

DEPARTMENT OF TRANSPORTATION**4910-9X****Office of the Secretary****14 CFR Part 399****[Docket No. DOT-OST-2019-0182]****RIN 2105-AE72****Defining Unfair or Deceptive Practices****AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).**ACTION:** Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Transportation (Department or DOT) is seeking comment in this Notice of Proposed Rulemaking (NPRM) on a proposal that would codify definitions for the terms “unfair” and “deceptive” in the Department’s regulations implementing its aviation consumer protection statute. While codifying these definitions into the Department’s regulations would be new, the proposed definitions of “unfair” and “deceptive” reflect the Department’s longstanding interpretation of the terms. This proposal would also require the Department to articulate in future enforcement orders the basis for concluding that a practice is unfair or deceptive where no existing regulation governs the practice in question, state the basis for its conclusion that a practice is unfair or deceptive when it issues discretionary aviation consumer protection regulations, and apply formal hearing procedures for discretionary aviation consumer protection rulemakings. In addition, this proposal would codify the longstanding practice of the Department’s Office of Aviation Enforcement and Proceedings to offer airlines and ticket agents the opportunity to be heard and present relevant evidence before any determination is made on how to resolve a matter involving a potential unfair or deceptive practice. The proposal is intended to provide regulated entities and other stakeholders with

greater clarity and certainty about the Department's interpretation of unfair or deceptive practice in the context of aviation consumer protection rulemaking and enforcement actions.

DATES: Comments should be filed by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by docket number DOT-OST-2019-0182 by any of the following methods:

- Federal eRulemaking Portal: Go to <https://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: (202) 493-2251

Instructions: You must include the agency name and docket number DOT-OST-2019-0182 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Privacy Act: Anyone can search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the *Federal Register* published on April 11, 2000 (65 FR 19477-78), or you may visit www.dot.gov/privacy.

Docket. For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>, or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Robert Gorman, Senior Trial Attorney, or Kimberly Graber, Deputy Assistant General Counsel, or Blane Workie, Assistant General Counsel, Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, D.C., 20590, 202-366-9342, 202-366-7152 (fax); robert.gorman@dot.gov; kimberly.graber@dot.gov; blane.workie@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

I. Introduction

A. The Department's Unfair and Deceptive Practices Statute

The Department's authority to regulate unfair and deceptive practices in air transportation or the sale of air transportation is found at 49 U.S.C. § 41712 ("Section 41712") in conjunction with its rulemaking authority under 49 U.S.C. § 40113, which states that the Department may take action that it considers necessary to carry out this part, including prescribing regulations. Section 41712 gives the Department the authority to investigate and decide whether an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice in air transportation or the sale of air transportation. Under Section 41712, after notice and an opportunity for a hearing, the Department has the authority to issue orders to stop an unfair or deceptive practice. A different statute, 49 U.S.C. § 46301, gives the Department the authority to issue civil penalties for violations of Section 41712 or for any regulation issued under the authority of Section 41712.

B. Request for Regulatory Reform

On February 24, 2017, President Trump signed Executive Order 13777, Enforcing the Regulatory Reform Agenda, which requires each agency to establish a Regulatory Reform Task Force to evaluate existing regulations, and make recommendations for their repeal, replacement, or modification. As part of this process, the Department is directed to seek input and assistance from entities significantly affected by its regulations. On October 1, 2017, the Department issued a Notice of Regulatory Reform seeking written input from the public on existing regulations and other agency actions that are good candidates for repeal, replacement, or modification.¹ In response to the Notice, Airlines for America (A4A), an airline trade association, urged the Department to adopt policies defining unfairness and deception consistent with principles articulated in Federal Trade Commission (FTC) and Federal court precedent interpreting those terms.²

A4A stated that the Department has relied on the phrase “unfair and deceptive practice” to issue detailed regulations and to take enforcement action without sufficient evidence that the practice at issue was actually unfair or deceptive. With respect to rulemaking, A4A stated that many of the Department’s past consumer protection rulemakings were not based on evidence that the benefits of the rules outweighed their cost. More specifically, they recommended that DOT issue new regulations only where objective evidence shows that: (1) the regulation is necessary to prevent deceptive practices that are occurring or are reasonably likely to occur; (2)

¹ See Notice of Regulatory Review, available at 82 FR 45750.

² See Comment of A4A, Docket DOT-OST-2017-0069-2753, available at www.regulations.gov.

the practice is causing or would cause significant consumer harm if it did occur; and (3) market forces are unlikely to provide a remedy to such consumer harm.

With respect to enforcement, A4A similarly claimed that the Department's Office of Aviation Enforcement and Proceedings (Enforcement Office) has aggressively pursued enforcement action in cases involving minor infractions, inadvertent errors, or isolated incidents with little evidence of a "practice" or of significant consumer harm. A4A recommended that the Department should align its policies on unfairness and deception with the policies of the FTC, use evidence for its determinations, and not merely speculate or assume that actual consumer harm took place.

C. Clarification of Department Interpretation of Statutory Terms in Aviation Consumer Protection Rules and Enforcement

The Department has considered the issues raised by A4A. In addition, the Department recently issued updated procedural requirements for its rulemaking and enforcement actions. The Department's recently issued updated policies and procedures governing the development and issuance of regulations are set forth in Subpart B of 49 CFR Part 5 on Administrative Rulemaking, Guidance, and Enforcement Procedures.³ Rules issued under the authority of Section 41712 must be consistent with the Department's recently updated rulemaking procedures, including the policy that rules should be straightforward and clear, incorporate best practices for economic analyses, and provide for appropriate public participation.

³ See Subpart B, "Rulemaking Procedures," 49 CFR Part 5, which was recently updated in a final rule published at 84 FR 71714 (December 27, 2019).

