

The DOT Third-Party Complaint System: Opportunities for Improvements (July 2020)

Part 302 in Title 14 of the Code of Federal Regulations contains the Department of Transportation's (the "DOT") Rules of Practice governing a variety of administrative proceedings and related matters, including formal complaints filed by individuals or organizations ("Third-Party Complaints") in the DOT public docket. These Third-Party Complaints seek DOT enforcement action against airlines for alleged violations of DOT's aviation consumer protection statutes, regulations, orders, and "other requirements."ⁱ As a consequence, the potential scope and subject of such Third-Party Complaints, which any person may file, is broad. Airline respondents generally are obligated to file detailed responses ("Answers") by established deadlines or else potentially suffer a default judgment – regardless of whether the complainant has articulated a claim actually within DOT's jurisdiction or actually suffered any cognizable harm from the conduct at issue.

Nevertheless, and until recently, Third-Party Complaints at DOT were relatively infrequent. Complainants were typically organizations seeking to strategically advance certain policies with the DOTⁱⁱ or a few individuals who, having gained familiarity with the DOT's Third-Party Complaint procedures, filed complaints on issues specific to them.ⁱⁱⁱ

During the first half of 2020, however, the number of Third-Party Complaints increased dramatically, driven in large part by the COVID-19 public health emergency. Facing severe financial headwinds in the wake of government-imposed travel restrictions and rapidly declining passenger traffic, airlines responded by drawing down their flight schedules. Some consumers, frustrated by what they perceived to be a slow pace of refunds or dissatisfied with alternatives offered by carriers, began turning to DOT's mechanism for the filing of Third-Party Complaints. For some of these cases now pending before DOT, it is unclear if the complainant is a U.S. resident (the class of consumers who the DOT regulations are intended to protect)^{iv} or if the itinerary involves a flight to, from or within the U.S. (the only air travel over which DOT has jurisdiction).



The firm's practice encompasses virtually every aspect of aviation law, including representing airlines in DOT enforcement cases. For further information regarding the matters discussed in this article, please contact the following attorneys:

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From the complainant's perspective, one perceived benefit is the regulation's requirement that carriers file an Answer in the DOT docket within 15 days, which is public and, depending on the allegations, potentially newsworthy.^v The Answer must specifically admit or deny each and every allegation in the Third-Party Complaint.^{vi} Although DOT will extend the deadline for the filing of an Answer upon "good cause shown," the preparation of an Answer is often time-consuming, given carrier internal investigations that must be undertaken to meet all of the regulation's requirements for Answers, regardless of whether there is any merit to the Third-Party Complaint. Oftentimes carrier employees must be interviewed and phone recordings must be reviewed. These tasks become even more burdensome in the current economic environment for carriers. And, although DOT regulations do not permit further rounds of pleadings after the filing of an Answer,^{vii} complainants will often file their own reply to a carrier's Answer (without seeking appropriate leave from the DOT to do so), for which the carrier is often compelled to file a sur-reply to ensure the administrative record is accurate and complete.

After briefing is complete, the regulations require the DOT to take one of the following actions: (i) institute a formal enforcement proceeding before an Administrative Law Judge; (ii) pursue other enforcement action through a negotiated settlement with the respondent; or (iii) dismiss the Third-Party Complaint.^{viii} Although the regulations require the DOT to make this decision within a "reasonable time,"^{ix} no specific timeline is specified. Over the last eight years, the average time for DOT to reach a decision (in cases where the parties have not voluntarily withdrawn the matter) has run about 21 months.^x

The last substantive update to the regulations was made 20 years ago,^{xi} and since then the landscape for seeking enforcement has changed. Pleadings can be filed with the DOT electronically via www.regulations.gov, greatly simplifying the process for filing Third-Party Complaints.^{xii} The Third-Party Complaint mechanism is now widely publicized on Internet blogs and forums related to commercial air travel issues. A frequent complainant has posted a template for formal complaints on his personal website.^{xiii} It is easier than ever for individuals to now file Third-Party Complaints with the DOT.

Providing an administrative mechanism for individuals to seek agency enforcement action is, of course, necessary and appropriate. However, the inescapable fact remains that some Third-Party Complaints either allege conduct that is not a violation of any DOT requirement (including matters not within the jurisdiction of DOT), contain purposely inaccurate information, or do not conform to DOT's rules of procedure (including, for example, service on the respondent carrier). Yet, the time required for carriers to defend themselves from such deficient complaints is often no less than the time required for potentially meritorious claims.

Against this backdrop, the time has come for the DOT to give serious attention to streamlining the Third-Party Complaint procedures, and in the process strike the right balance of interests to ensure (i) complainants get a fair opportunity to be heard, (ii) respondents are not required to file Answers unless and until directed to do so by DOT and (iii) the parties are provided with prompt adjudication. Although some streamlining measures may require amendments to DOT's regulations, many are already covered by existing regulations or else inherently within DOT's prosecutorial discretion. For example:

- Before requiring an Answer, the DOT should screen Third-Party Complaints to ensure that the complainant has clearly stated a claim and, if so, whether that claim is within the jurisdiction of DOT. If the complainant does not state a claim, the DOT can always allow the complainant to amend the Third-Party Complaint to be more specific. However, if the claim is clear but not within the jurisdiction of the DOT, the DOT should promptly dismiss the claim. Other agencies include mechanisms to dismiss complaints prior to an answer being required. For example, under 14 C.F.R. Part 16,^{xiv} the FAA may dismiss a complaint if (i) the complaint, on its face, appears outside the jurisdiction of a Part 16 proceeding; (ii) the complaint, on its face, does not warrant further investigation or action by the FAA; or (iii) the complainant lacks standing.^{xv}

