

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

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NOTICE REGARDING INVESTIGATORY AND ENFORCEMENT POLICIES AND PROCEDURES

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The U.S. Department of Transportation's Office of Aviation Consumer Protection (OACP), a unit within the Office of the General Counsel, is issuing this notice to explain its investigatory and enforcement policies and practices and reaffirm its commitment to vigorously enforce the law to protect aviation consumers. A robust enforcement program is necessary to protect the rights of the traveling public, particularly given the unprecedented increase in air travel service complaints received by the Department against airlines and ticket agents since the start of the COVID-19 pandemic. To confront the challenges faced by consumers, OACP believes that it is necessary to recalibrate the penalties imposed on airlines and ticket agents for violations of consumer protection, civil rights and economic licensing requirements. OACP intends to hold the regulated entities accountable and deter future misconduct by seeking higher penalties that would not be viewed as simply a cost of doing business.

OACP is responsible for monitoring airlines' and ticket agents' compliance with the Department's aviation consumer protection, civil rights, and economic licensing requirements. It has broad powers to investigate compliance with these requirements and broad discretion in determining whether and how to conduct investigations, issue subpoenas, require the production of special reports and records, and take depositions and other sworn statements from witnesses. OACP also has authority, under 49 U.S.C. § 46301, to assess civil penalties. The maximum civil penalty amounts that can be assessed, which DOT periodically adjusts based on inflation, are listed in 14 CFR 383.2. OACP pursues investigations and enforcement actions in accordance with established law and based on the specific facts and evidence available in each matter.

OACP uses a range of methods to ensure compliance with civil rights and consumer protection regulations, including working with the regulated entities to ensure that they understand their obligations and issuing warning letters to help regulated entities achieve compliance and resolve issues before they might require the commencement of enforcement actions. While OACP will continue to pursue these various means to achieve compliance with DOT regulations, it also intends to intensify enforcement actions for violations that cause significant harm through negotiated settlement orders assessing civil penalties or the filing of a formal complaint before the Department's Office of Hearings.

When OACP has evidence of systematic violations, or a single or a few egregious violations, it will take enforcement action. It will first attempt to negotiate with the regulated entity an order making sure consumers are made whole and assessing a civil penalty that is high enough to deter that entity and others from similar violations. If the regulated entity and OACP are unable to reach agreement on the terms of a consent order, OACP will seek resolution of the matter by filing a formal complaint with the Department's Office of Hearings for a decision by an Administrative Law Judge (ALJ).

**How OACP Learns About Potential Problems:** Today, most of OACP’s investigations and enforcement actions are based on consumer complaints. OACP receives complaints directly from consumers about services they received or requested from an airline or ticket agent that do not relate to airline safety or security. As a result of COVID-19’s impact on air travel, the Department has received an unprecedented number of air travel service complaints. After a complaint spike of 569 percent in 2020 (102,561 complaints compared to 15,332 complaints received in 2019), complaints have slowed but remain far above pre-pandemic numbers. In 2021, OACP received 49,958 complaints against airlines and ticket agents (a 226 percent increase compared to 2019). During the first 6 months of 2022, OACP received 28,550 complaints, a 300 percent increase from 7,161 complaints received in the first six months of 2019. A team of Transportation Industry Analysts enters each complaint into a computerized database, reviews consumer complaints, and tracks trends to identify problematic practices.

OACP also learns about potential problems through its own investigation by monitoring websites, advertisements, and other materials produced by airlines and ticket agents. OACP may also learn about potential problems through inspections of airline headquarters or airports, referrals from other government agencies such as State Attorneys General consumer protection offices, required submissions from airlines, reports from airline competitors, and media stories.

**Investigation Process:** Consistent with due process, once sufficient facts are established for OACP to open an investigation, OACP generally sends an investigation letter to the alleged violator. This letter advises the alleged violator of the problematic conduct, requests additional information, and allows the respondent to inform OACP of defenses, mitigating circumstances, or additional facts while encouraging voluntary cooperation. When an investigation letter is sent to an alleged violator, OACP considers the violator to be on sufficient notice of the alleged violation. OACP may also contact third parties to conduct interviews or obtain documents for review. Once OACP has received enough information to determine whether a violation occurred and the extent of the violation(s), OACP evaluates and decides how to resolve the matter. If an alleged violator does not cease problematic conduct, OACP has the authority to issue an Order directing that the entity cease and desist from such conduct.

OACP investigations, regardless of whether they lead to enforcement action, are tracked on OACP’s Computerized Tracking and Monitoring System (CTMS), which is part of the Consumer Complaint Application (CCA) system. However, OACP’s data reporting and analysis is currently hampered by the limited data tracking and reporting capabilities of the existing CCA system. OACP is currently working to upgrade and modernize its CCA system, including CTMS, which is used by lawyers in the office to track, manage, and preserve records. A modern system would enable OACP to conduct more robust data analysis, which would better assist OACP in identifying potential problems and trends that may indicate violations by regulated entities and in tracking enforcement activities.