Further, enforcement actions taken pursuant to Section 41712 should be consistent with Subpart D of 49 CFR Part 5, which includes the Department’s procedural requirements for enforcement actions.⁴ As stated in the preamble to the Department’s final rule codifying these procedures, all Department enforcement actions should satisfy principles of due process and remain lawful, reasonable, and consistent with Administration policy.⁵ Consistent with the Department’s enforcement policies and procedures, enforcement orders finding violations of Section 41712 should explain the specific factors considered and the basis for concluding that a practice either does or does not violate Section 41712. Similarly, the standards for unfairness and deception should be specified and an explanation of how any prohibited or required actions meet those standards should be provided for clarity and to ensure consistency with the statute.

II. Background

A. The FTC and the Department’s Statutes Regulating Unfair and Deceptive Practices

The Department’s unfair and deceptive practices statute, Section 41712, is closely modeled after Section 5 of the FTC Act, 15 U.S.C. § 45 (“Section 5”). As originally enacted in 1914, Section 5 granted the FTC authority to prohibit “unfair methods of competition” but did not address unfair or deceptive practices. Some early Supreme Court cases held that Section 5’s prohibition on unfair methods of competition required a showing of harm to competitors and competition, but was not focused on addressing harm to consumers.⁶ In response, Congress

⁴ See Subpart D, “Enforcement Procedures,” 49 CFR Part 5, which was recently updated in a final rule published at 84 FR 71714 (December 27, 2019).

⁵ See 84 FR 71715.

⁶ See, e.g., *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931).

amended Section 5 of the FTC Act in 1938 to proscribe “unfair or deceptive acts or practices” in order to better protect consumers.⁷

Section 5 grants the FTC broad enforcement authority to address unfair or deceptive acts or practices across a wide range of industries, but excludes the common carrier activities of air carriers and foreign air carriers from the FTC’s jurisdiction. In 1938, the same year that Congress amended the FTC Act to proscribe unfair and deceptive practices, Congress passed the Civil Aeronautics Act. Section 411 of the Civil Aeronautics Act granted to the Civil Aeronautics Authority (CAA) the exclusive power to prohibit unfair and deceptive practices in air transportation. Section 41712 was previously codified as Section 411 but in 1994, as part of a comprehensive non-substantive reorganization of the Transportation Code, Section 411 was re-codified as Section 41712. Neither Section 5 of the FTC Act, nor Section 41712 (formerly Section 411), specifically defines “unfair or deceptive practices.” In 1940, the CAA’s authority was transferred to the Civil Aeronautics Board (CAB). In 1952, Congress expanded the CAB’s authority to include unfair or deceptive practices in the *sale* of air transportation, not just air transportation itself.

The Federal Aviation Act of 1958 created the Federal Aviation Administration (FAA). This statute transferred safety authority to the FAA, but the CAB’s authority over unfair or deceptive practices remained intact. In 1978, the Airline Deregulation Act (ADA) substantially deregulated the U.S. airline industry by prohibiting regulation of rates, routes, and services. The ADA did not alter the CAB’s authority to prohibit unfair or deceptive practices, however.

⁷ Wheeler-Lea Act, Pub. L. No. 75-447, § 3, 52 Stat. 111, 114 (1938), amending FTC Act § 5, 52 Stat. 111, 114.

Effective January 1, 1985, the CAB was abolished, and the CAB's authority to regulate unfair and deceptive practices was transferred to the Department.

1. Jurisdiction of FTC and DOT

Section 41712 grants the Department the authority to prohibit unfair or deceptive practices, and jurisdiction over air carriers and foreign air carriers lies exclusively with the Department because those entities were carved out of FTC jurisdiction in Section 5. However, the FTC's general Section 5 authority to prohibit unfair and deceptive practices applies to ticket agents in the sale of air transportation. As a result, the Department and the FTC have concurrent authority over ticket agents in the sale of air transportation.

2. FTC's Definitions of Unfair and Deceptive Practices

The FTC Act does not specifically define "unfair or deceptive acts or practices," but authorizes the FTC to define such acts and practices through enforcement and rulemaking. 15 U.S.C. 45; 15 U.S.C. 57a.

i. Unfairness

In December 1980, the FTC issued a Policy Statement to Congress, which articulated general principles drawn from FTC decisions and rulemakings that the Commission applies in enforcing its mandate to address unfairness under the FTC Act.⁸ These principles were applied in FTC enforcement cases and rulemaking and approved by reviewing Federal courts.⁹ The FTC

⁸ Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), *Appended to International Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984)..

⁹ *See, e.g., International Harvester*, 104 F.T.C. 949 (1984); Credit Practices Rule, Statement of Basis and Purpose, 49 Fed. Reg. 7740 (1984) ("Credit Practices Rule SBP"); *Orkin Exterminating Co., Inc.*, 108 F.T.C. 263 (1986); *aff'd, FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988).

explained that unjustified consumer injury is the primary focus of the FTC Act. This concept contains three basic elements. An act or practice is unfair where it (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers; and (3) is not outweighed by countervailing benefits to consumers or to competition. The FTC also considers public policy, as established by statute, regulation, or judicial decisions along with other evidence in determining whether an act or practice is unfair.

ii. Congress Codifies FTC's Approach to Unfairness

In 1994, Congress codified existing case law defining the elements of unfairness. Specifically, Congress enacted 15 U.S.C. § 45(n), which states that the FTC shall have no enforcement authority or rulemaking authority to declare an act or practice unfair unless it is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. Congress further provided in section 45(n) that the FTC could rely on public policy, along with other evidence, for making a determination of unfairness, but public policy may not be the primary basis of its decision.

iii. FTC's Definition of Deception

In 1983, the FTC issued a Policy Statement on Deception.¹⁰ Like the 1980 Policy Statement on Unfairness, the 1983 Policy Statement clarified the general principles that the FTC applies in enforcing its mandate to address deception under the FTC Act. As explained in the policy statement, an act or practice is deceptive where: (1) a representation, omission, or practice

¹⁰ FTC Policy Statement on Deception (Oct. 14, 1983), 103 F.T.C. 174, 175 (1984) (*appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)).

misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and (3) the misleading representation, omission, or practice is material. Practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.

