

Airlines Must Prepare For State AG Investigations

By **Diana Cortes, Brendan Killeen and Nicholas Gess** (May 15, 2024, 3:01 PM EDT)

On April 16, the U.S. Department of Transportation and 18 state and territorial attorneys general agreed to a memorandum of understanding that delegates authority to the AGs to investigate consumer complaints against commercial passenger airlines, and streamlines the process for doing so.

While the MOU empowers these 18 AGs, it also poses significant risk of confusion, differing interpretations and uneven enforcement in an industry that, by its nature, is wholly dependent on uniformity.

Domestic commercial passenger air carriers and non-U.S. carriers that operate to or from the U.S. will, for the first time in over a generation, be subject to state consumer protection investigations — and will need to develop legal and public affairs capabilities to help them respond to what will likely be heightened scrutiny.

Education will be key in this process — because while certainly at home in the consumer protection realm, AGs have been unfamiliar with this niche area during its rapid evolution, as electronic booking and ticketing, and a significant drop in the relative cost of tickets, have made commercial air travel available to many who could not access it before.

DOT's Authority Over Airlines and Recent Sharing of Authority with AGs

In 1978, when President Jimmy Carter signed the Airline Deregulation Act into law, the new statute preempted state consumer protection authority, leaving sole authority to the DOT to investigate and penalize unfair or deceptive acts or practices in commercial passenger aviation.

This action is part of a concerted effort by the Biden administration to work with and empower states. It marks the third time that the White House and its federal agencies have recently granted significant expansions of state authority, rather than simply collaborating with the states.

The earlier instances include the recently promulgated rules implementing the Corporate Transparency Act, which require reporting of beneficial ownership to the U.S. Department of the Treasury's Financial Crimes Enforcement Network, and which also permit FinCEN to share that information with the states on a limited basis.



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Then, FinCEN proposed rules requiring certain unfinanced real estate transactions to be reported to it as part of anti-money laundering efforts. At the request of state attorneys general, those reports will be shared with them. This drew a supportive letter from the states.

Enhancing consumer protections in aviation was a priority for Kamala Harris as California's attorney general, and then as a U.S. senator. Now, as vice president, and working through the DOT, her policy goal has at least been partially fulfilled.

MOU: AGs Flex More Power and Access to DOT Consumer Complaint Database

The group of states and territories whose AGs are covered by the MOU was led by Colorado, and also includes California, Connecticut, Illinois, Maine, Maryland, Michigan, North Carolina, New Hampshire, Nevada, and New York, as well as the District of Columbia and the Commonwealth of the Northern Mariana Islands.

The MOU contains four key features, as described below.

Investigative Authority

Signatory state attorneys general have the delegated authority to investigate alleged unfair or deceptive acts or practices for which they were previously preempted. The MOU is silent on the method or process for such investigations.

Thus, it is unclear whether this means that an attorney general could use their state compulsory process such as an administrative subpoena or civil investigative demand. But at a minimum, they will have the authority and information to make a targeted request.

Investigations Backed by DOT Enforcement

Under the MOU, the DOT will use its enforcement regime to ensure that carriers cooperate with investigations — that they produce data and make witnesses available for interview.

Since the DOT is the carriers' primary regulator, carriers are hard-pressed to fend off such pressure.

Fast-Track Reporting Channel

The MOU establishes a fast-track channel for state attorneys general to report violations to the DOT, and for DOT consideration and action.

Because DOT investigators will know that a matter transmitted by a state attorney general has been investigated, they are able to prioritize those matters.

Access to Consumer Complaint Database

The MOU grants the AGs access to the DOT's nonpublic consumer complaint database, a centralized records system.

This will allow states to collaborate with both the DOT and each other — as they have done in matters

overseen by other federal agencies such as the Federal Trade Commission, the Consumer Financial Protection Bureau, the U.S. Securities and Exchange Commission and the U.S. Department of Justice.

Turbulence Ahead: What's on the Horizon, and What Carriers Should Do

We anticipate that signatory attorneys general will move expeditiously to identify complaints and initiate investigations leading to inquiries for carriers. Initially, this likely will mean letter inquiries, which could result in misrouting for businesses that have not historically interacted with the attorneys general.

Carriers can anticipate inconsistent approaches and enforcement among AGs, and between AGs and the DOT. As noted above, the MOU is silent on the methods and processes the AGs will use.

The DOT investigative process can be formal. Air carriers are familiar with it, and have dedicated staff to deal with it — and most of it occurs out of public view. However, state enforcement may well be quite public and less formal — and likely will differ between states.

All U.S. commercial passenger air carriers, as well as non-U.S. commercial air carriers that transport passengers to or from the U.S., now largely face the same dual enforcement scheme that most businesses in the U.S. must navigate: a primary federal agency and numerous state enforcement officials. While only the DOT has direct enforcement authority, differing approaches to consumer protection by AGs, and the resources they have access to, will mean more investigations — and possibly more prosecutions.

If an AG recommends action and none is taken, it will put "soft" pressure on the federal agency to act. Further, the MOU and the recent anti-money laundering regulations significantly increase the breadth and depth of investigations that state law enforcement will be able to conduct on its own. The MOU thus poses significant risks, because interpretations and policy will differ from state to state.

While the MOU is far from a repudiation of federal preemption, if the collaborative effort is successful, it opens the doors to requests to Congress to amend the 1978 law and simply permit the states full authority to investigate, as they do across the vast majority of the economy.

Finally, we anticipate that the MOU will spur more consumers to file complaints. That, in and of itself, poses a separate set of risks.

State access to the DOT's nonpublic database may well result in disclosures of nonpublic complaints. This creates a potential treasure trove for plaintiffs lawyers, who may use it to strategize new putative class actions, and for state legislatures, who may use it to hold damaging hearings.

Carriers should consider the foregoing, and undertake the following actions:

- Review their compliance and consumer protection policies relating to front-line issues — such as care for passengers during delays, refunds, unclear contract language and fees for ancillary services such as checked bags — to make certain that they are following through on their policies, and that those policies are concisely formulated and clear to the reasonable person.
- Ensure they have a process for outreach to AGs that can avert enforcement by addressing concerns before they rise to an adversarial level. This should include an educational component, since the commercial aviation space has been outside AG authority for well over a generation.

- Review their internal complaint processing to ensure that customer complaints are addressed and, when not favorably resolved, properly documented in a timely manner.
 - Establish a means for responding promptly and accurately to inquiries from AGs — which will likely arrive in letter form, increasing the risk of erroneous processing.
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