**Results of Investigations:** OACP investigations can result in a finding of a violation, no violation, or insufficient information if there is not adequate evidence of whether a violation occurred. If a violation is found, enforcement action can be taken through an enforcement order, a warning, or administrative proceedings before an ALJ. If OACP finds that no violation occurred following an investigation, OACP will inform the alleged violator. If there is insufficient information to identify whether a violation occurred, OACP may close the case or decide to monitor the alleged violator’s practices.

## **Types of Enforcement Action**

**Consent Orders:** OACP generally takes enforcement action when it sees a pattern or practice of violations—for example, when a company has a problematic policy, multiple consumers file complaints on similar issues, or an incident affects many consumers all at once—or if a single or a few particularly serious violations occur. If enforcement action is warranted, OACP primarily resolves these cases by negotiating with an alleged violator and reaching a settlement agreement in the form of a consent order. The consent order is an order directing the alleged violator to cease and desist from the problematic practice. In many cases, the consent order will assess an administrative civil penalty which is remedial in nature and is intended to bring about compliance and to deter similar violations by the same violator or other entities. Negotiated consent orders also help OACP to ensure that consumers' needs are addressed promptly. For example, if appropriate and to ensure future compliance, OACP may agree to settlements that include a suspended civil penalty amount, which would only become due if the regulated entity commits similar violations within a set time of the order, and/or a credit for costs expended by the violator to do things that benefit consumers beyond what is required by the law. OACP has often permitted up to half the assessed civil penalty to be suspended in tarmac delay cases, for example, to further encourage carriers to prevent future tarmac delays. In addition, OACP has permitted carriers to offset a portion of expenditures on systems that reduced wait times for passengers to obtain wheelchair assistance, or reduced the length of tarmac delays, to time periods below legal time limits.<sup>1</sup> All settlements are made public through OACP's website and the regulations.gov public docket. If OACP and a regulated entity cannot reach a satisfactory resolution of an enforcement matter using the consent order process, then OACP may choose to pursue such violations through the initiation of a formal enforcement proceeding before an ALJ as described below.

**Enforcement Proceeding in Front of the Office of Hearings:** OACP will vigorously pursue enforcement actions against regulated entities who take or fail to take action that results in violations of the law and substantial harm to a significant number of aviation consumers. Of particular concern are any regulated entities who blatantly or consistently disregard statutory or regulatory requirements. Such enforcement actions are begun by OACP filing a formal complaint with the Department's Office of Hearings, which will assign the matter to an ALJ for adjudication using trial-type proceedings. These enforcement actions likely would seek substantial civil penalties and include cease and desist provisions as well as other remedial relief deemed appropriate by OACP. The formal complaint that OACP files with the ALJ becomes public on OACP's website. Following the ALJ's decision, parties may file for further review from the Department decisionmaker.

**Warning Letters:** If enforcement action through an order or an administrative proceeding before an ALJ is not warranted, for example, if the violating entity took sufficient corrective action prior to OACP learning about the violation, OACP may exercise its discretion and send a warning letter to the violating entity. The letter places the violator on notice that OACP is aware of the violation and may pursue enforcement action if similar violations occur in the future.

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<sup>1</sup> See, e.g., DOT Order 2018-5-28 (British Airways), available at <https://www.transportation.gov/individuals/aviation-consumer-protection/british-airways-order-2018-5-28>, DOT Order 2017-7-8 (Frontier Airlines), available at <https://www.transportation.gov/individuals/aviation-consumer-protection/frontier-airlines-inc-consent-order-2017-7-8>, and DOT Order 2016-1-2 (United Airlines), available at <https://www.transportation.gov/airconsumer/eo-2016-1-2>.

**Voluntary Self-Disclosure:** If a regulated entity voluntarily self-discloses violations of the Department’s requirements, OACP will consider the entity’s disclosure and corrective actions in determining whether to take enforcement action and the remedies if action is taken. Depending on the level of consumer harm, OACP may determine enforcement action is not warranted if the entity has corrected the issue and made whole any consumer that was negatively impacted by the violations. In the alternative, OACP may take the self-disclosure into account as a factor in determining the civil penalty assessed against the entity. A self-disclosure is not considered voluntary if the disclosure is required by law.

**Case Closure:** OACP may close a case if it determines that no violation occurred, if there is insufficient information to make a determination, if OACP’s resources are better utilized elsewhere, or if an enforcement action has been taken and no further action is required.

**Sanctions:** OACP primarily sanctions violators through civil penalties. 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. Civil penalties that are too small may have little deterrent effect and do not change problematic behavior. Civil penalties that are too high may be disproportionate to the violation and its impacts, as well as lead to a reluctance by regulated entities to voluntarily disclose violations. Also, as penalties increase, regulated entities may choose to litigate rather than comply particularly if the facts or the law are not clear cut. OACP continually reevaluates its penalty structure to ensure that its administrative civil penalties are not merely a “cost of doing business.” Violators that continue to show non-compliance risk further audits or investigation by OACP, and, in extreme cases, airlines may risk losing their authority to operate and individuals may be banned from engaging in air transportation. Other factors may impact the level of civil penalty assessed. These 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, the Department’s past actions for similar violations, the possibility of incentivizing or deterring future actions, and the size of the business in question. Penalties are assessed on a per-violation basis. If civil penalties are insufficient due to the criminal nature of the violating conduct, OACP may refer the case to the Department’s Office of the Inspector General for review, investigation, and potential prosecution. OACP may also refer matters to the Department of Justice (DOJ) for civil enforcement, where appropriate. For a full list of criteria used by OACP in calculating sanction, please see the Attachment “Criteria Considered in Setting Civil Penalties.”