Congress has not enacted the FTC's 1983 Policy Statement on Deception into law, unlike the FTC's 1980 Policy Statement on Unfairness, but the Policy Statement was adopted by the FTC in formal adjudication, *see In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), and has been regularly cited by Federal courts.¹¹

3. Rulemaking Authority of FTC and DOT

The FTC enforces a broad range of consumer protection laws affecting most of the country's commercial entities, with some exceptions such as airlines. The FTC Act prescribes several specific statutory requirements for issuing rules prohibiting an act or practice as unfair or deceptive. As described above, to issue a rule defining an act or practice as unfair, FTC must first determine that the act or practice is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.¹² The FTC may consider public policy as evidence to

¹¹ *See, e.g., FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995); *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000).

¹² 15 U.S.C. § 45(n).

be considered with all other evidence, but public policy considerations may not serve as a primary basis for its determination. Moreover, Section 18 of the FTC Act, 15 U.S.C. 57a, specifies particular procedures for the promulgation of FTC rules that define with specificity acts or practices which are unfair or deceptive.¹³ Before issuing binding regulations defining specific acts or practices to be unfair or deceptive, the FTC must provide an opportunity for an informal hearing, and provide in the rule's statement of basis and purpose: (1) a statement as to the prevalence of the acts or practices treated by the rule; (2) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (3) a statement as to the economic effects of the rule, taking into account the effect on small business and consumers.¹⁴ There are no comparable statutory requirements for rulemaking by the Department finding a practice to be unfair or deceptive. Under 49 U.S.C. § 40113, Congress granted the Secretary of Transportation the authority to take action that he or she considers necessary to carry out his or her statutory duties, including prescribing regulations and issuing orders. Like other Federal agencies, the Department is subject to the general provisions of the Administrative Procedure Act when issuing regulations. The Department is also subject to the rulemaking procedures found in Subpart B of 49 CFR Part 5.

¹³ Section 18 rulemaking procedures apply to FTC rules to define "unfair or deceptive acts or practices" prohibited under Section 5 of the FTC Act unless Congress grants the agency authority to issue rules under the Administrative Procedure Act in a specific context. *See, e.g.*, Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6508; Fairness to Contact Lens Consumers Act, 15 U.S.C. §§ 7601-7610.

¹⁴ 15 U.S.C. § 57a.

III. Proposal for New Procedural Requirements

This rulemaking would codify the Department’s definitions of “unfair” and “deceptive” when engaging in aviation consumer protection rulemaking or enforcement action under the authority of Section 41712. This rulemaking would also require the Department to follow certain procedures when engaging in aviation consumer protection rulemaking and enforcement. For example, this rulemaking would require the Department to provide an explanation of how specific conduct meets the standard for an “unfair” or “deceptive” practice when engaging in an aviation consumer protection rulemaking or enforcement action, as further described below.

A. Defining Unfairness and Deception in Rulemaking and Enforcement Proceedings

When the Department issued its existing aviation consumer protection rules, the Department followed the Administrative Procedure Act and related statutory and administrative requirements to ensure that these rules are authorized by law and justified on a benefit-cost basis. However, more can be done to better inform the public and regulated entities how the Department determines what constitutes an unfair and deceptive practice when issuing discretionary aviation consumer protection rulemakings under the authority of Section 41712 and when issuing enforcement orders based on Section 41712 where there has not been a regulation that already specifies required or prohibited conduct.

This proposed rule would define the terms “unfair” and “deceptive” for aviation consumer protection enforcement or rulemaking actions brought pursuant to Section 41712. First, it would define a practice as “unfair” if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition. Second, the proposed rule would define a practice as “deceptive” if it is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue.

Under the proposal, an issue is “material” if it is likely to have affected the consumer’s conduct or decision with respect to a product or service. These definitions mirror the definitions used by the FTC.

The Department has used its general authority to prohibit unfair or deceptive practices of air carriers, foreign air carriers, and ticket agents to conduct oversight in the area of airline privacy¹⁵ and frequent flyer programs.¹⁶ Also, in the FAA Reauthorization Act of 2018, Congress specified that the Department’s authority to prohibit unfair or deceptive practices covers air ambulance providers and authorized the Department to investigate air ambulance complaints.¹⁷ Because the Department has not issued specific regulations with respect to complex and specialized issues, including privacy, frequent flyer programs, and air ambulances, it relies on the general provisions of section 41712. Are the general definitions of unfairness and deception proposed in this NPRM sufficient to provide the regulated entities, consumers and other stakeholders sufficient notice of what constitutes an unfair or deceptive practice in these or other specialized subject areas?

The proposal makes clear that proof of intent is not necessary to establish unfairness or deception. In other words, the Department is not required to find that an air carrier or ticket agent acted with the intent to cause harm before finding a practice to be unfair to a consumer. Likewise, it is not necessary for the Department to find that an air carrier, foreign air carrier, or

¹⁵ The Department considers the mishandling of private consumer information by airlines or ticket agents to be an unfair or deceptive practice. See <https://www.transportation.gov/individuals/aviation-consumer-protection/privacy>.

