

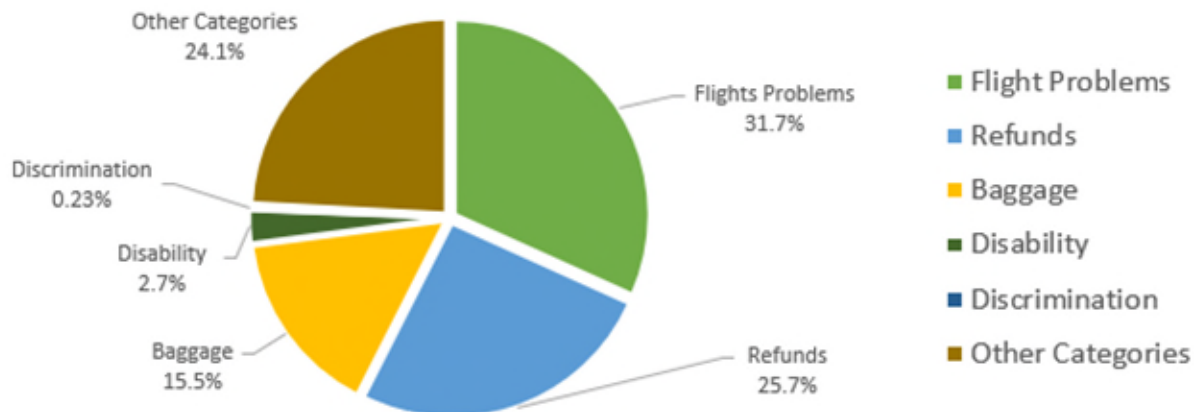
## Aviation Regulatory Update

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### DOT ISSUES 2022 AIRLINE COMPLAINT DATA REPORT

On April 12, 2023, the U.S. Department of Transportation (“DOT”) [issued](#) its updated February 2023 Air Travel Consumer Report, specifically focused on airline consumer complaint data for December 2022 and the full calendar year 2022. A graphic representation of the complaints DOT received along with further details on the report are included below:

Calendar Year 2022 Airline Consumer Complaints



DOT noted that for the full calendar year of 2022, it received a total of 77,656 complaints against airlines, a 55.3% increase from 2021, though notably a 24% decrease from the total number of complaints received in 2020. DOT also noted that of the total number of complaints it received, nearly 31% concerned flight problems (i.e., complaints for not being reimbursed for costs associated with flight problems), nearly 26% were related to ticket refunds, and nearly 16% were related to baggage issues.

For December 2022, DOT reported receiving 16,876 complaints, which was the third highest total for a single month on record. Flight cancellations and delays made up the highest category of complaints during this period (52.5%), followed by refund issues (14.5%) and baggage issues (13.8%). DOT also noted that more than half of the complaints received in December 2022 were submitted against Southwest Airlines (“Southwest”) in response to its software meltdown that caused over 16,700 flight cancellations. DOT said in the report that based on the large

number of complaints against Southwest, it would be investigating further to determine if Southwest had “engaged in unrealistic scheduling of flights”, which it considers an unfair and deceptive practice and violation of federal law.

DOT also reported that it received over 2,000 disability related complaints, up 50% from 2021, and 178 discrimination related complaints, up 32.8% from 2021.

## **DOJ JOINS INVESTIGATION INTO SOUTHWEST’S DECEMBER 2022 MELTDOWN**

On Friday, April 21, 2023, DOT announced that the U.S. Department of Justice (“DOJ”) has joined its investigation into Southwest’s scheduling practices following the carrier’s December 2022 “meltdown” resulting in over 16,000 cancelled flights. Severe winter weather largely affected the operations of many airlines at several U.S. airports between December 21st and 26th, 2022, but as DOT noted, all the other airlines affected were able to recover from the weather-related issues fairly quickly while Southwest struggled to recover due to its use of an outdated internal scheduling system that only added to the weather-related problems it faced.

DOT, DOJ, and the Federal Aviation Administration (“FAA”) are now working together to investigate whether Southwest engaged in unrealistic flight scheduling by scheduling flights that it knew it would not be able to properly staff, which DOT considers an unfair and deceptive practice. Since it announced its investigation into Southwest’s scheduling practices in January, DOT has conducted several on-site audits of Southwest’s refund records, worked with Southwest to determine how many passengers would be entitled to a refund under federal law, met with and interviewed Southwest officials, and examined thousands of pages of documents related to the incident. Southwest also asserted that it has completed an internal investigation and pledged to upgrade its scheduling system and winter infrastructure to prevent similar issues in the future. Nevertheless, Southwest recently suffered another “technical glitch” prompting it to ask the FAA to pause all its flights for about 40 minutes on April 18th, resulting in nearly 2,000 flight delays. Though cancellations in this instance were minimal, some U.S. Congress members and DOT have noted that the pause further shows the need for Southwest to upgrade its systems and for continued DOT observation to ensure all affected passengers are taken care of.

