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RETURN OF THE MAX: IS THE BOEING 737-MAX READY FOR THE AIR?

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BY: TOMMY STAFFIERI

Despite consumer apprehension and numerous legal challenges, the Boeing 737-Max has finally returned to the skies after a 20-month hiatus following two deadly crashes in 2019.[1] Since American Airline’s successful U.S. flight with the 737-Max in December of 2020, other major airlines have pushed the 737-Max back into service.[2] The Federal Aviation Administration (“FAA”) approved the 737-Max’s return in November of 2020 after a “comprehensive and methodical safety review process.”[3] Nonetheless, the return of this “workhorse” jet is still a concern for many passengers and consumer organizations, as evident by the recent challenge from Flyers Rights Education Fund Inc. (“Flyers Rights”) to block the FAA’s approval to return the 737-Max to service.[4]

In January, the D.C. Circuit Court denied the emergency motion to stay the FAA’s November decision that lifted the 737-Max flight ban.[5] Flyers Rights argued that the FAA decision lacked “transparency” when determining Boeing’s subsequent remedial measures to ensure passenger safety.[6] Flyers Rights additionally asserted that the FAA committed procedural error by failing to publicly release Boeing’s proprietary data submitted to the FAA during the safety review process.[7]





The Administrative Procedure Act (APA), the governing statute for administrative agencies to propose and establish regulations, ensures that the FAA's determination is lawful and within the powers granted by Congress to the agency.[8] In this case, Flyers Rights attempted to challenge the APA's procedural requirements for "rulemaking," primarily based on the amount of information and analyses used and disclosed by the FAA to lift the 737-Max's grounding.[9] The District Court, however, denied this challenge and accepted the FAA's reasoning and disclosures.

According to the FAA, the release of the detailed safety review process in November satisfied the necessary disclosure of evidence used in the FAA's determination to lift the 737-Max's grounding. [10] Much to Flyers Rights dismay, the D.C. Court's denial appears to favor the FAA's belief that the APA does not require the FAA to "publicly disclose a manufacturer's proprietary information during the airworthiness-directive process." [11] Instead, the FAA's disclosure of the 737-Max's detailed technical report of the fatal accidents and subsequent measures satisfied the APA procedural requirements.

Based on the D.C. Circuit's ruling, major airlines including American, Southwest, and United will continue to integrate the 737-Max into their respective fleets. [12] While the FAA subjects each airline to specific requirements based on design certification, pilot training, and airworthiness approval, consumer anxiety still remains a concern.[13] Safety measures and performance standards

for the 737-Max are being closely monitored by the FAA, including the current use of satellite technology to monitor every Boeing 737-Max in flight.[14] Despite assurances for free changes fees among the airlines, passengers may remain hesitant.[15] The question remains, however, whether the individual passenger will accept the FAA stamp of approval – or whether passengers will even have a choice as the “workhorse” jet is integrated back into airline’s fleets. Considering the FAA approval within two year of such horrific tragedies, would you think twice before boarding a 737-Max?

[1] Niraj Chokshi, *Boeing 737 Max Resumes Flying U.S. Passengers After 2-Year Hault*, N.Y. Times, <https://www.nytimes.com/2020/12/29/business/boeing-737-max-return.html> [https://perma.cc/RF3U-ZT4J]

(describing a pair of 737-Max crashes in Indonesia and Ethiopia in which 346 passengers were killed, resulting in the immediate grounding of all 737-Max aircrafts).

[2] *Id.*; Thomas Pallini, *The Boeing 737 Max is Flying Passengers Again in the US – Here’s When and Where the Each US Airline Will Be Flying It*, Business Insider, (Dec. 30, 2020) (noting that American Airlines, Southwest, United, Alaskan Airlines were among the initial airlines to push the 737-Max back into service) <https://www.businessinsider.com/when-where-us-airline-will-be-flying-boeing-737-max-2020-12#:~:text=US%20airlines%20are%20gearing%20up,fly%20the%20Max%20in%202021> [https://perma.cc/L92Y-M8QW]

[3] *FAA Statement on Boeing 737 Max Return to Service*, FAA (Nov. 18, 2020) <https://www.faa.gov/news/updates/?newsId=93206> [https://perma.cc/5GQA-QVVZ].

[4] Chokshi, *supra* note 1; *Flyers Rights Educ. Fund, Inc. v. FAA*, No. 20-1486, 2021 at *1 U.S. App. LEXIS 1546 (D.C. Cir. Jan. 14, 2021).

[5] *Flyers Rights*, 2021 U.S. App. LEXIS 1546 at *1.

[6] Linda Chiem, *DC Circ. Won’t Block 737 Max Return in Flyers’ FAA Challenge*, Law360 (Jan. 14, 2021), <https://www.law360.com/articles/1343923/dc-circ-won-t-block-737-max-return-in-flyers-faa-challenge> [https://perma.cc/VU3M-EXF3]

[7] *Id.*

[8] See generally 5 U.S.C.S. § 500, 706.

[9] See 5 U.S.C.S. §551 (defining “rulemaking” as an “agency process for formulating, amending, or repealing a rule”); See generally 5 U.S.C.S. §553; Chiem, *supra* note 6.

[10] Chiem, *supra* note 6.

[11] *Id.*

[12] Pallini, *supra* note 2.

[13] *Id.*; *Supra* note 3.

[14] Dominic Gates, *FAA Using Satellite Technology to Monitor Every Boeing 737 Max in Flight*, The Business Insider, (Feb. 18, 2021), <https://www.seattletimes.com/business/boeing-aerospace/faa-using-satellite-technology-to-monitor-every-boeing-737-max-in-flight/> [<https://perma.cc/G4JP-V3CC>].

[15] *Id.*

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