

## Aviation Regulatory Policy Implications of a Biden Administration (Jan. 2021)

The 2020 elections raised a host of questions about the path forward for the United States in both domestic and international affairs. The Biden administration will almost certainly introduce significant changes into aviation regulation, particularly with respect to labor, consumer protection, disability accommodation, and environmental concerns.<sup>1</sup> While President Biden may encounter challenges on Capitol Hill to several of his legislative initiatives, his party still enjoys a majority in the House of Representatives (albeit by a smaller margin than in the 116<sup>th</sup> Congress). And while the Senate is evenly split, Vice President Harris can cast tiebreaker votes in that chamber. The Biden administration will have a freer hand in regulatory and policy initiatives across various federal agencies, including the Department of Transportation (“DOT”).

Within hours of Biden’s inauguration on January 20, 2021, his White House Chief of Staff issued a memorandum to federal agencies, instituting a temporary moratorium on the issuance of further proposed or final agency rules pending review by an agency head appointed or designated by Biden.<sup>2</sup> Such a “regulatory freeze” is customary for incoming presidential administrations, as it allows them to assess the vast federal bureaucracy’s latest regulatory activities. Nevertheless, to contrast how a Biden administration can be expected to differ, a review of Trump administration policies will be helpful.

On February 24, 2017, President Trump issued Executive Order 13777, “Enforcing the Regulatory Reform Agenda” (the “EO”). The EO directed each Federal agency to take specific actions to



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## Aviation Regulatory Implications of a Biden Administration (Jan. 2021)

Page 2 of 7

alleviate unnecessary regulatory burdens and to provide a report to the agency head on progress within 90 days. These actions included creating a Regulatory Reform Task Force (“Task Force”) within each agency to report progress on implementing the President’s goals from prior policies and Executive Orders, including Executive Order (“EO”) 13771 (Reducing Regulation and Controlling Regulatory Costs)<sup>3</sup>; EO 12866 (Regulatory Planning and Review), as amended; section 6 of EO 13563 (Improving Regulation and Regulatory Review); and the termination of programs and activities that derive from or implement EOs, guidance documents, policy memoranda, rule interpretations, and similar (in contrast to regulations published through notice and comment procedures and having the force of law). President Trump’s directive also required agencies “to evaluate existing regulations and to make recommendations for their repeal, replacement, or modification” based on factors such as whether the existing regulations serve to eliminate jobs or job creation, are outdated, impose costs that exceed benefits, and so on.<sup>4</sup> On May 24, 2017, the Task Force submitted a report to Secretary Chao including 14 rules to be extended, withdrawn, or put on hold consistent with the “regulatory freeze” memorandum from White House Chief of Staff Priebus.<sup>5</sup>

One of the Trump administration’s hallmark efforts in the realm of DOT’s aviation regulation came on February 28, 2020, when a Notice of Proposed Rulemaking (“NPRM”) titled “Defining Unfair or Deceptive Practices” was issued. The NPRM sought to impose certainty and clarity on DOT’s enforcement of 49 U.S.C. § 41712 by<sup>6</sup> (i) codifying definitions for the terms “unfair” and “deceptive” in DOT’s regulations; (ii) requiring DOT “to articulate in future enforcement orders the basis for concluding that a practice is unfair or deceptive where no existing regulation governs the practice in question, state the basis for its conclusion that a practice is unfair or deceptive when it issues discretionary aviation consumer protection regulations”; and, (iii) further requiring DOT to “apply formal hearing procedures for discretionary aviation consumer protection rulemakings.”<sup>7</sup> DOT’s NPRM was, in large part, prompted by a request from Airlines for America (“A4A”) made in response to a DOT request soliciting input on existing regulations and agency actions that were candidates for repeal, replacement, or modification. A4A maintained that DOT had historically “relied on the phrase ‘unfair and deceptive practice’ to issue detailed regulations and to take enforcement action without sufficient evidence that the practice at issue was actually unfair or deceptive.”<sup>8</sup> In practice, DOT has long relied on informal agency guidance to “interpret” rules as well as *ad hoc* interpretations; both of which arguably should have been subject to notice and comment procedures pursuant to the Administrative Procedures Act. On November 28, 2020, a few weeks after Biden was projected to be the 46<sup>th</sup> president, DOT issued a final rule adopting its NPRM essentially as drafted, which was published in the *Federal Register* on December 9, 2020.<sup>9</sup> The rule became effective on January 6, 2021, which means it is not subject to the regulatory freeze memorandum.