¹⁶ Section 408 of the FAA Modernization and Reform Act of 2012 authorized the Department to investigate complaints relating to frequent flyer programs. Pub. L. 112-95; 126 Stat. 87 (2012). See also <https://www.transportation.gov/individuals/aviation-consumer-protection/frequent-flyer-programs>

¹⁷ Pub. L. No. 115-254, 132 Stat. 3186, section 419 (2018).

ticket agent acted with the intent to deceive before finding such a practice is deceptive. These principles are reflected in Federal case law applying Section 5 of the FTC Act. In addition, under the FTC Act, disseminating false advertisements, or causing false advertisements to be disseminated, is an unfair or deceptive act or practice. 15 U.S.C. § 52. The FTC Act, and its definition of “false advertisement,” make no reference to intent to deceive.

Section 5 of the FTC Act prohibits unfair “*acts or practices*” in or affecting commerce, while Section 41712 grants the Department authority over unfair or deceptive *practices* in air transportation or the sale of air transportation. The FTC Act and FTC regulations do not define “practice.” It is possible that a definition is not necessary in the FTC context because the FTC’s authority applies to specific acts, even if they do not rise to the level of a practice. At present, the Department does not believe that it is necessary to define “practice.” The Department’s rules with respect to unfairness or deception in air transportation or the sale of air transportation are always directed to practices of air carriers, foreign air carriers, and ticket agents, rather than to individual acts. In the aviation consumer protection enforcement context, when analyzing complaints, the Department regularly seeks to determine the extent to which one or more unfair or deceptive acts actually reflects a broader “practice” (for example, by investigating to determine whether multiple consumers have been harmed at different times by the same repetitive conduct, or by finding that a single act reflects company policy and therefore concluding that the policy is likely to have affected more consumers than just the individual complainant). In general, the Department is of the view that proof of a practice in the aviation consumer protection context requires more than a single isolated incident. On the other hand, even a single incident may be indicative of a practice if it reflects company policy, training, or

lack of training. The Department solicits comment on the question of whether a definition of “practice” is necessary, and if so, what the proposed definition should be.

This proposed rule would add a new section 399.75 to 14 CFR 399 Subpart F (Policies Relating to Rulemaking Proceedings). The proposed rule would state that when the Department issues a new discretionary aviation consumer protection rulemaking declaring that a specific practice in air transportation or the sale of air transportation is unfair or deceptive within the meaning of Section 41712, the Department shall employ the definitions of “unfair” and “deceptive” that are set forth in new Section 399.79. These definitions are consistent with the Department’s past practice and are based on FTC case precedent and policy.

B. Establishing Procedures for Aviation Consumer Protection Rulemaking Proceedings

1. Formal Hearing Procedures

In this NPRM, the Department proposes to apply formal hearing procedures for discretionary aviation consumer protection rulemakings issued under the authority of Section 41712 that are not defined as high-impact or economically significant within the meaning of the Department’s regulatory procedures found in 49 CFR 5.17(a). Any such high-impact or economically significant rulemakings are subject to the special procedures outlined in 49 CFR 5.17.

The Department proposes to adopt formal hearing procedures for discretionary aviation consumer protection rulemakings similar to the formal hearing procedures that apply to high-impact and economically significant rulemakings. These procedures would allow interested parties to request a formal hearing before the Department issues a final aviation consumer protection rule. These formal hearing procedures would not apply to rulemakings specifically mandated by Congress. Rather, they would apply to discretionary aviation consumer protection

rulemakings, where the Department proposes to declare specific practices to be unfair or deceptive. The addition of formal hearing procedures is also consistent with Section 41712(a), which requires notice and an opportunity for a hearing before a finding that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition.

The purpose of the formal hearing would be to address disputed issues of fact through the presentation of testimony and written submissions in front of a neutral administrative hearing officer. The Department is proposing to allow interested parties to request a formal hearing if one or more scientific, technical, economic or other factual issues are in dispute. Interested parties would be permitted to make such a request to the Department's General Counsel after the notice of proposed rulemaking is filed, but before the end of the comment period. In general, the purpose of the formal hearing is to ensure that rules are based on facts and not unfounded assumptions. The formal hearing would provide an opportunity to explore complex or disputed factual issues before proceeding beyond the proposed rule stage. The Department would use the developed factual record of the formal hearing to determine whether the rulemaking should proceed as originally proposed, be modified, or be terminated entirely.

Under this proposal, for a formal hearing to be granted, the interested party would be required to make a plausible initial showing that the rulemaking concerns one or more specific scientific, technical, economic, or other factual issues that are in dispute, that the ordinary notice and comment process is insufficient to provide an adequately informed judgment on the issue, and that resolution of the issue would have a material effect on the costs and benefits of the rule. Under the delegation of authority to the General Counsel to conduct rulemakings on these matters found in 49 CFR 1.27(n), the General Counsel would be authorized to deny a hearing,

even if the interested party makes the plausible initial showing described above, so long as the General Counsel determines that the requested hearing would not in fact advance the consideration of the proposed rule, or that the hearing would unreasonably delay completion of the rulemaking. The General Counsel would explain in writing the basis of that decision.

Under this proposal, if the Department grants the request for a hearing, the Department would publish a notice, specifying the proposed rule at issue and the specific factual issues to be considered in the hearing. The Department proposes that the rules for conducting the formal hearing itself would be adopted from relevant sections of the Administrative Procedure Act relating to hearings, or similar rules adopted by the Secretary.

