President Trump made a splash in the early days of his administration when he introduced several executive orders (EOs) in an effort to implement a campaign promise of reducing the burden of federal regulation. EO 13,771, “Reducing Regulation and Controlling Regulatory Costs,” is the genesis of this effort. EO 13,771, which is widely known as the “2-for-1 Rule,” requires federal agencies to eliminate two rules for every new rule they issue.\(^1\)

This article reviews the Trump administration’s macro approach to regulatory reform, including trends in regulatory enforcement, through a wide lens. It then focuses on three recent Department of Transportation (DOT) orders that flesh out certain principles the DOT has identified as significant when determining whether to exercise its authority to regulate in the field of aviation consumer protection.

Macro Trends in Trump Administration’s Regulatory Reform and Enforcement Policy

President Trump issued the 2-for-1 EO on January 30, 2017—only 10 days into his presidency. Such a move so early in his term underscores the importance of regulatory reform in the president’s overall agenda. This agenda is shepherded by the Office of Information and Regulatory Affairs (OIRA), which is a subagency of the Office of Management and Budget (OMB). OIRA is “the repository of expertise concerning regulatory issues.”\(^2\) As a result, OIRA is the central authority for the review of federal regulations across all agencies of the federal government.\(^3\)

The publication of Unified Agendas is one tool that OIRA uses to coordinate its regulatory reform efforts across the wide array of federal agencies. Unified Agendas are semiannual compilations of information about regulations under development by federal agencies and are historically published in the spring and fall. With each publication, the White House publicly conveys its regulatory policies to the nation. On October 1, 2018, OIRA published the “Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions.”\(^4\) The Fall 2018 Unified Agenda “demonstrates this Administration’s ongoing commitment to fundamental regulatory reform and a reorientation toward reducing unnecessary regulatory burdens on the American people.”\(^5\) Thus, the administration’s plan for regulatory reform is twofold: (1) to reduce the total amount of regulations in the Federal Register, and (2) to reduce unnecessary regulatory burdens on industry by less frequent enforcement action.

The Fall 2018 Unified Agenda provides insight into the administration’s efforts to advance what it sees as a deregulatory effort to eliminate “unnecessary and duplicative red tape” and to “develop[] common-sense regulatory policies . . . while minimizing costly, unnecessary burdens.”\(^6\) Neomi Rao, who was the administrator of OIRA from July 2017 until March 2019, summed up the administration’s overarching deregulatory goals in a Washington Post op-ed in the fall of 2018. There, Rao wrote:

> When reviewing regulations, we start with a simple question: What is the problem this regulation is trying to fix? Unless otherwise required by law, we move forward only when we can identify a serious problem or market failure that would be best addressed by federal regulation. These bipartisan principles were articulated by President Ronald Reagan and reaffirmed by President Bill Clinton, who recognized that “the private sector and private markets are the best engine for economic growth.”\(^7\)

Rao went on to state:

> The administration also aims to restore greater transparency and respect for the constitutional values of due process and fair notice. This includes limiting the improper use of guidance documents. Agencies should not impose new obligations on the public in a news release, blog post or speech, but instead must use statutory rulemaking procedures that provide public notice and an opportunity for comments.\(^8\)

Rao’s comments seek to give ammunition to President Trump’s two-pronged regulatory reform effort by positing that (1) reducing the number of regulations on industry and the associated economic burden on businesses and consumers will benefit society

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by driving employment, innovation, and efficiency while allowing market forces, absent a clear failure, to incentivize corporate and business conduct; and (2) enforcement efforts that exceed applicable regulations (i.e., enforcement based on agency guidance) go beyond the pale and should stop. Rao foreshadowed these points in an earlier op-ed for the Wall Street Journal. In that piece, the then administrator wrote that “[a]gencies are . . . expected to regulate only when explicitly authorized by law—and to follow proper procedures.” Further, Rao stated that if the federal government exercises authority to regulate a field, such regulation must be “necessary” and “the benefits of the regulation [must] justify its costs.”

Thus, on a macro level, Rao’s comments and the Fall 2018 Unified Agenda underscore that President Trump’s regulatory reform initiative is premised on the belief that unnecessary regulatory enforcement (including enforcement that relies on informal guidance) must be stopped and that new regulations ought to be limited in order to allow market forces to incentivize conduct that appropriately protects consumer welfare.