During the Obama administration, DOT issued several discretionary rulemakings under its § 41712 authority. Most notable was the Final Rule on Enhancing Airline Passenger Protections in 2011.<sup>10</sup> This regulation covered many consumer protection areas, including expanded tarmac delay and customer service plan requirements, price advertising, and

## Aviation Regulatory Implications of a Biden Administration (Jan. 2021)

Page 3 of 7

ancillary service fee disclosures. The requirements found in these regulations forced aviation industry stakeholders to overhaul their websites to conform to the advertising requirements as well as overhaul their operations to adhere to the tarmac delay regulations. A challenge to the price advertising requirements failed in the U.S. Court of Appeals for the District of Columbia Circuit.<sup>11</sup> However, many stakeholders saw the December 2020 final rule as a step to curtail future discretionary rulemaking by an administration with a different consumer protection agenda than the Trump administration. Of course, this final rule does not apply to mandatory consumer protection regulations that Congress may direct DOT to adopt.

Another significant change occurred around DOT enforcement activities. While respondents in enforcement cases involving alleged violations of DOT's aviation consumer protection and disability accommodation requirements have long had the right to seek a hearing before an administrative law judge, such hearings are very rare. Most enforcement cases are settled with a negotiated consent order. In the aggregate, such consent orders tend to reflect DOT enforcement priorities and the then-current administration's policy objectives. Not surprisingly, a historical analysis of DOT consent orders shows a marked change depending on the administration. For example, during the eight-year George W. Bush administration, DOT averaged 25 consent orders per year. During the eight years of the Obama administration, DOT averaged 39 consent orders per year.<sup>12</sup> Yet, during the four-year Trump administration, DOT averaged just 12 consent orders per year, with only six issued in 2020.<sup>13</sup> It is reasonable to assume that a Biden administration will focus DOT staff on more aggressive enforcement, consistent with enforcement during the Obama administration.

The Trump administration took an increasingly hard line concerning Cuba (including by tightening restrictions on already limited air service<sup>14</sup> and naming Cuba as a state sponsor of terrorism just before the end of Trump's term<sup>15</sup>), reversing significant overtures made under President Obama (re-establishing diplomatic relations and easing sanctions, among other things). President Biden is expected to begin incremental liberalization, such as by eliminating limits on remittances, easing travel restrictions, and lifting a ban on flights to Cuban airports other than Havana.

On December 15, 2020, then President-elect Biden nominated Pete Buttigieg to be his secretary of transportation.<sup>16</sup> Buttigieg, a former mayor of South Bend, Indiana, and a candidate during the Democratic Party presidential primaries, is known for revitalizing South Bend infrastructure. On January 10, 2021, Mr. Buttigieg announced a \$1 trillion infrastructure plan, which included \$150 billion to improve public transit, \$100 billion of which would be allocated to states and cities to repair existing systems and expand their rail and bus services, and \$12 billion of which would go toward rural public transit projects.

In Mayor Buttigieg's confirmation hearings before the Senate Committee on Commerce, Science and Transportation on January 21, 2021, Mr. Buttigieg emphasized DOT's role in safety as well as its role in environmental matters, noting that transportation is the United States' leading cause of greenhouse gas emissions.<sup>17</sup> Separately, several Democratic senators pressed Mr. Buttigieg to use DOT's unfair and deceptive authority more aggressively. Additionally, Senator Blumenthal, a noted advocate for air passenger