Also, the NPRM specifies that after the formal hearing and after the record is closed, the presiding hearing officer would render a report containing findings and conclusions addressing the disputed issues of fact identified in the hearing notice. Interested participants in the formal hearing would have the opportunity to file statements of agreement or objection in response to the hearing officer's report. The Department would then consider the record of the formal hearing and determine whether to terminate the rulemaking, proceed with it as proposed, or modify the proposed rule. If the Department decides either to proceed with the rule as originally proposed, or to terminate the rulemaking, the Department would explain those decisions in writing. If the Department decides to modify the proposed rule in light of the formal hearing, then the Department would issue a new or supplemental NPRM, and explain its decision in the preamble to that modified proposal. Finally, this NPRM clarifies that the formal hearing procedures shall not impede or interfere with the interagency rulemaking review process of the Office of Information and Regulatory Affairs. The Department solicits input on whether the public and regulated entities find the Department's utilization of this type of process for the

promulgation of unfair and deceptive regulations to be helpful and, if so, how. Further, if this process would not be helpful, the Department solicits comment on what elements of these proposed procedures should be modified, and why.

2. Explaining Findings of Unfairness and Deception

This proposal states that when the Department issues a discretionary aviation consumer protection rulemaking declaring a practice to be unfair or deceptive, it shall explain the basis for its conclusion that the practice is unfair or deceptive. The intent is to ensure that when issuing new aviation consumer protection regulations under the authority of Section 41712, the Department provides greater transparency to the public and to regulated entities about the reasons supporting the Department's finding that a practice is unfair or deceptive. For example, if the Department proposes a final rule determining that a particular practice is unfair, the Department would be required to explain how the practice is likely to cause substantial injury, which is not reasonably avoidable, and that the harm is not outweighed by benefits to consumers or to competition. The Department's explanation would provide its basis for reaching that conclusion. Similarly, when proposing a rulemaking finding a particular practice deceptive, the Department would follow the same practice of outlining the factors of deception and the basis for its conclusion.

The Department solicits comment on the support needed for rulemakings finding a practice unfair or deceptive. The proposed rule does not specifically indicate the type or extent of evidence that would be necessary to support a finding of unfairness or deception. In many instances, the Department identifies issues that may be problematic and addresses them in an aviation consumer protection rulemaking as an unfair or deceptive practice based on information in the Department's consumer complaint database. In other instances, aviation consumer

protection rulemaking is instituted in response to recommendations from entities such as consumer advocates or advisory committees. The Department envisions that the formal hearing procedures described above will provide another means of gathering information, data, and evidence that may be helpful in making these determinations. What type of evidence should be necessary to demonstrate that a practice is unfair or deceptive to support the Department issuing a rule prohibiting that practice? How should the Department gather that information? During the rulemaking process, consumers may comment that a practice is harmful while regulated entities may disagree. In those instances, how should the Department determine whether a practice is harmful?

C. Establishing Procedures for Aviation Consumer Protection Enforcement Proceedings

1. Providing Opportunity to Present Evidence

The Department is proposing to codify a longstanding practice of the Department with regard to aviation consumer protection enforcement proceedings. Specifically, proposed paragraph 399.79(e) states that, before issuing an order finding that an air carrier, foreign air carrier, or ticket agent violated any regulation issued under the authority of Section 41712, or Section 41712 itself, the Department shall afford the party the opportunity to present evidence in support of its position. For example, under current practice, the party is permitted to present evidence tending to establish that: (1) the regulation at issue was not violated; (2) the violation took place, but mitigating circumstances apply; (3) the conduct at issue was not unfair or deceptive (in cases where a consumer protection regulation does not already apply to the conduct at issue); and (4) consumer harm was limited, or that the party has taken steps to mitigate past or future consumer harm (for example, by issuing compensation and/or refunds to affected passengers, or by implementing innovative practices and procedures to ensure that the violations

will not recur). This list is intended to provide examples, but not to be complete or exhaustive. The Enforcement Office considers all information provided when determining whether a violation of aviation consumer rights took place and, if a violation took place, the appropriate civil penalty to seek for the violations at issue. The Department has incorporated the opportunity to present relevant evidence and mitigating circumstances into its proposal.

Paragraph 399.79(e) applies to informal nonpublic investigations of potential violations of aviation consumer rights, which represent the overwhelming majority of the Enforcement Office's enforcement efforts.¹⁸ These investigations typically conclude with the Enforcement Office issuing a consent order, a warning letter, or other appropriate disposition that does not involve the filing of a complaint with an Administrative Law Judge (ALJ). The Department is aware that paragraph 399.79(e) does not propose a formal "hearing" for the regulated entity to present evidence. The Department is also aware that Section 41712(a) requires the Department to provide air carriers, foreign air carriers, and ticket agents with the opportunity for a "hearing" before declaring that a practice is unfair or deceptive. The Department is of the view that a hearing is not required in the course of informal nonpublic investigations, because full hearings are already available at a later stage. Specifically, where the Department and the regulated entity cannot agree on a disposition of a dispute regarding a potential aviation consumer rights violation, the Enforcement Office has the option of filing a formal complaint with an ALJ.¹⁹

¹⁸ 14 CFR Part 305 sets forth additional rules of practice in informal nonpublic investigations. Part 305 does not explicitly state that regulated entities have the opportunity to present mitigating evidence, but the opportunity to present such evidence traditionally has been available to regulated entities during investigations by the Enforcement Office and prior to any determination to take enforcement action.

¹⁹ Since 2014, the Enforcement Office has filed one formal complaint with an ALJ. See Docket DOT-OST-2014-0229.

These procedures are set forth in 14 CFR Part 302, subpart D (14 CFR 302.407-302.420), and they include the opportunity for a hearing before an ALJ. See 14 CFR 302.415. The Department seeks comment on all aspects of this proposal.