Micro Trends in Trump Administration’s Regulatory Policy and DOT/FAA Enforcement

The president’s economics-driven 2-for-1 approach to regulatory reform is not a one-size-fits-all answer for reform across all regulated industries. This is particularly true of the aviation industry and the DOT, which regulates it. The DOT, including the Federal Aviation Administration (FAA), which “enacts dozens of regulations a month to require critical repairs on aircraft,” is known to prioritize safety over all other concerns when promulgating regulations. In other words, safety concerns rather than economic concerns often dictate the promulgation of aviation regulations. Thus, to some extent, the DOT and FAA will not contribute toward the administration’s plan to monetize the effects of regulatory reform. In fact, the White House “has acknowledged its calculations of savings from rolled-back regulations cited in public statements include only the cost to industry and others without taking into account benefits the rules produce, including lives saved.” In this regard, although the DOT and FAA may not promulgate regulations that promote a “dollars and cents” motive, the practical effect of these regulations may be priceless.

Although safety-related aviation regulations may not fit neatly into the administration’s broader 2-for-1 policy on regulatory reform, EO 13,771 has had a direct effect on DOT consumer protection rulemaking and enforcement initiatives. Regarding the 2-for-1 Rule’s effects on the DOT, in 2017 the DOT canceled or froze all pending airline industry regulations as part of the administration’s efforts “to cut the burden of red tape” on the industry. The move was followed by the DOT’s publication of its “Notification of Regulatory Review” on October 2, 2017. As part of the Notification of Regulatory Review, the DOT invited the public to “provide input on existing rules and other agency actions that are good candidates for repeal, replacement, suspension, or modification.” The invitation for public comments resulted in over 2,000 contributions.

Additionally, on February 5, 2019, the DOT issued a “Notice of Review of Guidance” announcing it will review existing guidance documents “to evaluate their continued necessity and determine whether they need to be updated or revised.” As with the Notification of Regulatory Review, the DOT requested public comment on “existing guidance documents that are good candidates for repeal, replacement, or modification.” Comments were due on May 8, 2019. Tying into former Administrator Rao’s op-ed regarding the misplaced role of guidance as a substitute for formal rulemaking or catalyst for regulatory enforcement, the Notice of Review of Guidance stated that the DOT does not use guidance documents “as a substitute for rulemaking and does not use guidance documents to impose new requirements on entities outside the Executive Branch.” The Notice of Review of Guidance also echoes Rao’s economic concern that “in some instances, even non-binding guidance may spur cost-inducing actions by regulated entities.”

Regarding the effects of EO 13,771 on DOT enforcement of the aviation industry, a summary of the DOT’s Aviation Consumer Protection Division’s (ACPD’s) cases against airlines and ticket agents shows that it issued 17 percent fewer consent orders in the first two full years of President Trump’s administration than it did during the last two full years of President Obama’s administration. In 2016, the last full year of President Obama’s presidency, the DOT exacted $4.7 million in fines against U.S. carriers. In 2017, the first year under the Trump administration, fines imposed by the DOT dropped to $2.7 million. And in 2018, DOT fines levied on U.S. air carriers dropped to $560,000. This represents an 88 percent drop in fines over a two-year period.

This drop in consumer protection enforcement has led some consumer advocates to argue that the ACPD is asleep at the switch. In response, industry representatives have stated their appreciation that the administration has taken a more compliance-oriented approach. While both consumer advocates and the aviation industry may argue their cases for the pros and cons of the current administration’s approach to regulation as a whole, it is readily apparent that the Trump administration’s generally applicable 2-for-1 Rule and willingness to rely on market forces to shape industry conduct has had a direct effect on the DOT’s regulatory reform agenda.

That effect is on display in three recent DOT orders denying petitions for rulemaking by FlyersRights.org to address asserted gaps in the DOT’s consumer protection
rules. These orders illustrate the animating principles guiding the DOT as it continues to define the boundaries of its aviation consumer protection authority.28

**DOT’s Consumer Protection Regulatory Reform Efforts as Illustrated by Three Denied FlyersRights.org Petitions**

The DOT recently denied three petitions to initiate rulemakings on various consumer protection issues proposed by FlyersRights.org,29 a not-for-profit consumer advocacy group.30 The DOT’s decision to decline to propose new regulations is consistent with the Trump administration’s efforts to reduce regulatory burdens on industry and rely on market forces to incentivize consumer-friendly competition.31 Although the DOT appeared to be sympathetic to consumer protection concerns raised by FlyersRights, it believes that existing regulations and enforcement authority address these concerns and provide adequate notice to, and protection of, consumers.

