

DOT Signals its Intent to Move Fast on Consumer Protection Matters (January 2022)

On January 24, 2022, the U.S. Department of Transportation (“DOT”) [issued a Final Rule](#) amending a procedural regulation it uses to promulgate discretionary rulemakings. Under 49 U.S.C. § 41712, DOT has the authority to investigate and prohibit unfair and deceptive practices. This authority includes issuing regulations prohibiting such practices. DOT has exercised this authority to issue regulations such as the “full fare” regulation (14 C.F.R. § 399.84) as well as the regulation prohibiting lengthy tarmac delays and requiring airlines to adhere to minimum customer service standards (14 C.F.R. Part 259).

In the waning days of the Trump administration DOT issued a rule, codified at 14 C.F.R. § 399.75, that would make it more difficult for DOT to issue discretionary regulations under its § 41712 authority. That rule allowed interested parties to request hearings on proposed rules and provided little flexibility to the DOT General Counsel in terms of both accepting or denying the petition for a hearing as well as the procedures to be observed in such a hearing.

In January 2021, President Biden revoked several Trump Executive Orders related to the rulemaking process and directed federal agencies to rescind rules implementing those Executive Orders. DOT’s Final Rule implements this directive by amending 14 C.F.R. § 399.75. The amendments are intended to streamline hearing procedures. First, they provide the General Counsel greater flexibility in denying petitions for hearings, adopting a “public interest” standard for the consideration of the



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petitions. Next, the Final Rule gives greater flexibility to DOT regarding the structure of a hearing, allowing the General Counsel to appoint a DOT official as the hearing officer and allowing that officer to choose the method of receiving and accepting evidence. DOT states that its intention is to provide a more efficient manner of conducting potential hearings so as to not unduly delay important consumer protection rulemakings.

This rule will become final thirty days after formal publication in the Federal Register, expected to occur on [date]. DOT's aviation consumer rulemaking agenda is busy, with several potentially controversial rules in the queue for 2022. Specifically, DOT has announced plans to initiate a rulemaking related to when an airline must provide a refund to a passenger. This rulemaking, spurred by the COVID-19 pandemic and its effect on the ability of airlines to provide prompt refunds, is expected to garner significant interest from both airline stakeholders and consumer advocates. Additionally, DOT has announced plans to revive long-dormant proposals regarding the disclosure of ancillary service fees.

By issuing this procedural rulemaking today, DOT is signaling its intent to expedite these rulemakings potentially pursue a forceful consumer protection agenda which, prior to these procedural changes, may have been delayed by hearing requests.