2. Explaining Findings of Unfairness and Deception

i. Current Practice for Enforcement of Regulations Issued under Section 41712

Many of the Department's aviation consumer protection regulations that are issued under the authority of Section 41712 state that a violation of the rule amounts to an unfair and deceptive practice. For example, the tarmac delay rule states that covered carriers must adopt and adhere to contingency plans providing various assurances to consumers in the event of a lengthy tarmac delay.²⁰ The rule explicitly states that failure to comply with the required assurances is considered an unfair and deceptive practice within the meaning of Section 41712.²¹ Similarly, the Department has issued regulations explicitly declaring that it is an unfair or deceptive practice within the meaning of Section 41712 to engage in certain types of post-purchase price increases.²² Other regulations issued under the authority of Section 41712 (e.g., the oversales/denied boarding compensation rule and the requirement that carriers issue and comply with a Customer Service Plan) do not specifically declare that a violation of the regulation also constitutes a violation of Section 41712.²³

²⁰ 14 CFR 259.4(a).

²¹ 14 CFR 259.4(f).

²² 14 CFR 399.88(a).

²³ 14 CFR Part 250; 14 CFR 259.5.

In instances where an enforcement action is based on regulations issued under the authority of Section 41712, the Department's enforcement orders set forth the relevant regulation or regulations, describe the facts of the case, including the problematic conduct, and identify the manner in which the regulation has been violated. In such orders, there is typically a statement that a violation of the regulation is also considered an unfair and deceptive practice in violation of Section 41712. In such cases, the orders have not explained in detail how the practice is unfair and deceptive, because the underlying regulation was issued under the authority of Section 41712.

ii. Current Practice for Enforcement of "Standalone" Violations of Section 41712

The Department also has the authority to investigate and enforce where an air carrier, foreign air carrier, or ticket agent may be engaging in conduct that does not violate a specific consumer protection regulation, but which may nevertheless be unfair or deceptive to consumers. These are potential "standalone" violations of Section 41712 and such cases are infrequent. When deciding whether to take enforcement action in these matters, the Department has relied on the FTC's approach to both unfairness and deception. Departmental orders issued in cases where the Department declined to take action have explicitly recited FTC precedent in the course of explaining why the acts were not unfair or deceptive. For example, in a case against a large airline, DOT Order 2016-12-11 (2016), a passenger filed a formal complaint alleging that the airline improperly penalized him 60,000 frequent flyer miles when it wrongly accused him of manipulating the airline's web site to gain favorable seating upgrades. The passenger was flagged by the airline's security department for engaging in suspicious activity on its web site. While no regulation covered the airline's behavior, the Department applied the standard articulated in the FTC's Policy Statement on Unfairness and relevant precedent and found that

the harm of losing miles, while substantial, could have been reasonably avoided by not logging into the airline's web site in suspicious and unusual ways.²⁴ The Department also found that it was not deceptive for the airline to fail to warn the passenger that he was subject to a penalty before imposing that penalty. Applying the standard articulated in the FTC's Policy Statement on Deception and relevant precedent, the Department reasoned that the passenger was not acting as a reasonable consumer would. The Department dismissed the formal complaint. Similarly, in another case, DOT Order 2018-2-18 (2018), a passenger missed the check-in deadline for a multi-city itinerary and was informed his reservations for the remaining flights would be cancelled if he did not change his reservation and pay the applicable fees. After outlining the relevant facts, the Department applied the standard for unfairness and found that the alleged practices were not unfair. In addition, using the FTC standard for deception, and noting that the consumer was not actually deceived, the Department also found that the airline's practice at issue was not deceptive and the complaint was dismissed.

The Department has also issued orders finding that violations of civil rights laws constitute violations of Section 41712, without explaining in detail how the violations were either unfair or deceptive, e.g., DOT Order 2012-5-2 (2012); DOT Order 2011-11-2 (2011). The resulting consent orders reflect the unfair/deceptive determination of the Department but do not provide the underlying description of how the relevant standard was met. Department aviation consumer protection enforcement orders should provide valuable information for regulated

²⁴ The airline presented evidence that in the 96 hours prior to the flight, the passenger created 28 bookings using fictitious names, while omitting the passenger's frequent flyer number. This laborious process created temporary passenger name records that took upgraded seats out of inventory. While the passenger contended that he simply wanted to view the available seating to see if upgraded seats were available, the airline presented evidence that its web site had a simple method to view available seating that did not take seating out of inventory; he could have also simply called the airline.

entities; accordingly, this rulemaking proposes that going forward, such orders would contain a more detailed statement of the relevant standard and how the particular facts of the case met the standard.

iii. Explaining Findings of Unfairness and Deception in Aviation Consumer Protection Enforcement Proceedings

In this NPRM, we propose that when the Department issues an enforcement order relying on Section 41712, and where no existing regulation governs the practice in question (where the Department relies solely on the phrase “unfair or deceptive” in Section 41712), then the enforcement order must articulate the Department’s basis for concluding that the practice is unfair or deceptive, as defined in this rule. For example, if the Department issues an order declaring that a particular practice is unfair, the Department would be required to explain that the practice is likely to cause substantial injury, which is not reasonably avoidable, and that the harm is not outweighed by benefits to consumers or competition. The Department would be required not only to recite these conclusions, but also to recite the basis for how it arrived at those conclusions. The proposed rule makes clear that when the conduct of an air carrier, foreign air carrier, or ticket agent also violates a regulation that was issued under the authority of Section 41712, then the explanation of unfairness or deception is not required. Instead, by establishing a violation of the regulation, the Enforcement Office has necessarily established a violation of Section 41712. Nevertheless, the Department seeks comment on whether such an order should reiterate the explanation of unfairness or deception as well.

