

(Lat. 46°36'24" N, long. 111°59'0.0" W)

That airspace extending upward from the surface within an area bounded by a line beginning at Lat. 46°34'18.57" N, long. 111°51'30.319" W, to Lat. 46°38'5.89" N, Long. 111°51'24.53" W, to Lat. 46°37'12.53" N, long. 111°45'24.67" W, to Lat. 46°32'22.72" N, Long. 111°46'31.44" W, to Lat. 46°33'24.13" N, Long. 111°54'20.01" W, then counter-clockwise along the 4.4-mile radius of the airport to Lat. 46°34'20.01" N, long. 111°53'22.03" W, then to the point of beginning, and within an area bounded by a line beginning at Lat. 46°38'39.95" N, long. 112°06'47.50" W, to Lat. 46°36'47.49" N, long. 112°07'53.41" W, to Lat. 46°37'22.52" N, long. 112°11'37.80" W, to Lat. 46°39'19.40" N, long. 112°10'58.64" W, then to the point of beginning west of Helena Regional Airport.

*Paragraph 6005. Class E Airspace Areas Extending Upward from 700 feet or more above the Surface of the Earth.*

\* \* \* \* \*

#### **ANM MT E5 Helena, MT [Amended]**

Helena Regional Airport, MT

(Lat. 46°36'24" N, long. 111°59'0.0" W)

That airspace extending upward from 700 feet above the surface within an 8.3-mile radius of the airport, and within 1 mile each side of the 103° bearing from the airport, extending from the 8.3-mile radius to 10.7 miles east of the airport, and within 1.8 miles each side of the 281° bearing from the airport, extending from the 8.3-mile radius to 18.1 miles west of the airport; and that airspace extending upward from 1,200 feet above the surface within a 36-mile radius of Helena Regional Airport.

Issued in Seattle, Washington, on December 1, 2020.

**B. G. Chew,**

*Acting Group Manager, Operations Support Group, Western Service Center.*

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## **DEPARTMENT OF TRANSPORTATION**

### **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:** Final rule.

**SUMMARY:** The U.S. Department of Transportation (DOT or Department) is issuing a final rule codifying its longstanding definitions for the terms “unfair” and “deceptive” in the Department’s regulations implementing its aviation consumer protection statute. The final rule also describes the

Department’s procedural requirements for its rulemaking and enforcement actions when based on the Department’s authority to prohibit unfair or deceptive practices. Most of the Department’s aviation consumer protection regulations, such as the Department’s rules on overbooking, are based on the Department’s authority to prohibit unfair or deceptive practices. This rule is intended to provide regulated entities and other stakeholders with greater clarity and certainty about the Department’s interpretation of unfair or deceptive practices and the Department’s process for making such determinations in the context of aviation consumer protection rulemaking and enforcement actions.

**DATES:** Effective on January 6, 2021.

#### **FOR FURTHER INFORMATION CONTACT:**

Robert Gorman, Kimberly Graber, or Blane Workie, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202-366-9342, 202-366-7152 (fax); [robert.gorman@dot.gov](mailto:robert.gorman@dot.gov); [kimberly.graber@dot.gov](mailto:kimberly.graber@dot.gov); [blane.workie@dot.gov](mailto:blane.workie@dot.gov) (email).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Rulemaking Background**

Much of the background information presented here also appears in the preamble to the Department’s Notice of Proposed Rulemaking on Defining Unfair and Deceptive Practices published on February 28, 2020.<sup>1</sup> We have presented background information again here to assist the public in understanding the issues involved.

##### **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

<sup>1</sup> “Defining Unfair or Deceptive Practices,” 85 FR 11881 (February 28, 2020).

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 Federal 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 actions that are good candidates for repeal, replacement, or modification.<sup>2</sup> In response to the Notice, Airlines for America (A4A), an airline trade association, urged the Department to adopt policies defining unfairness and deception in Section 41712 consistent with principles articulated in Federal Trade Commission (FTC) and Federal court precedent interpreting those terms.<sup>3</sup> A4A also urged the Department to adopt various procedures which would, in its view, ensure that the Department’s enforcement and rulemaking activities were rooted in fairness, due process, and an adequate factual foundation.

