

## **DOT 2023 Enforcement Summary: The top of the mountain or the beginning of the ascent? (January 2024)**

The United States Department of Transportation's (DOT) Office of Aviation Consumer Protection (OACP) opened 2023 with a strong message to regulated entities that it intended to aggressively use its broad investigatory and enforcement powers to levy penalties in higher amounts in 2023. This message was delivered in a Notice summarizing OACP's enforcement and investigatory procedures related to alleged violations of DOT's consumer protection regulations.<sup>1</sup> OACP stated its assertive posture was to ensure that carriers did not consider civil penalties for failing to follow DOT's consumer protection regulations simply as the "cost of doing business." The higher penalties, OACP argued, are necessary to hold carriers accountable and deter future violations. This notice is consistent with rhetoric throughout the year by DOT's leadership that the DOT intends to "beat up" on the airlines when it perceives it is necessary to "protect" passengers.<sup>2</sup>

Although the total number of enforcement orders resulting in assessed civil penalties was lower than 2022 (10 versus 14), the aggregate amount of assessed penalties in 2023 was the highest ever, led by a \$140 million assessed penalty against Southwest for alleged consumer protection violations associated with the handling of a wave of cancellations in the wake of a major winter storm over the Christmas holiday season in 2022. Below, we provide a summary of DOT enforcement in 2023 and an enforcement outlook for 2024.



The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with the DOT's regulations and policies. For further information regarding the matters discussed in this article, please contact any of the following attorneys:

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## **Record-breaking Enforcement Against Southwest Airlines**

DOT closed the year with a record-breaking consent order against Southwest Airlines related to consumer protection issues arising from cascading delays and cancellations as a result of the winter storm that affected U.S. air travel in December 2022.<sup>3</sup> In December 2022, Southwest cancelled several hundred flights due to severe weather. Due to operational constraints and other issues, it took Southwest several days to recover from the massive irregular operation. DOT estimates at least 2 million passengers were affected by the operational issues, including hundreds of thousands of passengers who were stranded over the holidays. The “meltdown” (as DOT referred to the incident) garnered widespread media attention that resulted in an immediate DOT investigation into Southwest’s passenger handling practices during the recovery period.

DOT found three areas of consumer protection violations: violations of DOT’s statute prohibiting unfair and deceptive practices (49 U.S.C. § 41712) for inadequate call center assistance; violations of the regulation regarding flight status notifications (14 C.F.R. § 259.8); and failures to provide prompt refunds to affected passengers (14 C.F.R. § 259.5).

Although Southwest denied the violations, DOT and Southwest settled the investigation through the issuance of a negotiated consent order that assessed Southwest a \$140,000,000 penalty, with \$35,000,000 due and payable over three years. The remaining portion of the penalty was credited to Southwest for refunds provided to affected passengers who were not entitled to refunds under DOT regulatory requirements, and the remaining portion will be offset by Southwest’s future commitment to provide \$30,000,000 in vouchers per year until 2027 to passengers who are affected by a cancellation or significant delay within Southwest’s control. The commitment to provide vouchers goes above and beyond DOT’s regulatory requirements, a significant factor for DOT when evaluating potential penalties.

## **Tarmac Delays and Refund Processing Continue to Be Enforcement Priorities**

- Refunds

Since the pandemic, DOT’s enforcement efforts have focused on carriers who failed to provide timely refunds to passengers whose flights were significantly delayed or cancelled during the pandemic. 2023 continued that trend with four of the ten orders issued by DOT focusing on pandemic-related refund processing issues.<sup>4</sup> All four orders were against non-U.S. carriers. As with previous pandemic-related refund orders, DOT focused its enforcement efforts on carriers that received a substantial number of complaints related to their refund practices, indicating to DOT that the carrier engaged in a pattern or practice of delaying the processing of refunds. DOT also reviewed public statements made by the carriers regarding the availability of refunds to determine if the carriers misrepresented their obligations to provide prompt refunds. The four consent orders for pandemic-related refund processing issues assessed a total of \$3,375,000 in civil penalties. Including the

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Southwest order, described above, half of DOT's consent orders in 2023 involved refund processing issues.

- Tarmac Delays

The enforcement of 14 C.F.R. § 259.4, the regulation prohibiting excessive tarmac delays without offering passengers the opportunity to deplane, has been a focus for DOT for over a decade. 2023 continued the trend with four tarmac delay cases being resolved through the issuance of consent orders. The largest, against American Airlines, covered 43 domestic flights between 2018 and 2021.<sup>5</sup> The assessed penalty was \$4.1 million, with half paid and half credited to American for passenger compensation provided to passengers both on the affected flights and on other delayed flights.

DOT also issued three consent orders against foreign airlines for single incidents where passengers did not have the opportunity to deplane.<sup>6</sup> The assessed penalties for these flights ranged from \$130,000 to \$225,000, representing an increase in assessed penalties for single tarmac delay-related incidents.