The Department is undertaking this rulemaking because it is appropriate to provide an explanation, in enforcement orders, of the basis for concluding that a practice either does or does not violate Section 41712. Specifically, this rulemaking proposes that enforcement orders will

identify the factors used to determine whether a practice is unfair or deceptive and will identify the facts and conduct relevant to each factor, so that the rationale for the determination is clear in the order. This is particularly important in orders based on Section 41712 alone, where there has not been a regulation that already specifies required or prohibited conduct. In cases involving conduct that violates a regulation that was issued under the authority of Section 41712, enforcement orders should continue to identify the relevant facts and conduct that violates the regulation at issue. For example, in a case involving a violation of the Department's oversales rule, the specific facts and conduct at issue should be stated and the rationale for a determination that the oversales rule has been violated should be clear. However, this rulemaking is not proposing changes to enforcement orders regarding violations of existing regulations. The new proposed requirement regarding explaining the standards for unfairness and deception that are stated in this rulemaking and rely on FTC precedent are reflected in new proposed Section 399.79.

The proposed rule does not specifically indicate the type or extent of evidence that would be necessary to support a finding of unfairness or deceptiveness for standalone violations of Section 41712. The Department solicits comment on this question.

Finally, the Department seeks comment on the benefits and costs of this rule. The Department's description of the benefits and costs are described immediately below in Section A of the Regulatory Analyses and Notices section.

Regulatory Analyses and Notices

- A. *Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563*

(Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

This proposed rule is not a significant regulatory action under section 3(f) of E.O. 12866 (58 FR 51735, October 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, January 21, 2011), Improving Regulation and Regulatory Review. Accordingly, the Office of Management and Budget (OMB) has not reviewed it under that Order. It is also not significant within the meaning of DOT regulatory policies and procedures. This NPRM is issued in accordance with the Department's rulemaking procedures found in 49 CFR Part 5 and DOT Order 2100.6.

The Department does not anticipate that this rulemaking will have an economic impact on regulated entities. This is primarily a rule of agency procedure and interpretation. The NPRM would clarify how the Department interprets the terms "unfair" and "deceptive," and potentially require enhanced departmental procedures in analyzing, enforcing, and regulating in this area. This rulemaking could impose a social cost on the public if increased procedural requirements are adopted, as the opportunity cost of these enhanced procedural requirements could translate into the Department performing fewer enforcement and rulemaking actions. In addition, enhanced procedures would likely lengthen the time needed to complete these actions. However, the Department anticipates that these social costs would be outweighed by the benefits associated with improved and more transparent departmental decision making, informed by enhanced analyses and public participation. The Department seeks comment on the costs, benefits, and cost savings associated with this rulemaking.

This proposed rule is not expected to be an EO 13771 regulatory action because this proposed rule is not significant under EO 12866.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. A direct air carrier or foreign air carrier is a small business if it provides air transportation only with small aircraft (i.e., aircraft with up to 60 seats/18,000-pound payload capacity). See 14 CFR 399.73. The Department does not expect this rule to have a significant economic impact on a substantial number of small entities. However, we invite comment on the potential impact of this rulemaking on small entities.

C. Executive Order 13132 (Federalism)

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). This NPRM does not include any provision that: (1) has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. States are already preempted from regulating in this area by the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13175

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this NPRM does not significantly or uniquely affect the communities of the Indian

Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. The DOT has determined there are no new information collection requirements associated with this NPRM.

F. Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

G. National Environmental Policy Act

The Department has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). *See* 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 10.c.16.h of DOT Order 5610.1D categorically excludes “[a]ctions relating to consumer

protection, including regulations.” Since this rulemaking relates the definition of unfair and deceptive practices under Section 41712, the Department’s central consumer protection statute, this is a consumer protection rulemaking. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

List of Subjects

14 CFR Part 399

Consumer protection; policies; rulemaking proceedings; enforcement; unfair or deceptive practices

For the reasons discussed in the preamble, the Department proposes to amend 14 CFR Part 399 as follows:

PART 399-- STATEMENTS OF GENERAL POLICY

1. The authority citation for Part 399 is revised to read as follows:

Authority: 49 U.S.C. §§ 41712, 40113(a).

2. Section § 399.75 is added to Subpart F to read as follows:

Subpart F – Policies Relating to Rulemaking Proceedings

§ 399.75 Rulemakings relating to unfair and deceptive practices.

(a) *General.* When issuing a proposed or final regulation declaring a practice in air transportation or the sale of air transportation to be unfair or deceptive to consumers under the authority of 49 U.S.C. 41712(a), unless the regulation is specifically required by statute, the Department shall employ the definitions of “unfair” and “deceptive” set forth in section 399.79.

(b) *Procedural requirements.* When issuing a proposed regulation under paragraph (a) that is defined as high impact or economically significant within the meaning of 49 CFR 5.17(a), the Department shall follow the procedural requirements set forth in 49 CFR 5.17. When issuing a proposed regulation under paragraph (a) that is not defined as high impact or economically significant within the meaning of 49 CFR 5.17(a), unless the regulation is specifically required by statute, the Department shall follow the following procedural requirements:

- (1) *Request for a hearing.* Following publication of a proposed regulation, and before the close of the comment period, any interested party may file in the rulemaking docket a petition, directed to the General Counsel, to hold a formal hearing on the proposed regulation.
- (2) *Grant of petition for hearing.* Except as provided in paragraph (3), the petition shall be granted if the petitioner makes a plausible prima facie showing that:
 - (i) the proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other factual issues that are genuinely in dispute or that may not satisfy the requirements of the Information Quality Act;
 - (ii) The ordinary public comment process is unlikely to provide an adequate examination of the issues to permit a fully informed judgment; and
 - (iii) The resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule.
- (3) *Denial of petition for hearing.* A petition meeting the requirements of paragraph (2) may be denied if the General Counsel determines that:

- (i) The requested hearing would not advance the consideration of the proposed rule and the General Counsel's ability to make the rulemaking determinations required by this section; or
- (ii) The hearing would unreasonably delay completion of the rulemaking.

