

## Biden's Competition EO Mandates Scrutiny of Airline Practices

On July 9, 2021, President Biden issued an Executive Order (EO) designed to promote competition across the U.S. economy. The EO targets a swath of industries — from agriculture to information technology to prescription drugs (to name but a few) — and directs or encourages multiple federal agencies, under a “whole-of-government” approach, to use their authorities to confront “overconcentration, monopolization, and unfair competition” in those industries. The airline industry-related provisions are among the broadest in the EO, tasking DOT to carry out the EO’s mandates on specific issues, including but not limited to: operating slots at congested airports; refunds for tickets, delayed baggage delivery, and unused ancillary services; access to flight-related fee information; and new aviation technologies. How this initiative will affect the airline industry remains to be seen, particularly as it continues to recover from the impact of COVID-19 on domestic and international travel.

### Key Provisions

Specifically, DOT must take the following actions:

- **COVID-19 Refunds:** Report to a newly established White House Competition Council on DOT’s efforts “to address the failure of airlines to provide timely refunds for flights cancelled” as a result of COVID-19. DOT has been investigating a number of airlines’ ticket refund policies during the pandemic, and in June 2021 announced it would seek \$25.5 million in civil penalties from Air Canada for failing to provide refunds in a timely manner.
- **Refunds of Baggage and Other Fees:** Publish a notice of proposed rulemaking (NPRM) that would require airlines to refund (1) baggage fees when a passenger’s luggage is “substantially delayed,” and (2) other ancillary fees when passengers pay for a service that is not provided. DOT issued an advance copy of this NPRM on the same day as the EO. Congress mandated these requirements in 2016 and, although DOT toward the end of the Obama administration initiated the required rulemaking and solicited public comments on the baggage fee refunds, no specific regulations were proposed during the Trump administration.
- **Access to Flight and Ancillary Fee Information and Related Practices:** Enhance “consumer access to airline flight information so that consumers can more easily find a broader set of available flights, including by new or lesser known airlines” and “ensure that consumers are not exposed or subject to advertising, marketing, pricing, and charging of ancillary fees that may constitute an unfair or deceptive practice or an unfair method of competition.” The EO further encourages DOT to initiate a rulemaking that would require the provision of ancillary fee information to consumers at the time of ticket purchase, including baggage, change, and cancellation fees. In 2017, during the final days of the Obama administration, DOT issued a “Transparency of Airline Ancillary Fees” NPRM that would have required (i) airlines to transmit information on “basic ancillary fees” to ticket agents, and (ii) airlines and ticket agents to present such information in a specified manner across all internet displays. The ancillary fee information identified in the EO is broader than in 2017 NPRM (which the Trump administration withdrew later that year).
- **Competition Policy — DOJ/DOT:** Consult with the DOJ regarding “means of enhancing effective coordination between the Department of Justice and the Department of Transportation to ensure competition in air transportation and the ability of new entrants [airlines] to gain access.” Although DOT is required by statute to consult with DOJ to avoid duplicative reviews of joint venture agreements between U.S. carriers and DOJ has provided its views on applications before DOT for antitrust immunity for international alliances, the two agencies often have not seen eye to eye, particularly regarding the need for and scope of remedies.



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### Related Practice Areas

- Aviation Regulatory

### Industry Sectors

- Aviation

- **Airport Congestion:** “Consider measures to support airport development and increased capacity and improve airport congestion management, gate access, implementation of airport competition plans” as well as “‘slot’ administration.” This directive follows a long history of attempts at “reforming” the slot system at New York area airports — a goal that has eluded several administrations, including an NPRM that was issued in 2015, withdrawn in 2016 and would have allowed airlines to permanently transfer slots among themselves, with DOT reviewing certain such transfers for anti-competitive effects. Since the withdrawal, slots have been abolished at Newark but continue in place at JFK and LaGuardia, and cannot be permanently transferred absent an exemption from the FAA.
- **Amend DOT’s “Unfair and Deceptive” Rule:** “Start development” of proposed amendments to DOT’s definitions of “unfair” and “deceptive” that are essential to DOT’s fundamental regulatory authority under 49 U.S.C. § 41712 to prohibit airlines from engaging in unfair and deceptive conduct. As noted below, this initiative may entail a dismantling of Trump era regulations that were widely supported by the airline industry and had codified DOT’s definitions to formally align them with decades of Federal Trade Commission precedent.
- **New Aviation Technologies:** Support new aviation technologies by “tak[ing] action” to (1) “facilitate innovation that fosters U.S. market leadership and market entry to promote competition and economic opportunity and to resist monopolization, while also ensuring safety, providing security and privacy, protecting the environment, and promoting equity;” and (2) “provide vigilant oversight over market participants.”
- **Aviation Consumer Protection Programs:** Appoint/reappoint members to the existing Advisory Committee for Aviation Consumer Protection (ACACP) to “ensure fair representation of consumers, State and local interests, airlines, and airports with respect to the evaluation of aviation consumer protection programs and convene a meeting of the Committee as soon as practicable.” The ACACP was first established by statute in 2012 and, following a hiatus during the first half of President Trump’s term, was re-convened in 2018 at the direction of Congress. The EO also directs DOT to convene a working group within DOT “to evaluate the effectiveness of existing commercial aviation programs, consumer protections, and rules of the Federal Aviation Administration.”

## Impact to Airlines

The EO indicates that the Biden administration has two key focus areas with respect to airlines: consumer protection and competition.

First, the EO asks DOT to evaluate whether DOT’s consumer protection regulations adequately protect consumers. To that end, DOT is not only required to promulgate new regulations to address perceived regulatory gaps — such as baggage and ancillary fee refunds — but must also evaluate *existing* regulations — even recently issued regulations. For example, in January 2021, DOT adopted regulations clarifying DOT’s interpretation of its fundamental authority to regulate unfair and deceptive airline practices. DOT is now required to revisit that work and “start development” of amendments to the definitions of “unfair” and “deceptive” just months after completing a three-year regulatory review and rulemaking process — with multiple opportunities for public comment — that led to the definitions in place today. (This is in addition to a recent DOT initiative, identified before the EO’s issuance, to modify Trump era regulations that allow interested parties to seek hearings when DOT proposes discretionary (as opposed to congressionally mandated) rulemakings under its general Section 41712 authority to prohibit unfair and deceptive practices. DOT states the modification is needed to ensure the hearing’s conduct “does not unduly delay the rulemaking.”)

Second, the EO seeks to probe whether airline industry consolidation has had negative competitive effects on consumers. While the unspoken assumption underlying this competition review is that such negative effects have occurred, airlines argue that the industry is more competitive than ever, noting increased investment in technologies and workforces, improved performance metrics and a steady growth in nonstop routes during the decade before the COVID pandemic. Additionally, Airlines for America, the industry trade organization for the leading U.S. airlines, asserts that “air travelers benefit from robust industry competition” today and experience “unprecedented levels of affordability and accessibility.”