##### **C. Department’s Comprehensive Update of Rulemaking and Enforcement Procedures**

On December 27, 2019, the Department issued a comprehensive update and consolidation of its procedural requirements for the Department’s rulemaking and enforcement actions.<sup>4</sup> This update reflects the Department’s policy that regulations should be straightforward and clear, incorporate best practices for economic analyses, and provide for appropriate public participation.<sup>5</sup> It also reflects the Department’s policy that enforcement actions should satisfy principles of due process and remain

<sup>2</sup> “Notification of Regulatory Review,” 82 FR 45750 (October 1, 2017).

<sup>3</sup> See Comment of A4A, Docket DOT-OST-2017-0069-2753, available at [www.regulations.gov](http://www.regulations.gov).

<sup>4</sup> “Administrative Rulemaking, Guidance, and Enforcement Procedures,” 84 FR 71714 (December 27, 2019), amending 49 CFR part 5 and other provisions.

<sup>5</sup> 84 FR 71718-71826.

lawful, reasonable, and consistent with Administration policy.<sup>6</sup>

#### *D. Summary of Notice of Proposed Rulemaking (NPRM)*

On February 28, 2020, the Department published an NPRM proposing to define the terms “unfair” and “deceptive” found in Section 41712, the Department’s aviation consumer protection statute. The NPRM also proposed a series of amendments to the Department’s aviation consumer protection procedures with respect to both regulation and enforcement. The proposals were issued to provide greater clarity, transparency, and due process in future aviation consumer protection rulemakings and enforcement actions.

By way of background, the Department described the origin of section 41712 and explained how it was modeled on Section 5 of the Federal Trade Commission (FTC) Act. The Department explained that while Section 5 vests the FTC with broad authority to prohibit unfair or deceptive practices in most industries, Congress granted the Department the exclusive authority to prohibit unfair or deceptive practices of air carriers and foreign air carriers. The Department noted that DOT and FTC share the authority to prohibit unfair or deceptive practices by ticket agents in the *sale* of air transportation.

Next, the Department explained that 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.<sup>7</sup> These principles were applied in FTC enforcement cases and rulemakings, and approved by reviewing Federal courts.<sup>8</sup> The FTC 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.

These principles are now reflected in the FTC Act itself. In 1994, 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.

Next, the Department explained that in 1983, the FTC issued a Policy Statement on Deception.<sup>9</sup> 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 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.

In the NPRM, the Department proposed to adopt definitions of “unfair” and “deceptive” that echo FTC precedent. The Department explained that adopting these definitions would simply codify existing practice and would not reflect a change of policy, because the Department’s Office of Aviation Consumer Protection (formerly known as the Office of Aviation Enforcement and Proceedings), a unit within the Office of the General Counsel that enforces aviation consumer protection requirements, has often explicitly relied on those definitions in its enforcement orders.

Next, the Department proposed a set of procedural rules that would govern the Department’s future discretionary rulemaking and enforcement efforts in the area of aviation consumer protection. With respect to rulemaking actions, the Department proposed three measures. First, future rulemakings

declaring certain practices to be “unfair” or “deceptive” would use the Department’s proposed definitions of those terms.<sup>10</sup> In prior rulemakings, the Department tended to make a conclusory statement that a practice was unfair or deceptive and did not provide its reasoning for that conclusion. In arriving at these conclusions that certain practices were unfair or deceptive, DOT employed the same definitions that are set forth in this rule, though that analysis was done informally at the Department and not further described in rule preambles.

Second, future discretionary rulemakings would be subject to a hearing procedure. Specifically, if the Department proposes that a practice was unfair or deceptive in a rulemaking, and that rulemaking raised scientific, technical, economic, or other factual issues that are genuinely in dispute, then interested parties may request an evidentiary hearing to gather evidence on those disputed issues of fact. Third, future rulemakings would explain the Department’s basis for finding a practice to be unfair or deceptive.

With respect to enforcement, the Department proposed three measures. First, when taking enforcement action against an airline or ticket agent for unfair or deceptive practices, the Department would use the proposed definitions of “unfair” and “deceptive” set forth above (unless a specific regulation issued under the authority of section 41712 applied to the practice in question, in which case the terms of the specific regulation would apply). Second, in future enforcement actions, the Department would provide the airline or ticket agent with the opportunity to be heard and to present mitigating evidence. This final rule codifies the longstanding practice of allowing regulated entities to present mitigating evidence during the course of informal DOT enforcement actions. In a typical enforcement action, the Office of Aviation Consumer Protection issues an investigation letter to an airline or ticket agent, seeking information about the extent and nature of the violations. During that process, the Office also allows airlines and ticket agents to present mitigating evidence (e.g., that consumer harm was low, or that the airline or ticket agent has taken steps to mitigate the harm to consumers). While the rule now makes this process explicit, we do not expect an *expansion* in its usage; instead, we expect that it

<sup>6</sup> 84 FR 71729–71733.