Questions regarding this notice may be addressed to the Office of Aviation Consumer Protection (C-70), U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590.

By:

Blane A. Workie  
Assistant General Counsel  
for the Office of Aviation Consumer Protection

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An electronic version of this document is available at <http://www.transportation.gov/airconsumer>

# ATTACHMENT

## U.S. Department of Transportation Office of Aviation Consumer Protection

### Criteria Considered in Setting Civil Penalties

The Office of Aviation Consumer Protection (OACP) considers the factors listed below in determining the civil penalty it would seek or settle for in an enforcement proceeding and considers other relevant factors as appropriate. The civil penalty amounts referenced in this document are annually adjusted based on inflation pursuant to statute.<sup>2</sup> OACP will update the penalty amounts in this attachment when that occurs and include the date of this change.

- 1) The maximum assessable amount of the civil penalty under 49 U.S.C. § 46301 and 14 CFR Part 383, as adjusted for inflation. As of 2022, the maximum civil penalty assessable per violation is as follows:

- The **General Penalty Provision** for violations of Title 49 and Department orders and regulations is \$37,377 per violation for all entities, other than small business or individuals, to which a general penalty amount of \$1,644 per violation applies. [For OACP purposes, the \$1,644 per violation penalty is usually applicable only in cases involving reporting violations by small carriers.]
- For **small businesses**, as defined in 13 CFR Part 121, 15 U.S.C. § 632, and **individuals**, three specialized penalty amounts apply to specific kinds of violations:
  - \$14,950 for violations of certain provisions of Chapter 401 (see statute for specifics), including the anti-discrimination provisions of § 40127 and those applying to passengers with disabilities (49 U.S.C. § 41705) and related rules and orders;
  - \$7,475 for violations of 49 U.S.C. § 41719 (related to essential air service) and related rules and orders;
  - \$3,738 for violations of 49 U.S.C. 41712 (unfair and deceptive practices) and related rules and orders.

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<sup>2</sup> The Department's civil penalties are adjusted annually pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), Pub. L. 101-410, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), Pub. L. 114-74, 129 Stat. 599, codified at 28 U.S.C. 2461 note. The FCPIAA and the 2015 Act require Federal agencies to adjust minimum and maximum civil penalty amounts to preserve their deterrent impact. The 2015 Act specifically required an initial catch-up adjustment, followed by annual adjustments of civil penalty amounts using a statutorily mandated formula.

- For **continuing violations**, each day a violation continues is a separate violation for penalty purposes.
- 2) The number of violations.
  - 3) How long the violations continued, especially after the alleged violator's management became aware of them.
  - 4) The harm caused by the violations, as well as steps taken to reimburse passengers or otherwise correct the harm.
  - 5) Whether the violations were inadvertent or deliberate.
  - 6) The alleged violator's enforcement history.
  - 7) The alleged violator's compliance disposition:
    - a. did the carrier expend resources to prevent such violations?
    - b. did the carrier have procedures in place to prevent such violations?
    - c. did the carrier provide training to employees in the area?
    - d. how quickly was the problem corrected after C-70 notification?
    - e. what resources did the carrier expend to correct the situation (*e.g.*, for training, new equipment, new procedures, additional personnel)?
  - 8) The alleged violator's ability to pay (*e.g.*, small business, carrier in financial distress).
  - 9) History of Department in assessing penalties for similar violations, adjusting for statutory penalty increases and inflation.
  - 10) The alleged violator's experience/sophistication level (*e.g.*, new airline or established carrier; foreign carrier with limited service to U.S.).
  - 11) Need to eliminate/disgorge any profits attributable to the violations.
  - 12) Any valid excuses for the violations (*e.g.*, were they beyond the alleged violator's control?).
  - 13) Whether the violations were voluntarily self-reported by the alleged violator

In addition, to encourage future compliance, OACP may permit the inclusion of a suspended civil penalty amount, as appropriate for each case. This amount becomes immediately due if the regulated entity violates the cease and desist and payment provisions of the order within a set period, usually one year from the issuance date of the order. The office also may include "offsets" in settlements for expenditures the violator makes that go above and beyond the Department's aviation consumer requirements, *e.g.*, providing compensation to consumers when not required under the Department's requirements, or purchasing equipment or implementing systems that will provide tangible consumer benefits in the future beyond what a violator requires to comply with the law.

Finally, it should be noted that virtually every settlement the office enters into involves the issuance of a cease-and-desist order with findings of violations. Consent orders become final orders of the Department 10 days after issuance, unless a petition for review is filed or the Department takes review on its own initiative. Consent orders have become a valuable source of Department enforcement case precedent.