(4) *Explanation of denial.* If a petition is denied in whole or in part, the General Counsel shall include a detailed explanation of the factual basis for the denial including findings on each of the relevant factors identified in paragraphs (2) or (3) above.

(5) *Hearing notice.* If the General Counsel grants the petition, the General Counsel shall publish a notice of the hearing in the Federal Register. The notice shall specify the proposed rule at issue and the specific factual issues to be considered at the hearing. The scope of the hearing shall be limited to the factual issues specified in the notice.

(6) *Hearing process.*

- (i) A formal hearing under this section shall be conducted using procedures set forth in sections 556 and 557 of Title 5, United States Code, or similar procedures as approved by the Secretary, and interested parties shall have a reasonable opportunity to participate in the hearing through the presentation of testimony and written submissions.
- (ii) The General Counsel shall arrange for an administrative judge or other neutral administrative hearing officer to preside over the hearing and shall provide a reasonable opportunity to question the presenters.
- (iii) After the formal hearing and after the record of the hearing is closed, the hearing officer shall render a report containing findings and conclusions addressing the disputed issues of fact identified in the hearing notice.

- (iv) Interested parties who participated in the hearing shall be given an opportunity to file statements of agreement or objection in response to the hearing officer's report. The complete record of the hearing shall be made part of the rulemaking record.

(7) Actions following hearing.

- (i) Following the completion of the formal hearing process, the General Counsel shall consider the record of the hearing and shall make a reasoned determination whether to terminate the rulemaking; to proceed with the rulemaking as proposed; or to modify the proposed rule.
- (ii) If the General Counsel decides to terminate the rulemaking, the General Counsel shall publish a notice in the Federal Register announcing the decision and explaining the reasons for the decision.
- (iii) If the General Counsel decides to finalize the proposed rule without material modifications, the General Counsel shall explain the reasons for the decision and its responses to the hearing record in the preamble to the final rule.
- (iv) If the General Counsel decides to modify the proposed rule in material respects, the General Counsel shall publish a new or supplemental Notice of Proposed Rulemaking in the Federal Register explaining the General Counsel's responses to and analysis of the hearing record, setting forth the modifications to the proposed rule, and providing additional reasonable opportunity for public comment on the proposed modified rule.

(8). The formal hearing procedures under this paragraph shall not impede or interfere with the interagency review process of the Office of Information and Regulatory Affairs for the proposed rulemaking.

(c) *Basis for rulemaking.* When issuing a proposed or final regulation declaring a practice in air transportation or the sale of air transportation to be unfair or deceptive to consumers under the authority of 49 U.S.C. 41712(a), unless the regulation is specifically required by statute, the Department shall articulate the basis for concluding that the practice is unfair or deceptive to consumers as defined in section 399.79.

3. Section § 399.79 is added to Subpart G to read as follows:

Subpart G – Policies Relating to Enforcement

399.79. Policies relating to unfair and deceptive practices.

(a) *Applicability.* This policy shall apply to the Department’s aviation consumer protection actions pursuant to 49 U.S.C. § 41712(a).

(b) *Definitions.*

(1) A practice is “unfair” to consumers if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.

(2) A practice is “deceptive” to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer’s conduct or decision with respect to a product or service.

(c) *Intent.* Proof of intent is not necessary to establish unfairness or deception for purposes of 49 U.S.C. § 41712(a).

(d) *Specific regulations prevail.* Where an existing regulation applies to the practice of an air carrier, foreign air carrier, or ticket agent, the terms of that regulation apply rather than the general definitions set forth in this section.

(e) *Informal Enforcement Proceedings.*

(1) Before any determination is made on how to resolve a matter involving a potential unfair or deceptive practice, the U.S Department of Transportation's Office of Aviation Enforcement and Proceedings will provide an opportunity for the alleged violator to be heard and present relevant evidence, including but not limited to:

(i) In cases where a specific regulation applies, evidence tending to establish that the regulation at issue was not violated and, if applicable, that mitigating circumstances apply;

(ii) In cases where a specific regulation does not apply, evidence tending to establish that the conduct at issue was not unfair or deceptive as defined in paragraph (b); and

(iii) Evidence tending to establish that consumer harm was limited, or that the air carrier, foreign air carrier, or ticket agent has taken steps to mitigate consumer harm.

(2) During this informal process, if the Office of Aviation Enforcement and Proceedings reaches agreement with the alleged violator to resolve the matter with the issuance of an order declaring a practice in air transportation or the sale of air transportation to be unfair or deceptive to consumers under the authority of 49 U.S.C. 41712(a), and when a regulation issued under the authority of section 41712 does not apply to the practice at issue, then the Department shall articulate in the order the basis for concluding that the practice is unfair or deceptive to consumers as defined in this section.

(f) *Formal Enforcement Proceedings.* When there are reasonable grounds to believe that an airline or ticket agent has violated 49 U.S.C. § 41712, and efforts to settle the matter have failed, the Office of Aviation Enforcement and Proceedings may issue a notice instituting an enforcement proceeding before an administrative law judge. After the issues have been formulated, if the matter has not been resolved through pleadings or otherwise, the administrative law judge will give the parties reasonable written notice of the time and place of the hearing as set forth in 14 CFR 302.415.

Authority: 49 U.S.C. 41712; 49 U.S.C. 40113(a).

Issued this 20th day of February, 2020, in Washington, D.C., under authority delegated in 49 CFR 1.27(n).

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Steven G. Bradbury,

General Counsel.