<sup>7</sup> 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).

<sup>8</sup> See, e.g., *International Harvester*, 104 F.T.C. 949 (1984); Credit Practices Rule, Statement of Basis and Purpose, 49 FR 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).

<sup>9</sup> 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)).

<sup>10</sup> The proposal recognized that if Congress directed the Department to issue a rule declaring a specific practice to be unfair or deceptive, then the Department would do so without reference to the Department’s own definitions.

will continue unchanged after the issuance of this final rule. Third, in future enforcement orders, if a specific regulation does not apply to the practice in question, the Department would explain the basis for its finding that a practice was unfair or deceptive. The Department is of the view that these measures generally codify existing practice.

In addition, the Department solicited comment on related matters. For example, the Department asked whether the term “practice” should be defined. The Department also noted that it relies on its general unfair and deceptive practices authority in certain specialized areas (e.g., privacy, frequent flyer programs, and air ambulance service) and asked whether the proposed general definitions of “unfair” or “deceptive” were sufficient to provide stakeholders sufficient notice of what constitutes an unfair or deceptive practice in these or other subject areas.

The comment period for the NPRM was originally scheduled to expire on April 28, 2020. However, in response to a request by consumer advocacy organizations, the comment period was extended to May 28, 2020.

## II. Summary of NPRM Comments and the Department's Responses

### A. Overview

The Department received a total of 224 comments by the end of the comment period. Approximately 180 comments were filed by individual consumers, who almost uniformly opposed the NPRM. Individual consumers typically did not comment on any specific provision, but instead opposed the NPRM as a whole, viewing it as a weakening of aviation consumer protection. Many consumers noted with disapproval that the NPRM was initiated at the request of airlines, which in their view engage in practices that are anti-consumer.

Consumer advocacy organizations<sup>11</sup> and two FTC Commissioners<sup>12</sup> generally opposed the proposals on the ground that they were either unnecessary or weakened consumer protection. Four Senators and one Member of Congress<sup>13</sup> urged the Department to discontinue the NPRM

for many of the same reasons identified by consumer advocates and the FTC Commissioners.

Airline associations, individual airlines, and a nonprofit public policy organization<sup>14</sup> broadly supported the proposals in the NPRM on the ground that they provided greater transparency and due process in the Department's rulemaking and enforcement activities. Airlines also suggested that the Department adopt additional provisions, which will be discussed in greater detail below.

Travel agent representatives and a large travel agency<sup>15</sup> generally supported the NPRM for the reasons expressed by airlines; however, they opposed the proposal to adopt hearing procedures relating to discretionary aviation consumer protection rulemakings.

We will discuss the comments in further detail below.

### B. Definitions

#### 1. Definitions of “Unfair” and “Deceptive”

Consumer advocacy organizations generally recognized that the proposed definitions of “unfair” and “deceptive” mirror the FTC's interpretation of those terms. They argued, however, that the Department should not limit itself to those specific definitions. They contended that the flexibility of undefined terms serves as a deterrent to engaging in practices that do not fit within the proposed definitions, but which may nevertheless be unfair or deceptive.

They argued that this flexibility is especially important in the field of air transportation because the Airline Deregulation Act (ADA) prohibits States from regulating the unfair and deceptive practices of airlines. They contended that outside of the field of aviation, State consumer protection laws serve as a backstop to the FTC's authority, and that many consumer protection agencies take aggressive and successful action under State law with respect to practices that would not qualify as unfair or deceptive under the FTC's definitions. They also observed that because of ADA preemption, relief in court is generally limited to Federal class-actions or small claims. Consumer organizations concluded that the FTC definitions may be used for guidance,

but should not be transformed into regulatory text.