## Aviation Regulatory Implications of a Biden Administration (Jan. 2021)

Page 4 of 7

rights,<sup>18</sup> pressed Mr. Buttigieg on DOT's delay in issuing rulemakings as required by Congress. He specifically drew Mr. Buttigieg's attention to a requirement in the FAA Reauthorization Act of 2018 that requires FAA to issue a regulation regarding minimum seat size, which is a topic long-pursued by consumer advocates.<sup>19</sup>

On January 18<sup>th</sup>, then President-elect Biden nominated Polly Trottenberg to be Deputy Secretary of Transportation. Trottenberg, the former commissioner of the New York City Department of Transportation, previously served as Assistant Secretary for Transportation Policy and Under Secretary for Policy during the Obama administration. Other appointees for aviation-related positions announced by President Biden indicate his intention to steer DOT towards a more environmentally conscious agenda. Particularly, his appointee as Principal Deputy Secretary for Aviation and International Affairs, Annie Petsonk, comes from the Environmental Defense Fund where she has authored several articles on aviation's contribution to greenhouse gas emissions.<sup>20</sup>

There are several regulatory actions issued under the Trump administration that are subject to the regulatory freeze. Once the outcome of DOT's review of these actions is announced, stakeholders and consumers will have a better understanding of how DOT under President Biden and Secretary Buttigieg (if he is confirmed, which is expected) plan to address aviation consumer protection matters. As an initial matter, on his first day in office, President Biden issued an Executive Order revoking six Trump Executive Orders, including EO 13771 (the "two for one" order), EO 13777 (the regulatory reform order), and two executive orders that were meant to curtail the use of agency guidance documents and set parameters for the use of discretion in civil enforcement proceedings.<sup>21</sup> Therefore agencies will no longer be constrained by these regulatory limits that the Trump administration had placed on their rulemaking activities.

On January 15, 2021, DOT sent two regulatory notices to the Office of the Federal Register<sup>22</sup> but neither was published in the *Federal Register* before January 20, 2021. Under the regulatory freeze memorandum, such unpublished final rules must be withdrawn for agency review. The first is a final rule concerning DOT's regulation prohibiting lengthy tarmac delays wherein passengers do not have an opportunity to deplane. This final rule was issued based on a notice of proposed rulemaking issued in October 2019.<sup>23</sup> The final rule (i) codifies a change to the definition of departure delays promulgated in the FAA Extension, Safety, and Security Act of 2016<sup>24</sup> related to departure delays and (ii) alters requirements related to reporting of tarmac delays and announcements carriers must provide during a delay. DOT's Office of Aviation Consumer Protection has focused its enforcement efforts around the tarmac delay requirements for several years.<sup>25</sup> Therefore, it is likely an area that the new administration will review closely before deciding if it will finalize the rule, particularly because the rulemaking is a combination of a statutory requirement as well as DOT discretion.

DOT also sent an Advance Notice of Proposed Rulemaking (ANPRM) to the Office of the Federal Register regarding price advertising on or about January 15, 2021. As noted above, in 2011 DOT issued a comprehensive consumer protection rulemaking. This rulemaking included a requirement that sellers of air transportation must advertise the total price for air transportation, inclusive of taxes and fees, as the most prominent price

## Aviation Regulatory Implications of a Biden Administration (Jan. 2021)

Page 5 of 7

in a fare advertisement or solicitation.<sup>26</sup> As part of President Trump's effort to repeal or replace regulations, the so-called "full fare" rule was identified by industry groups as a rule that would make for a good candidate for repeal. The ANPRM sought comment on the costs and benefits of the rule. However, the ANPRM was not published in the *Federal Register*. Therefore, under the regulatory freeze memorandum, it will be withdrawn and reevaluated by the new DOT leadership. How the new administration chooses to treat this ANPRM will be an early, and clear, signal of how DOT under President Biden will address consumer protection issues.