Common themes run throughout the DOT’s responses to FlyersRights’ petitions: (1) the DOT believes that consumers are sufficiently protected by its statutory authority under 49 U.S.C. § 41712 to prohibit airlines from engaging in various unfair or deceptive practices and unfair methods of competition; (2) the DOT believes that airlines’ DOT-mandated customer service plans, contracts of carriage, and other commonly occurring carrier notices adequately inform consumers of their consumer rights; and (3) market conditions provide adequate incentive for carriers to avoid predatory or misleading business practices.

A summary of each of the petitions and the DOT’s rationale for denying FlyersRights’ requests follows.

**Petition for DOT to Regulate Change Fees in Foreign Air Transportation**

*What FlyersRights requested.* FlyersRights petitioned the DOT to regulate change and cancellation fees (change fees) in foreign air transportation. The petition noted that change fees have “progressively gone up” in recent years—rising from as little as $50 before 2000 to as much as $300 in 2013.32 FlyersRights requested that the DOT impose a $100 cap on international change fees and only allow higher fees where airlines can demonstrate an administrative cost to the airline greater than $100.33 The petition stated that the DOT has the “authority and obligations” under 49 U.S.C. §§ 41501 and 41509 to determine whether a “rate, fare, or charge” in the provision of foreign air transportation is unreasonable or unreasonably discriminatory.34

**DOT’s decision.** Although federal law requires airlines offering foreign travel to file a tariff with the DOT describing prices and rules of travel, DOT regulations (14 C.F.R. part 293) exempt many carriers from this requirement. These exemptions were prompted by the growing liberalization of international air policy and open skies agreements, which guarantee carriers the right to set their own prices. The DOT stated that any regulation of change fees would be “inconsistent” with U.S. obligations under current open skies agreements.35 The DOT’s order noted that change fee regulations are unnecessary because the DOT already has regulations that protect consumers regarding the disclosure of cancellation policies and/or change fees, including: 14 C.F.R. § 221.107(d) (direct notice of certain terms); 14 C.F.R. § 253.7 (direct notice of certain items); 14 C.F.R. § 259.5(b)(4) (24-hour post-reservation cancellation rule); 14 C.F.R. § 259.5(b)(9) (customer service plan disclosure of cancellation policies); 14 C.F.R. § 259.6 (posting of customer service plan on website); and 14 C.F.R. § 399.84(d) (disclosure of optional services).36 The DOT rejected arguments that it has authority under 49 U.S.C. §§ 41501 and 41509 to set universal international change fees, “even if [it] were inclined to do so.”37 Further, the DOT contended that regulatory interference with airline pricing structures, including change fees, could have “unintended consequences” for consumers that could result in higher base fares.38 Thus, the denial indicates that the DOT is not inclined to promulgate universal caps on international change fees because it already possesses authority under 49 U.S.C. § 41712 to protect consumers should carriers engage in “unfair or deceptive” business practices related to such fees.

**Petition for DOT to Regulate How Carriers Provide Passengers Notice of Rights under Montreal Convention**

*What FlyersRights requested.* FlyersRights petitioned the DOT to dictate by regulation how carriers provide notice of passenger rights on international flights under the Montreal Convention.39 The Montreal Convention, among other things, limits carrier liability in the event of passenger delay, injury, or death, or the delay, damage, destruction, or pilferage of baggage, in international travel. The petition alleged that airlines regularly engage in unfair or deceptive business practices and unfair methods of competition because they have a “policy and practice of misinforming passengers by falsely alleging passengers have no compensation rights” under the Montreal Convention.40 As a result, the petitioners urged the DOT to require airlines to disclose Montreal Convention compensation rules in a “conspicuous plain language notice to passengers,” including during the booking process, check-in, and delay situations.41 FlyersRights also argued that the DOT should require airlines to publish a consumer awareness “outline” that would inform consumers about their rights to delay-related compensation, instructions on how to apply for such compensation, a link to the full text of the Montreal Convention, information on limits of liability in U.S. dollars, and a “brochure” at every check-in desk used for international flights that expands on the
information provided in the outline.\textsuperscript{42}