## **FAA ANNOUNCES SUBMISSION DEADLINE FOR WINTER 2023/2024 SCHEDULE INFORMATION FOR VARIOUS U.S. AIRPORTS**

On April 13, 2023, FAA published a [Notice](#) announcing the **May 11, 2023** submission deadline for Winter 2023/2024 flight schedules at Chicago O’Hare International Airport (ORD), John F. Kennedy International Airport (JFK), Los Angeles International Airport (LAX), Newark Liberty International Airport (EWR), and San Francisco International Airport (SFO). Carriers serving these capacity-constrained airports are encouraged to submit schedules for the Winter 2023/2024 scheduling season (October 29, 2023, through March 30, 2024) including sufficient details on the name of the marketing or operating carrier, flight number, scheduled time of operation, frequency, aircraft equipment, and effective dates for flights to be operated during the Winter season.

## **FAA REFERS ADDITIONAL UNRULY PASSENGER CASES TO THE FBI**

On April 13, 2023, the FAA [announced](#) that it has decided to send at least 16 more unruly passenger cases to the U.S. Federal Bureau of Investigation (“FBI”) so that it can pursue criminal prosecution against the unruly passengers. To date, FAA has referred over 250 unruly passenger cases to the FBI for criminal prosecution. The new cases being referred to the FBI date back to incidents that occurred on flights operated in 2022, including the following:

- *March 2023:* A passenger who allegedly tried to open the aircraft door and used a makeshift weapon to assault a flight attendant.

- *January 2023:* A passenger that inappropriately touched a 17-year-old passenger.
- *January 2023:* A passenger who refused to remain seated, acted erratically, and said he needed to fly the aircraft.
- *December 2022:* A passenger who assaulted flight attendants and other passengers.
- *December 2022:* A passenger who tried to strike a flight attendant and enter the flight deck.
- *December 2022:* A passenger who assaulted, threatened, and intimidated flight attendants.
- *July 2022:* A passenger who threatened and intimidated flight attendants and passengers.
- *July 2022:* A passenger who threatened flight attendants and passengers.
- *April 2022:* A passenger who sexually assaulted a flight attendant.
- *April 2022:* A passenger who assaulted a flight attendant and passenger and deployed the evacuation slide.

## **BIDEN ADMINISTRATION PROPOSES NEW CHANGES TO THE REGULATORY REVIEW PROCESS**

On April 7, 2023, the Biden administration [announced](#) new changes related to the regulatory review process used by U.S. executive branch agencies like DOT and the Environmental Protection Agency to institute new rulemakings and regulatory actions. The changes re-classify what will be considered a “significant regulatory action” by raising the threshold that determines which federal regulations will be required to undergo the more thorough review process required for significant regulatory actions. As an example, under the [old review process guidelines](#), significant regulatory actions must be reviewed by the Office of Information and Regulatory Affairs (“OIRA”, which is housed within the White House Office of Management and Budget (“OMB”)) and have a cost-benefit analysis done to determine whether the action’s benefits justify its costs. Previously, “significant regulatory actions” were also considered to be any action likely to result in a rule that would have an annual effect on the U.S. economy of \$100 million or more or otherwise adversely affect the economy, that could create a serious inconsistency or interfere with an action of another agency, or that could raise legal or policy issues, among other things. Under the changes however, an action or rulemaking would only be designated a “significant regulatory action,” and therefore have to undergo the more thorough review process detailed above, if the action or rulemaking is considered to have an annual effect on the economy of at least \$200 million, instead of \$100 million currently required. Further, if a rulemaking or regulatory action does not require a rigorous cost-benefit analysis, does not create a serious inconsistency with other agency actions, and/or does not have material budgetary impacts, the action would only have to undergo interagency review. In addition to the changes to “improve” the effectiveness of the regulatory review process, the Biden administration is also encouraging greater public participation in the process, and urging OIRA to discourage meeting requests that are “duplicative of earlier meetings” and that involve the same regulatory action by the same parties. Therefore, the new changes can be considered significant, as they are likely to be detrimental to regulated entities by effectively giving more expansive power to the U.S. government and its agencies to regulate without having to go through the more thorough review process.

Following the announcement, OIRA issued several memos and other documents to further explain how agencies will be instructed to conduct the rulemaking process and produce regulatory analyses like a cost-benefit analysis. The OMB also issued three notices including: (1) its [proposed revisions](#) to the guidelines for the process through which the public may request a meeting with OIRA, (2) its [proposed revisions to Circular A-94](#) on agency cost-benefit analysis and cost-effectiveness analysis of federal spending, and (3) its [proposed revisions to Circular A-4](#), which instructs agencies on the regulatory review process generally.

