enforcement actions.¹

The GAO reviewed OACP's compliance program generally, which includes both enforcement action and extensive engagement with stakeholders through trainings, audits and inspections. Further to this review, the GAO (a) interviewed OACP staff and reviewed publicly available data on enforcement trends, including reviewing the number of complaints that result in



The firm's practice encompasses virtually every aspect of aviation law, including advising U.S. and foreign airlines, tour and public charter operators and travel agencies on compliance with DOT's aviation consumer protection requirements.

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public enforcement action, and (b) interviewed various stakeholders, including commercial airlines, industry groups, and consumer advocates. A general consensus among stakeholders, which the GAO agreed with, was that the OACP's enforcement efforts lacked transparency and clarity. In response, the GAO made two recommendations, which are summarized below and which DOT agreed to implement.

Recommendation #1: Provide Clarity in the Enforcement Process

GAO's first recommendation was for the OACP to provide additional information on the process OACP uses to not only investigate alleged violations of consumer protection requirements but also how and why it chooses to pursue enforcement, whether through negotiated settlement orders (referred to as "consent orders")² or warning letters. The only public information about enforcement investigations comes from the release of the consent orders, which usually assess civil penalties. The OACP does not issue information about findings of violation that do not result in consent orders. Although the OACP also has the option to file a formal complaint in front of an Administrative Law Judge, that process is used very rarely by the OACP.³

The GAO found that the OACP process for investigating alleged violations of consumer protection regulations, determining which violations merited further investigation, and then subsequently determining which of those violations merited public enforcement action, was more of "an art than a science." Based on publicly available consent orders, the GAO found that the cases that ended in a consent order with an assessed civil penalty varied. Some focused on violations that affected multiple consumers, such as alleged violations of the DOT's regulation requiring airlines to provide passengers with an opportunity to deplane during a lengthy tarmac delay. Other orders addressed alleged violations that may have only affected a limited number of consumers but represented actual harm to those consumers. Finally, GAO found that several consent orders addressed alleged violations that may only potentially harm consumers, but in which DOT did not find actual consumer harm.

The GAO found that while the OACP generally considers several factors in determining the amount of an assessed penalty, there is no standardized process for determining when actions should be the subject of a consent order or when a warning letter would suffice. OACP staff claimed that each case is determined based on the particular factors of that case. However, such an approach often leaves stakeholders unsure when an action may result in a civil penalty, which discourages those stakeholders from voluntarily disclosing potential violations. OACP staff said it is drafting a handbook, similar to handbooks used by other modal operating administrations within DOT (such as the Federal Aviation Administration), that will outline the enforcement process and considerations that go into enforcement decisions. However, the OACP was unable to provide GAO with any draft of such a handbook and it is unclear when the handbook will be released. Based on the lack of clarity and public statements regarding the enforcement

process, GAO recommended that DOT provide additional public information on OACP's enforcement process.

Recommendation #2: Transparency in Enforcement Results

GAO's second recommendation, although related to its first recommendation, focuses specifically on transparency in the results of OACP's enforcement efforts. Currently, enforcement results are only known if the OACP issues a consent order resolving the alleged violations. However, these consent orders represent a small fraction of the investigations actually initiated by DOT. For example, and according to DOT data, DOT initiated 2,377 investigations into alleged consumer protection violations between 2008 and 2017. Of those investigations, 17% resulted in public consent orders, 18% resulted in private warning letters, 23% resulted in letters of no violations, and 40% were "administratively" closed.⁴

The Report focused on the lack of information about warning letters. The OACP claimed to the GAO that warning letters are meant to be non-punitive and publishing information about such letters may chill industry cooperation with investigations (notwithstanding that other federal enforcement agencies publish information about warning letters). The GAO disagreed, noting both the success of voluntary disclosure programs (such as the Federal Aviation Administration's program) and that other DOT modal operating administrations, including the Pipeline and Hazardous Materials Safety Administration, publish warning letters without chilling industry cooperation. The GAO stated that even aggregated data about cases would provide regulated entities and consumers more information about the OACP's enforcement process.

Also lacking in the limited data that OACP currently makes available to the public is information on which avenues of a DOT investigation result in the public enforcement action. DOT has many avenues available to pursue enforcement. It can initiate investigations based on informal consumer or competitor complaints, on its own initiative, on regulated entities voluntarily disclosing information, or on formal complaints. DOT publishes statistics of the number of consumer complaints it receives through its informal channels, such as through the web complaint form on its website. However, the statistics do not indicate if any of these informal complaints (i) actually receive further investigation by DOT, (ii) represent actual violations of consumer protection statutes and regulations, or (iii) ultimately result in enforcement action.

* * *

Although not the subject of either recommendation, the Report also found that a lack of clear performance measures for the OACP enforcement program inhibited the GAO's ability to evaluate the effectiveness of the enforcement program. And, although GAO recommended in 2018 that the OACP develop such measures, the measures have not been finalized. The Report further noted that from 2017 to the present, the number of

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consent orders fell dramatically. DOT told GAO that the decline – which has been commented on by consumer advocacy groups – was not due to any change in its enforcement approach, but rather a re-prioritization of its resources to focus on compliance and other activities.

DOT agreed with the two GAO recommendations without elaboration on timing for implementing the recommendations. If a new administration takes office in January 2021, the enforcement approach of the OACP may change or evolve, which may impact efforts to provide greater transparency and clarity around DOT aviation consumer protection enforcement.

¹ Public Law 115-254, Sec. 411 (Oct. 5, 2018).

² Under 49 U.S.C. § 46301, DOT has the authority to assess civil penalties for aviation consumer protection violations. The current maximum civil penalty amount is \$34,174 per violation per day of continuing violation. Typically, if DOT does determine a violation warrants an assessed penalty, DOT will negotiate with the regulated entity that is the subject of the enforcement action to settle the case. DOT is willing to settle enforcement cases at a penalty amount lower than what the assessed level could be under 49 U.S.C. § 46301. By settling the case through a negotiated settlement order (“consent order”) both DOT and the regulated entity are able to close the case without a costly and protracted formal hearing in front of an Administrative Law Judge.

³ The GAO found that only two cases in the past 11 years have ended with an order from an Administrative Law Judge.

⁴ Administrative closures include cases closed with an email warning of violations, a finding of no violation, a finding of insufficient evidence, or other miscellaneous reasons. The analysis did not include 87 cases that were still open.