\textbf{DOT’s decision.} The DOT relied on two bases in denying FlyersRights’ petition.\textsuperscript{43} First, the DOT cited insufficient evidence that carriers are failing to fulfill their notice obligations under the Montreal Convention, or are otherwise attempting to “conceal” information regarding delay compensation.\textsuperscript{44} The DOT reviewed the contracts of carriage of “several major U.S. carriers” and determined that those documents provide “adequate notice” regarding compensation and the Montreal Convention.\textsuperscript{45} The DOT also noted that “many” U.S. carriers incorporate the relevant compensation information into airport signage and/or ticket notices.\textsuperscript{46} To reinforce its position that consumers are properly informed about their Montreal Convention rights, the DOT stated that it recently updated its own “Fly Rights” web page, which educates consumers about their rights.\textsuperscript{47} The DOT took into account that carriers provide necessary information via their contracts of carriage, advertising media, and/or disclosure on passengers’ tickets such that there is insufficient “consumer confusion” on the matter to require a rulemaking on the issue.\textsuperscript{48} Second, the DOT relied on the premise that existing regulatory requirements and market conditions provide consumers with adequate notice of their compensation rights under the Montreal Convention.\textsuperscript{49}

\textbf{Petition for DOT to Require Airlines to Put Passengers on Next Available Flight in Case of Cancellation or Extended Delay}

\textbf{What FlyersRights requested.} FlyersRights petitioned the DOT to reinstate the “reciprocity rule,” which would require airlines to place passengers on the next available flight (even if operated by another carrier) at no cost in the event of canceled or excessively delayed flights (two or more hours).\textsuperscript{50} The reciprocity rule existed prior to Congress’s passage of the Airline Deregulation Act of 1978 and was enforced by the Civil Aeronautics Board (CAB).\textsuperscript{51} The Airline Deregulation Act phased out the government’s control over fares and service and “allowed market forces to determine the price and level of domestic airline service in the United States.”\textsuperscript{52} Since deregulation, and in the absence of a requirement to do so, few airlines guarantee that passengers will be accommodated on the flights of other carriers in the event of a cancellation or extended delay. FlyersRights’ petition requested a new rule that would require air carriers to coordinate transportation for passengers on another carrier, without a stopover and within the same class of travel, at no additional cost, in the event of a cancellation or an excessive delay.\textsuperscript{53} FlyersRights further suggested that, if acceptable to the passenger, the carrier could offer a partial refund and transport the passenger in a lower class of service.\textsuperscript{54} FlyersRights argued that the regulation is needed to combat “predatory and anticompetitive” airline practices that are unfair and deceptive to consumers.\textsuperscript{55} The petition cites a significant recent increase in airline computer outages, which have left airlines unable to operate, thus leaving passengers “stranded” until the systems return online.\textsuperscript{56}

\textbf{DOT’s decision.} The DOT determined that information provided to consumers by carriers and competitive market conditions sufficiently protect consumers in situations where they experience canceled or delayed flights, and additional regulations would not enhance those protections. The DOT reasoned that the type of harm alleged by FlyersRights regarding reaccommodation does not warrant the reintroduction of the reciprocity rule because it retains authority to enforce violations of “unfair or deceptive” business practices and methods of unfair competition pursuant to 49 U.S.C. § 41712.\textsuperscript{57} Further, the DOT’s rules under 14 C.F.R. part 259 require carriers operating to, from, or within the United States to “adopt and adhere” to a customer service plan that must include provisions to mitigate passenger inconveniences resulting from canceled or delayed flights.\textsuperscript{58} The customer service plans, which must be posted on carriers’ U.S.-marketed websites, can also be included in a carrier’s contract of carriage. The DOT determined that although carriers may not “guarantee” reaccommodation, the “availability” of the information allows consumers to be informed in the event of a cancellation or an extended delay.\textsuperscript{59} The DOT also stated that tarnished brand image, bad publicity, and other negative impacts resulting from canceled or delayed operations pose a “significant incentive” for airlines to reaccommodate affected passengers as quickly as possible.\textsuperscript{60} The DOT determined that its existing regulations and free market conditions properly serve to protect consumers in situations where they experience flight cancellations or extended delays. Specifically, 14 C.F.R. § 259.5 requires carriers to notify consumers of known delays, cancellations, and diversions (§ 259.5(b)(2)), notify consumers in a timely manner of changes in their travel itineraries (§ 259.5(b)(10)), and identify the services they provide to mitigate passenger inconveniences resulting from flight cancellations and misconnections (§ 259.5(b)(12)). Finally, the DOT posited that the proposed rule would be an “intrusion” into the operational and financial decisions of carriers and “contrary to a primary goal of deregulation.”\textsuperscript{61}