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- Some Third-Party Complaints allege a violation of only 49 U.S.C. § 41712, which is a general statute prohibiting unfair and deceptive practices in air transportation or the sale of air transportation, and which DOT relies upon when adopting specific aviation consumer protection regulations. The DOT should require that any claim based solely on Section 41712 invoke an established DOT decisional or guidance document that has placed the industry on notice regarding the DOT's enforcement position.
- Before requiring an Answer, the DOT should ensure the complaint has met the procedural requirements of Part 302, including the requirement that Third-Party Complaints are properly served and verified under Title 18 of the United States Code as to their truthfulness. Given that many complainants proceed *pro se*, the DOT can always allow the complainant to amend or otherwise “cure” the procedural defect, without dismissing the complaint.^{xvi}
- The DOT should not require Answers unless and until the respondent is directed by the DOT to provide one; this will allow DOT sufficient time to assess the Third-Party Complaint to determine whether (i) an actionable claim has been stated and (ii) the complainant has satisfied the procedural requirements.
- Under DOT's regulations, DOT may consolidate cases involving issues that are the same or closely related.^{xvii} The DOT has used this mechanism in the past to consolidate formal complaints that arise out of the same set of operative facts.^{xviii} Upon request from a carrier respondent, the DOT should use this mechanism to promote greater efficiency in reviewing and responding to Third-Party Complaints.
- The DOT should update its regulations to establish a set timeframe for its resolution of Third-Party Complaints following the submission of an Answer. Complainants and respondents alike deserve to have pending matters expeditiously resolved.^{xix} Although the DOT rejected the inclusion of a decisional deadline when last updating the applicable regulations 20 years ago, the landscape today is much different for filing Third-Party Complaints than it was then.

DOT regulations require that enforcement actions be carried out in a “fair and just manner.”^{xx} While having a formal complaint process in place is an important feature of government consumer protection, the Third-Party Complaint mechanism in its current form presents quandaries for the DOT, carriers and, ultimately, consumers with potentially meritorious claims. In addition to approximately 45 Third-Party Complaints now pending before the DOT, the agency received over 25,000 informal complaints during the period from March 1, 2020 through April 30, 2020, most of which were related to ticket refunds during the COVID-19 pandemic.^{xxi} (The DOT is charged with reviewing all informal consumer complaints it receives.^{xxii}) Given the finite resources of the DOT, streamlining the Third-Party Complaint procedures will allow DOT to better ensure that both complainants and respondents receive a fair, expeditious review of claims within DOT's jurisdiction.

ⁱ The DOT regulation providing for the filing of Third-Party Complaints is 14 C.F.R. § 302.404(a).

ⁱⁱ See e.g., *Order Dismissing Complaint and Denying Rulemaking in the Matter of Association of Discount Travel Brokers v. Continental/Eastern Tariff Co.*, Order 92-5-60 (served May 29, 1992).

ⁱⁱⁱ See e.g., *Order of Dismissal in the Matter of Benjamin Edelman v. American Airlines*, Order 2018-5-30 (served May 22, 2018).

^{iv} Although DOT procedural regulations require complainants to provide a mailing address on the initial filing, many complainants do not do so. 14 C.F.R. § 302.4(a)(2)(i)(d).

^v 14 C.F.R. § 302.405(a). The requirement is 15 days from the date when the Third-Party Complaint is served on the respondent.

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- vi 14 C.F.R. § 302.408(b).
- vii 14 C.F.R. § 302.408(c).
- viii 14 C.F.R. § 302.406(a).
- ix *Id.* The prior version of the DOT's procedural requirements required the DOT to process a formal complaint within 60 days of receipt. The DOT, in adopting the "reasonable time" standard stated "[o]ur experience is that the 60 days set forth in the existing rule rarely, if ever, permits enough time to conduct an investigation and satisfactorily resolve issues that may be raised." *Final Rule, Rules of Practice in Proceedings*, 65 Fed. Reg. 6446, 6452 (Feb. 9, 2000).
- x A review of DOT Third-Party Complaint dockets shows four complaints pending from 2018, one from 2017, one from 2016, and one from 2015.
- xi 65 Fed. Reg. 6446 (Feb. 9, 2000).
- xii Prior to the establishment of www.regulations.gov, Third-Party Complaints were required to be filed either by mail with DOT's Documentary Services Division or on DOT's little-known Document Management System website.
- xiii <http://www.benedelman.org/dot-complaints/>. At the time of this article, all the refund-related Third-Party Complaints filed due to COVID-19 cancelations follow this template.
- xiv Part 16 governs the rules of proceeding for enforcement actions related to federally-assisted airports.
- xv 14 C.F.R. § 16.25.
- xvi 14 C.F.R. § 302.404(a) (requiring formal complaints to meet the procedural requirements of §§ 302.3 and 302.4, which specify the form of the document as well that all documents must be verified); 14 C.F.R. § 302.7(d) (specifying on whom service should be made).
- xvii 14 C.F.R. § 302.13.
- xviii See Docket DOT-OST-2018-0137 (consolidating several formal complaints that arose out of the same incident).
- xix DOT rules of general applicability require the DOT to adjudicate proceedings promptly. 49 C.F.R. § 5.89.
- xx 49 C.F.R. § 5.59.
- xxi <https://www.transportation.gov/briefing-room/us-department-transportation-announces-two-air-service-notice-impacting-airlines-and>.
- xxii See e.g., 49 U.S.C. § 41705(c) (requiring the DOT to investigate all disability-related complaints it receives).