FTC Commissioner Chopra urged the Department not to adopt the FTC's definitions, for many of the reasons identified by consumer advocacy organizations. He also raised several additional concerns. First, he argued that after the FTC adopted its Policy Statement on Unfairness in 1980, the Commission's “number of enforcement actions and rulemakings plummeted, leaving a vacuum that hobbled development of the law.”<sup>16</sup> Commissioner Chopra also argued that “the key planks undergirding the FTC's unfairness definition—competitive markets, consumer choice, and a de-emphasis on public policy—are poorly suited to airline regulation,” because the aviation market is not competitive, in his view, and because the Transportation Code affirmatively requires the Secretary to emphasize certain public policies.<sup>17</sup> He also argued that the proposed definitions do not adequately take these policies into account.

Airlines and travel agents supported the proposed definitions, arguing that they provide much-needed transparency and predictability to regulated industries. Southwest Airlines argued that the lack of clear definitions has led DOT to overreach in certain past rulemakings and enforcement actions. Southwest also argued that the third prong of the unfairness definition (i.e., that the harm of the practice “is not outweighed by countervailing benefits to consumers or to competition”) correctly reflects departmental policy to place “maximum reliance on competitive market forces and on actual and potential competition.”<sup>18</sup> Spirit Airlines suggested that the proposed definition of “deceptive,” which currently refers to misleading a singular “consumer” acting reasonably under the circumstances, should be written in the plural to reflect that the practice must be misleading to “consumers” in the aggregate. Travel agents argued that because DOT and FTC share jurisdiction over them, it is important for the two regulatory standards to be harmonious.

<sup>16</sup> Comment of Commissioner Chopra at 2. He particularly noted that in the years after adoption of the Policy Statement, the FTC failed to take action against predatory lending and the deceptive practices of the tobacco industry; instead, states took the lead, and the FTC's authority over consumer lending practices was transferred to the Consumer Financial Protection Bureau (CFPB), which has a broader standard for taking enforcement action than the FTC. *Id.* at 6–8.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> Southwest comment at 4, citing 49 U.S.C. 40101(a)(6), (12).

<sup>11</sup> Travelers United, Flyersrights.org, National Consumers League, Consumer Action, American Association for Justice (formerly American Trial Lawyers' Association), Travel Fairness Now, Consumer Reports, Consumer Federation of America, and US PIRG.

<sup>12</sup> Commissioners Rebecca Kelly Slaughter and Rohit Chopra.

<sup>13</sup> Senators Edward J. Markey, Tammy Baldwin, Maria Cantwell, and Richard Blumenthal and Representative Katie Porter.

<sup>14</sup> Airlines for America (A4A), International Air Transport Association (IATA), National Business Aviation Association (NBAA), U.S. Tour Operators Association (USTOA), Spirit Airlines, Southwest Airlines, and the Competitive Enterprise Institute (CEI).

<sup>15</sup> Travel Tech and BCD Travel USA.

After reviewing the comments, the Department remains of the view that it should adopt the definitions of “unfair” and “deceptive” as proposed. We are guided by the principles set forth in our recent final rule, “Administrative Rulemaking, Guidance, and Enforcement Procedures,” which seeks to provide greater transparency to regulated entities when conducting enforcement actions and adjudications.<sup>19</sup> Offering clear definitions of “unfair” and “deceptive” will serve this goal. We note that transparency and clarity is particularly needed with respect to ticket agents, which are subject to both FTC and DOT jurisdiction.

We stress that the definitions that we adopt do not reflect a substantive departure from past DOT practice. As we explained in the NPRM, DOT has traditionally relied on these definitions when taking enforcement and discretionary rulemaking actions. Therefore, the Department is not of the view that codifying these definitions will diminish the Department’s authority to take enforcement action or to regulate effectively.

We recognize the argument of consumer advocacy organizations and Commissioner Chopra that the ADA preempts State consumer protection agencies from acting as a more aggressive backstop to DOT action. At present, however, we are of the view that the proposed definitions are adequate to ensure regulations continue to prohibit unfair and deceptive practices while at the same time providing necessary transparency to the regulated industry. We also recognize that under FTC practice, the role of public policy is explicitly deemphasized,<sup>20</sup> while Congress has directed the Department to take into account a variety of policies in conducting economic regulation of air transportation.<sup>21</sup> We are not convinced that this distinction compels a different result. While the definitions of “unfair” and “deceptive” will remain the guiding principles for regulation and enforcement, in doing so, the Department recognizes its statutory

responsibility to consider the public policies enumerated by Congress. These policies include safety, ensuring economic competition, and preventing unfair and deceptive practices.<sup>22</sup>

## 2. Intent as an Element of Unfairness or Deception

The proposed rule would clarify that intent is not an element of either unfairness or deception. We received relatively few comments on this issue. FTC Commissioners Chopra and Slaughter both expressed the view that the Department’s position was legally correct. A4A and IATA, however, urged the Department to adopt an “intent to deceive” standard for both unfairness and deception. In the alternative, they urged the Department to give lack of intent “significant weight” when exercising its enforcement discretion.