Finally, DOT published a final rule on January 13, 2021 addressing domestic baggage liability and denied boarding compensation.<sup>27</sup> As this rule is not effective until April 13, 2021, DOT may decide to delay its effective date, consistent with guidance in the regulatory freeze memorandum. More specifically, this rule addresses inflation-based increases to minimum levels that airlines are permitted to establish for (i) liability in the case of lost, delayed or damaged domestic baggage and (ii) denied boarding compensation. As part of the underlying rulemaking, DOT also finalized several Congressional directives related to involuntary denied boarding procedures that were required in the FAA Reauthorization Act of 2018. This rule might be one regulatory action to survive the change in administrations as it increases the compensation due to passengers in certain situations (based on inflation adjustments required under existing regulation) and codifies Congressional mandates.

The national transportation policy developed by the Biden campaign in 2020 heavily emphasizes infrastructure – both for its public benefits (e.g., increased mobility, reduced emissions and decreased congestion) and for creating union jobs.<sup>28</sup> While it does not, as of yet, directly address the aviation sector, the policy does specifically address zero-emissions public transportation options for cities (such as light rail networks, improvements to existing transit and bus lines, and new infrastructure for pedestrians and bicyclists) as well as cost reductions in critical clean energy technologies and negative emissions technologies. It is likely the philosophy underlying these policies will carry over into aviation and will include increased funding for airports and airport infrastructure and sustainable aviation fuels. A Biden administration will have implications for many other policy areas, including quite possibly antitrust immunity for airline alliances where, in previous administrations, labor considerations have not been a primary focus. DOT may also be more receptive to objections concerning applicants for airline operating authority in which labor issues arise.<sup>29</sup> Finally, DOT will likely re-prioritize its regulatory and enforcement efforts in the aviation consumer protection sector, as was the case in the Obama administration.

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Entities doing business in the regulated aviation sector should plan for more aggressive enforcement of existing regulations as well as moves towards further regulation of the sector, as well as pro-labor and consumer policies.

## Aviation Regulatory Implications of a Biden Administration (Jan. 2021)

Page 6 of 7

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<sup>1</sup> Of 18 members on the Biden-Harris Transportation Agency Review Team (volunteers who are “responsible for evaluating the operations of the federal agencies so that the incoming Biden-Harris administration is prepared to lead our country on Day One”), three were recently employed by labor unions. While there are members who were formerly employed by airport authorities and state and municipal departments of transportation, there are no former airline or airline industry group members. President Biden’s first round of DOT political appointees were formally announced on January 21, 2021; some of these appointees served on the Agency Review Team during the transition. See <https://www.transportation.gov/briefing-room/us-department-transportation-announces-biden-appointees-ready-work-behalf-american> (accessed Jan. 21, 2021).

<sup>2</sup> See “Regulatory Freeze Pending Review,” available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/> (accessed Jan. 21, 2021).

<sup>3</sup> EO 13771 was important in that it required agencies to identify at least two existing regulations for repeal for each new regulation promulgated.

<sup>4</sup> See Report of the U.S. Department of Transportation Regulatory Reform Task Force (May 25, 2017) (“Task Force Report”), available at [https://www.transportation.gov/sites/dot.gov/files/docs/regulations/284161/rtrf-report\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/regulations/284161/rtrf-report_0.pdf) (accessed Jan. 21, 2021).

<sup>5</sup> The Chief of Staff’s memorandum directed agencies to withdraw rules at the Office of the Federal Register awaiting publication and to postpone the effectiveness of rules not in effect by January 20 in order to give the then-new Trump administration “an opportunity to review the legal and policy implications of these ‘midnight regulations.’” *Id.* at 4.

<sup>6</sup> Section 41712 vests the Secretary with the authority to “investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.”

<sup>7</sup> 85 Fed. Reg. 11881, 11881-11882 (Feb. 28, 2020)

<sup>8</sup> *Id.* at 11882.

<sup>9</sup> 85 Fed. Reg. 78707 (Dec. 7, 2020).

<sup>10</sup> 76 Fed. Reg. 23110 (Apr. 25, 2011).

<sup>11</sup> *Spirit Airlines, Inc. v. U.S. Department of Transportation*, 687 F.3d 403 (D.C. Cir. 2012).