### **DOT Takes Actions to Encourage Carriers to go “Above and Beyond” Regulatory Requirements**

While assessing civil penalties is one enforcement tool DOT uses to ensure regulatory compliance, in 2023, DOT also showed its willingness to work with carriers to ensure that carriers take proactive approaches to customer service issues to go “above and beyond” regulatory requirements. On September 28, 2023, DOT and United Air Lines announced an agreement wherein United agreed to take several actions related to providing mobility assistance for passengers with disabilities that go above and beyond the requirements of DOT's regulation requiring certain accommodations, 14 C.F.R. Part 382.<sup>7</sup> The agreement came as a result of the DOT's investigation into a complaint from a disability rights advocate, Engracia Figueroa, alleging that United mishandled her personal wheelchair, resulting in injuries and rendering the wheelchair unusable. Through the agreement, DOT agreed to close the investigation into Ms. Figueroa's complaint. United agreed to take steps to implement a filter on its booking engine so that passengers are better able to select flights that can accommodate their wheelchair, and United agreed to implement a pilot program at one of its hubs related to the return of wheelchairs after the wheelchair is checked.

### **2024 Enforcement Outlook**

While fewer consent orders were issued in 2023 than 2022, DOT's enforcement focus is clear – higher penalties with a goal of deterring future violations. DOT is especially aggressive if an incident is widely reported and covered in the press or in social media. If an incident garners significant media attention, DOT is likely to send an investigation letter to the carrier at issue to ensure the carrier complied with DOT regulations.

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DOT also is cognizant that while higher penalties are an important tool, penalties are paid to the U.S. government and not to consumers. Therefore, DOT will likely be looking for ways to integrate consumer benefits that go above and beyond regulatory requirements into its enforcement program, as it did in the Southwest order and the United agreement related to wheelchairs.

We anticipate that 2024 will likely be another year of aggressive DOT enforcement, as well as a busy year for DOT to implement new regulatory requirements. DOT's regulatory agenda is ambitious, with final rules being planned related to refunds as well as the display of fees for ancillary services, and proposals being issued related to family seating fees and minimum compensation levels for controllable delays and cancellations.

Regulated entities, particularly air carriers and foreign air carriers, are well advised to consult with counsel about their ongoing compliance with DOT regulations. We also strongly urge regulated entities that may be under investigation to retain experienced counsel.

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<sup>1</sup> Notice Regarding Investigatory and Enforcement Policies and Procedures (Jan. 3, 2023) (available at <https://www.transportation.gov/sites/dot.gov/files/2023-01/OACP%20Enforcement%20and%20Sanction%20Practices%20Notice%2012%202022.pdf>).

<sup>2</sup> <https://www.reuters.com/business/aerospace-defense/us-beat-up-airlines-when-necessary-passengers-transport-chief-2023-07-21/>.

<sup>3</sup> Southwest Airlines, Violations of 49 U.S.C. § 41712 and 14 C.F.R. Part 259, Order 2023-12-11 (issued Dec. 15, 2023).

<sup>4</sup> LATAM Airlines Group S.A., Violations of 49 U.S.C. § 41712 and 14 C.F.R. Part 259, Order 2023-5-16 (issued on May 22, 2023); British Airways Plc, Violations of 49 U.S.C. § 41712 and 14 C.F.R. Part 259, Order 2023-6-3 (issued on June 1, 2023); Scandinavian Airlines System, Violations of 49 U.S.C. § 41712 and 14 C.F.R. Part 259, Order 2023-7-8 (issued on Jul. 18, 2023); and Air Transat A.T. Inc., Violations of 49 U.S.C. § 41712 and 14 C.F.R. Part 259, Order 2023-7-10 (issued on Aug. 2, 2023).

<sup>5</sup> American Airlines, Inc., Violations of 14 C.F.R. Part 259 and 49 U.S.C. §§ 41712 and 42301, Order 2023-8-20 (issued on Aug. 28, 2023).

<sup>6</sup> Eurowings GmbH, Violations of 14 C.F.R. Part 259 and 49 U.S.C. § 41712, Order 2023-3-4 (issued on March 8, 2023); British Airways Plc, Violations of 14 C.F.R. Part 259 and 49 U.S.C. § 41712, Order 2023-4-5 (issued on Apr. 5, 2023); and Compañía Panameña de Aviación, S.A., d/b/a Copa Airlines, Violations of 14 C.F.R. Part 259 and 49 U.S.C. § 41712, Order 2023-8-6 (issued on Aug. 24, 2023).

<sup>7</sup> Agreement Between the U.S. Department of Transportation and United Air Lines, Inc. (Sept. 27, 2023) (available at <https://www.transportation.gov/sites/dot.gov/files/2023-09/United%20and%20DOT%20Agreement%20on%20Accessibility.pdf>).