

DOT Issues Notice Concerning Investigatory and Enforcement Procedures (January 2023)

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In an important notice issued on January 4, 2023, the Office of Aviation Consumer Protection (“OACP”) of the U.S. Department of Transportation (“DOT”) issued explanatory guidance (“the Notice”) concerning its investigatory and enforcement procedures. By way of background, OACP is an office within DOT’s Office of the General Counsel. Among other things, OACP has primary responsibility for monitoring compliance with DOT consumer protection and civil rights regulations, and in furtherance of that goal OACP conducts investigations and initiates investigations (and sometimes formal enforcement) against regulated entities such as U.S. and foreign air carriers and ticket agents.

Regulated entities are well advised to monitor and ensure continuing compliance with DOT regulations. In the current administration, and with an active Secretary, DOT has indicated a far more aggressive enforcement approach. DOT also has the statutory authority to impose (in most cases) civil penalties of up to \$37,377 per violation, per day.

The discussion below is based on DOT’s Notice and the authors’ experience with the DOT enforcement process.

Learning of Potential Compliance Problems

DOT’s Notice explains the entire investigative process, beginning with how DOT becomes aware of potential violations. DOT learns of



The firm’s practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines and ticket agents on compliance with DOT’s regulations and policies concerning consumer protection matters, defending regulated entities in proceedings, and negotiation of consent orders. For further information regarding the matters discussed in this article, please contact either of the following attorneys:

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issues by monitoring consumer complaints submitted to the agency; via its own investigations (such as monitoring carrier websites); through on-site inspections and audits (to include inspections of air carrier offices as well as airport inspections), referrals from other government agencies, and competitor complaints.

DOT's Investigation Process

DOT has broad discretion to open an investigation and issue investigatory demands to carriers. Often, the commencement of an investigation will rest on DOT's belief that significant consumer harm has occurred, even if it is not clear that a violation may have occurred. To commence the investigation, DOT sends the alleged violator a letter of investigation and may contact third parties for additional information (e.g., in the case of a lengthy tarmac delay by a foreign carrier, DOT may reach out to Customs and Border Protection at the airport to obtain additional factual information). DOT's statutory authority permits it to request a wide variety of documentary evidence as well, including requiring the carrier to develop special reports to respond to DOT's investigatory demands.

Investigation Results

Depending on the results of DOT's investigation – including the alleged violator's response (defenses, supporting evidence, mitigating circumstances, and additional facts) – DOT will determine whether a violation occurred. If a violation occurred, and depending on the severity of the violation or the consumer harm that resulted from the violation, DOT may issue a warning, a negotiated consent order (discussed below), or may proceed to a formal enforcement proceeding before an Administrative Law Judge (also discussed below). Unless the alleged violator's conduct is egregious, DOT generally looks for a "pattern or practice" of violative conduct – as a practical matter, DOT does not generally propose penalties for isolated conduct.

If DOT determines that a violation occurred, but that enforcement is not warranted in the circumstances (e.g., the violator voluntarily took sufficient corrective action prior to DOT becoming aware of the conduct), it will issue a warning letter.

If DOT cannot determine whether a violation occurred, it may close the case or continue to monitor the alleged violator's conduct.

Negotiated Consent Orders

If DOT determines that a violation has occurred and that enforcement is warranted, it will first seek to reach an informal resolution with the violator. This process begins with DOT sending the violator a draft consent order and proposed civil penalty, which may be further negotiated, particularly as to the amount of the penalty and payment terms (e.g., suspension of a penalty payment, installment plans and spending offsets towards improving customer service and compliance). Cease and desist provisions triggering future, additional penalties for repeat violations occurring within one year are typical.

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Formal Enforcement Proceedings

If the violator and DOT are unable to reach a negotiated settlement, DOT will submit a formal complaint to the Office of Hearings, initiating a trial-type administrative proceeding presided over by an Administrative Law Judge. In such cases DOT typically seeks higher penalties than initially proposed during informal negotiations. The expense of such proceedings is a strong inducement to most violators to settle with DOT via a negotiated consent order.

Voluntary Self Disclosure

Unlike the Federal Aviation Administration, DOT's OACP does not have a formal voluntary self-disclosure program.¹ However, the Notice sets forth DOT's enforcement policy concerning such self-disclosures. When informed of violative conduct, DOT will assess the disclosure and corrective actions to determine whether enforcement is warranted. Importantly, DOT will consider whether the violator has corrected its conduct and made impacted consumers whole. If DOT considers enforcement action is warranted, it will consider the self-disclosure as a factor in determining a proposed penalty.

Sanctions

Civil penalties are DOT's primary tool for ensuring compliance with its regulations. According to DOT's Notice,

Civil penalties are meant to be sufficiently large to change the violator's behavior and bring about compliance. They also should be sufficient to deter the violator and other entities from committing similar violations in the future.²

DOT states that excessively high civil penalties may result in fewer voluntary disclosures and increased litigation, while penalties that are too low will not be adequate deterrents and do not change violative conduct.

DOT further notes that repeat offenders are subject to further audits, investigation, and in extreme cases, the loss of operating privileges in the U.S.

Other factors DOT considers when calculating civil penalties include the scope and scale of the violations, the degree of harm caused, the violator's history of non-compliance, the violator's ability to pay, DOT's past actions for similar violations, the possibility of incentivizing or deterring future actions, and the size of the business in question.

If DOT deems civil penalties to be inadequate for noncompliance in criminal circumstances, it may refer the case to DOT's Inspector General. For serious noncompliance in civil matters, DOT may refer the case to the Department of Justice.

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DOT's notice also includes a detailed explanation of criteria DOT will consider when setting civil penalties.

Key Takeaways

Regulated entities such as air carriers and ticket agents are subject to a host of complex and wide-ranging regulations. A full understanding of compliance includes knowledge of DOT's enforcement policies and procedures and the potential consequences of noncompliance.

Regulated entities should consult with counsel about compliance and the enforcement process. DOT enforcement can be expensive, public, and may involve extensive requests for information and records. Negotiating with DOT – especially concerning the wording of consent orders and the amount of the civil penalty – requires skilled and experienced legal counsel. Questions concerning compliance, DOT's enforcement procedures, and related matters may be addressed to the authors.

¹ <https://www.faa.gov/newsroom/aviation-voluntary-reporting-programs-1>

² Notice Concerning Investigatory and Enforcement Procedures at 4.