<sup>12</sup> Included in this number is the first negotiated agreement between DOT and Southwest concerning airport kiosk accessibility, the first such negotiated agreement made in lieu of a consent order. As the practical impact is largely the same as a consent order we count such agreements among consent orders. There was one such negotiated agreement during the Obama administration and five during the Trump administration.

<sup>13</sup> The COVID-10 crisis has also undoubtedly slowed the pace of DOT enforcement with only six consent orders issued in 2020.

<sup>14</sup> See, e.g., Notice in Dockets OST-2016-0021, OST-2016-0226, OST-1998-20 suspending the authority of U.S. air carriers to provide scheduled service to points in Cuba other than Havana (Oct. 25, 2019).

<sup>15</sup> See press statement of Secretary of State Michael Pompeo, available at <https://2017-2021.state.gov/u-s-announces-designation-of-cuba-as-a-state-sponsor-of-terrorism//index.html> (accessed Jan. 21., 2021).

## Aviation Regulatory Implications of a Biden Administration (Jan. 2021)

Page 7 of 7

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<sup>16</sup> See <https://www.politico.com/news/2020/12/15/biden-cabinet-pete-buttigieg-transportation-secretary-445515> (accessed Jan. 21, 2021).

<sup>17</sup> See <https://www.commerce.senate.gov/2021/1/ni> (accessed Jan. 21, 2021).

<sup>18</sup> See <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-fights-for-passenger-protections-in-faa-reauthorization> (accessed Jan. 21, 2021).

<sup>19</sup> See <https://flyersrights.org/uncategorized/flyersrights-org-outraged-over-faa-ruling-on-seat-sizes> (accessed Jan. 21, 2021).

<sup>20</sup> See <http://blogs.edf.org/climate411/2020/12/08/aviation-on-the-cusp-from-covid-19-to-the-climate-crisis/> (accessed January 21, 2021).

<sup>21</sup> See Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation (issued Jan. 20, 2021) (available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-revocation-of-certain-executive-orders-concerning-federal-regulation/>). This Executive Order repealed the following Trump orders: EO 13771 (Reducing Regulation and Controlling Regulatory Costs); EO 13777 (Enforcing the Regulatory Reform Agenda), EO 13875 (Evaluating and Improving the Utility of Federal Advisory Committees), EO 13891 (Promoting the Rule of Law Through Improved Agency Guidance Documents), EO 13892 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication), and EO 13893 (Increasing Government Accountability for Administrative Actions by Reinvigorating Administrative PAYGO).

<sup>22</sup> See <https://www.transportation.gov/airconsumer/latest-news> (accessed Jan. 21, 2021).

<sup>23</sup> 84 Fed. Reg. 57370 (Oct. 25, 2019).

<sup>24</sup> P.L. 114-190, § 2308.

<sup>25</sup> Violations of DOT's tarmac delay rule represented 32% of the public enforcement orders DOT issued during the Trump administration. See DOT, Office of Aviation Consumer Protection, "Aviation Enforcement Orders," available at <https://www.transportation.gov/airconsumer/enforcement-orders> (accessed Jan. 22, 2021).

<sup>26</sup> 14 C.F.R. § 399.84(a).

<sup>27</sup> 86 Fed. Reg. 2534 (Jan. 13, 2021).

<sup>28</sup> See <https://joebiden.com/clean-energy/> (accessed Jan. 21, 2021).

<sup>29</sup> One example of labor concerns influencing a licensing proceeding involved the December 2013 application of Norwegian Air International ("NAI") (Docket DOT-OST-2013-0204) which took exactly three years to process, from application to a final order awarding NAI its requested traffic rights. The application was opposed by a host of labor interests on the grounds that, as an affiliate of Norwegian Air Shuttle, it held an Irish operating license to evade the application of Norwegian social laws to NAI's aircrew in contravention of the "social dimension" clause of the U.S. – EU air service agreement. See, e.g., Answer of the Air Line Pilots Association, Docket DOT-OST-2013-0204 (Dec. 17, 2013). DOT's approval of NAI's application was ultimately upheld by a federal appeals court. *ALPA v. Chao*, 889 F.3d 785 (D.C. Cir. 2018).