\textbf{Conclusion}

The rationale underlying the DOT’s decisions to deny the three FlyersRights petitions for the DOT to initiate certain rulemakings tracks the Trump administration’s overall regulatory reform agenda, which seeks to reduce regulation across the federal government and reduce unnecessary enforcement, in order to allow market forces to incentivize industry to adhere to those regulations that will remain in force.

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Further, the DOT’s rationale appears to reflect an understanding that its authority to prevent unfair or deceptive business practices and unfair methods of competition is bounded by the policies and principles Congress identified as important when it passed the Airline Deregulation Act, including reliance on competitive market forces, in the first instance, to drive consumer welfare in the form of low prices, innovation, and a variety of services to meet the needs of consumers.\(^{52}\)

**Endnotes**


5. See Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions, Off. MGMT. & BUDGET, https://www.reginfo.gov/public/do/eAgendaHistory (last visited June 10, 2019). The Spring 2019 Unified Agenda had not been published as of the writing of this article.


7. Id.

8. Id.


10. Id.

11. Id.


15. The DOT is on record as recognizing and reserving its duty to conduct rulemakings in situations involving “public safety, technical amendments, and where Congress has afforded the agency no discretion.” See FlyersRights.org, Response Denying Petition for Rulemaking, Docket No. DOT-OST-2016-0197, at 2 (Dep’t of Transp. Feb. 1, 2019).

16. Hugo Martin, Airlines Propose Long List of Rules to Kill or Revise as Part of Trump Deregulation Initiative, L.A. TIMES (Mar. 18, 2018), https://www.latimes.com/business/la-fi-trump-airline-regulations-20180318-story.html. For example, two consumer-friendly rulemakings that were affected by the freeze include a rule that would have required airlines to (1) disclose baggage fees at the point of sale, and (2) report annually on revenue from add-on charges.


18. Id. at 45,750.


20. Id.

21. Public comments were originally due on April 8, 2019, but the DOT extended the deadline for comment until May 8, 2019. 84 Fed. Reg. 8579 (Mar. 8, 2019).

22. 84 Fed. Reg. at 1820.

23. Id.


27. McCartney, supra note 25. The article quotes John Breyault, a vice president of the National Consumers League, saying, “There doesn’t seem to be any meaningful enforcement going on. . . . The DOT under Secretary Chao seems to be even less willing to engage in serious consumer protection efforts than it did under President Obama’s watch, which is a pretty low bar.” This compares to an industry representative who is also quoted in the article as saying, “We’re thankful . . . that [the DOT’s] philosophy isn’t to regulate every little thing.” Id.

28. The DOT predicates its authority to promulgate and enforce consumer protection regulations on 49 U.S.C. § 41712, which states: “On the initiative of the Secretary of Transportation . . . and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.”

29. FlyersRights.org states that it is the largest airline
passenger nonprofit organization, with over 60,000 members. See About Us, FlyersRights.org, https://flyersrights.org/about-us/ (last visited June 10, 2019).


33. Id. at 11–12.

34. Id. at 6.


36. Id. at 14 n.21.

37. Id. at 16. FlyersRights has petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review the DOT’s decision. Flyers Rights Educ. Fund, Inc. v. DOT, No. 19-1071 (D.C. Cir. filed Mar. 21, 2019).


40. Id. at 4.

41. Id.

42. Id. at 14.


44. Id.

45. Id.

46. Id. at 2.

47. Id. at 1.

48. Id.

49. Id.


51. The CAB was disestablished on January 1, 1985, as a result of the Airline Deregulation Act of 1978, Pub. L. No. 95-504 (Oct. 24, 1978). Thereafter, the remaining functions of the CAB were transferred to the DOT.


54. Id.

55. Id. at 2–4.

56. Id. at 4.


58. Id.

59. Id.

60. Id.

61. Id.