

## DOT Provides Airline Payment Flexibility for Enforcement Penalty During COVID-19

The U.S. Department of Transportation (DOT) recently issued a consent order assessing a \$70,000 civil penalty against Volaris, the Mexican low-cost airline, for alleged violations of DOT's regulations governing lengthy tarmac delays. The case's facts and DOT's rationale for assessing violations did not break new ground, but aspects of DOT's order may provide insights into how DOT is approaching enforcement during COVID-19. Although the order makes no mention of COVID-19 or whether Volaris sought relief from DOT because of the current operating environment, the order includes a few features that could be interpreted as reflecting some recognition on DOT's part of COVID-19's impact on carriers. Specifically:

The alleged violations occurred in September 2017, but DOT only issued the consent order in July 2020, even though the case involved only a single flight and therefore should not have required a very complicated investigation. While DOT has generally refrained from issuing consent orders against airlines in the current environment, possibly reflecting some reluctance to impose monetary penalties on carriers that are struggling to survive the pandemic's effects, this order shows that DOT is not willing to entirely discontinue imposing civil penalties on airlines during COVID-19.

Of the \$70,000 penalty amount, DOT is only requiring payment of \$35,000, subject to DOT's frequently used format whereby the remaining \$35,000 will be forgiven if Volaris does not commit another violation within the next year. The format of the penalty, however, is novel: DOT has established a payment schedule whereby Volaris will be required to pay the \$35,000 in three installments: \$10,000 is due within 120 days, an additional \$10,000 is due after 180 days, and the final \$15,000 is due after 270 days. In previous cases, DOT would require the carrier to pay the full \$35,000 amount in one installment within 30 days of the order's issuance.

Finally, DOT, as a legal matter, continues to take the position that it may assess tarmac delay penalties on a per-passenger basis. Airlines disagree: they argue that DOT's civil penalty statute only authorizes DOT to assess such a penalty on a per-flight basis. This is an important issue because, by statute, DOT may not impose a civil penalty in excess of \$34,174 per violation. Thus, if the airlines are correct, the statute would only allow DOT to assess a maximum \$34,174 penalty against Volaris in this case (because the case only involves one flight), whereas, under DOT's interpretation, DOT's maximum penalty amount would be \$34,174 multiplied by 92 (the number of passengers on the Volaris flight). In support of its position, DOT contends that because the policy purpose of its tarmac delay regulation is to protect passengers who experience a lengthy tarmac delay, it is justified in assessing penalties on a per-passenger basis. This is a questionable assertion because, as a matter of statutory interpretation, agencies lack authority to decide (or alter) how a statute should be interpreted based on the claimed policy goal of the agency's implementing regulations. The Volaris case does not resolve this dispute about how to interpret DOT's statutory penalty authority because Volaris, like most carriers, opted to settle DOT's enforcement case rather than litigate it.



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