The OMB is seeking comments on all three notices until **June 6, 2023**.

## **FAA CREATES OFFICE OF INVESTIGATIONS AND PROFESSIONAL RESPONSIBILITY**

On April 11, 2023, FAA [announced](#) the establishment of a new “Office of Investigations and Professional Responsibility” tasked with providing independent reviews and decisions related to alleged manager misconduct at FAA. The goal of the Office’s work is mainly to protect whistleblowers and others that raise safety concerns. Creation of the new Office was mandated by the U.S. Congress in 2020 in response to two Boeing 737 MAX crashes that were allegedly the result of FAA managers exerting “undue pressure” on FAA Organization Designation Authorization unit members during the aircraft certification process causing them to act in conflict with their safety duties. The new Office will also support the FAA’s “Voluntary Safety Reporting Program” enacted in 2021, which allows FAA personnel to confidentially report safety concerns without the fear of facing punitive action.

## **MICROSOFT AGREES TO PAY NEARLY \$3M FOR ALLEGED OFAC SANCTIONS VIOLATIONS**

On April 6, 2023, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) issued a [press release](#) announcing a settlement with Microsoft Corporation (“Microsoft”) for \$2,980,265.86 in relation to the exportation of services or software by Microsoft from the U.S. to sanctioned individuals in violation of OFAC’s Cuba, Iran, and Ukraine/Russia- related sanctions programs.

Microsoft allegedly sold and/or activated software licenses and provided related services from servers located in the U.S. and Ireland to blocked individuals known as Specially Designated Nationals (“SDNs”) located in Cuba, Iran, Syria, Russia, and the Crimea region of Ukraine between July 2012 and April 2019, which resulted in a total value of sales of over \$12 million. OFAC further alleged that sales of the software and services to SDNs constituted sanctions violations as the sales were ineligible for any general licenses or other exemptions. OFAC noted that upon an investigation into the alleged violations, it found that some of the causes of the violations included Microsoft’s failure to obtain complete or accurate information on the identities of the end customers of its products, and the fact that during the time period in question, there were apparent shortcomings in Microsoft’s restricted-party screening processes. While the statutory maximum civil monetary penalty OFAC could have imposed in this case is \$404,646,121.89, OFAC noted that based on the mitigating factors it found, such as the fact that Microsoft voluntarily self-disclosed the violations, and because it considered the case to be “non-egregious”, a settlement amount of \$2,980,265.86 was appropriate. This is important as it shows how vital voluntary self-disclosures and having a robust internal monitoring process can be to mitigate and get civil penalties reduced for violations.

## **DOT ISSUES \$135,000 CIVIL PENALTY AGAINST BRITISH AIRWAYS FOR ALLEGED TARMAC DELAY VIOLATIONS**

On April 5, 2023, DOT issued a [consent order](#) assessing \$135,000 in civil penalties against British Airways PLC (“British Airways”) for alleged violations of the tarmac delay rule.

DOT found that on December 7, 2017, a British Airways flight from Austin-Bergstrom International Airport (AUS) to Heathrow Airport (LHR) experienced a lengthy tarmac delay during deicing at AUS. According to DOT, the aircraft remained on the tarmac because its ground handler, which only had one truck available to complete the deicing process, had to discontinue deicing after running out of fluid. DOT further noted that while the aircraft was sitting on the tarmac waiting for the deicing truck to return, passengers were provided with food and water as required under the tarmac delay rule, but that the airline did not return the aircraft to a gate or otherwise give the passengers an opportunity to deplane in violation of the rule. In total, the aircraft remained on the tarmac for four hours and 27

minutes, a violation of the requirement that airlines not allow an aircraft to remain on the tarmac at a U.S. airport for more than four hours for international flights, without providing passengers an opportunity to deplane, except in certain circumstances.

British Airways made several arguments in its mitigation efforts, including explaining that the Austin area was experiencing “unusual weather” including rain, snow, and sleet on the day of the flight in question, arguing that once the second deicing was completed the aircraft was airborne within 15 minutes, and noting that the captain of the flight, who had years of experience, “justifiably assumed” that the second deicing would be completed in sufficient time for the flight to take off before the four hour deadline, but DOT disagreed, noting that the “responsibility for deicing aircraft and ensuring compliance with the Department’s rules ultimately rests with the carrier.”

This Aviation Regulatory Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact author Evelyn Sahr at 202.659.6622 or [esahr@eckertseamans.com](mailto:esahr@eckertseamans.com); Drew Derco at 202-659-6665 or [dderco@eckertseamans.com](mailto:dderco@eckertseamans.com); or Alexis George at 804-788-7772 or [ageorge@eckertseamans.com](mailto:ageorge@eckertseamans.com) or any other attorney at Eckert Seamans with whom you have been working.