We remain of the view that intent is not an element of either unfairness or deception.<sup>23</sup> We also reject A4A and IATA’s suggestion to adopt an intent requirement. Such a requirement would place the Department’s view of unfairness and deception substantially out of step with FTC precedent. It would also limit the Department’s consumer protection actions to only those matters where parties establish and the Department can substantiate the private intent of carriers and ticket agents. In light of the revisions to the Department’s rulemaking and enforcement procedures adopted in this final rule to enhance the justifications for actions taken under the Department’s statutory authority, we view this as an unnecessary and unacceptably high bar. We also decline to include in the regulation the weight that lack of intent should be given in any future enforcement action, because the proper exercise of enforcement discretion generally involves an individualized consideration of a variety of factors.<sup>24</sup>

## 3. Definition of Additional Terms

Airlines urged the Department to define further the component elements of unfairness and deception, such as “substantial harm,” “likely to mislead,”

“reasonably avoidable,” and “acting reasonably under the circumstances.” In general, airlines asked the Department to adapt into regulatory text certain aspects (but not all of the aspects) of the FTC’s guidance on these terms, as found in the 1980 Policy Statement on Unfairness and the 1983 Policy Statement on Deception. We decline this invitation, because the regulatory text adequately explains the necessary elements of unfairness and deception.<sup>25</sup> The Department will continue to look to the FTC Policy Statements, as well as FTC precedent and the Department’s own precedent, for guidance in determining whether any specific practice meets all of the component elements of unfairness and deception.

## 4. Definition of “Practice”

In the NPRM, the Department noted that neither the DOT nor the FTC Act defines “practice.” The Department indicated that it did not believe that a definition of “practice” was necessary, because its aviation consumer protection regulations are always directed to “practices” rather than individual acts. The Department also explained that its enforcement efforts include a determination that the conduct in question reflects a practice or policy affecting multiple consumers, rather than an isolated incident. We concluded that “in general, the Department is of the view that proof of a practice in the aviation consumer

<sup>25</sup> For example, A4A/IATA asks the Department to define “substantial harm” as not involving merely trivial or speculative harm. A4A/IATA comment at 6, citing 1980 FTC Policy Statement on Unfairness. We are of the view that this clarification is unnecessary because the term “substantial harm” would necessarily exclude “trivial or speculative harm.” (We also observe, however, that in keeping with 15 U.S.C. 45(n), a practice is unfair not only if it causes substantial harm, but if also it is *likely* to cause substantial harm.)

Similarly, A4A/IATA asks us to define “not reasonably avoided” as excluding circumstances where a consumer’s willful, intentional, or reckless conduct leads to harm (for example, by intentionally taking advantage of a mistakenly published fare). We are of the view that in general, the term “not reasonably avoided” would necessarily exclude the types of self-imposed harms described by A4A and IATA. We also note that mistaken fares are governed by a specific regulation relating to post-purchase price increases (14 CFR 399.88). The Department has issued guidance with respect to mistaken fares at [https://www.transportation.gov/sites/dot.gov/files/docs/Mistaken\\_Fare\\_Policy\\_Statement\\_05082015\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/Mistaken_Fare_Policy_Statement_05082015_0.pdf).

Finally, A4A, IATA, Southwest, and Spirit all stress under the 1983 FTC Policy Statement on Deception, deception should be judged by reference to reasonable consumers as a whole, and that a single consumer’s unreasonable interpretation of a statement does not make it deceptive. We agree that deception is judged in reference to a reasonable consumer and believe that these concepts are adequately reflected in the phrase “acting reasonably under the circumstances,” regardless of whether the word “consumer” is singular or plural.

<sup>19</sup> 84 FR 71716, citing Executive Order 13892, “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication” (October 9, 2019).

<sup>20</sup> As noted above, pursuant to 15 U.S.C. 45(n), the FTC may 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.

<sup>21</sup> 49 U.S.C. 40101 (directing the Department, when engaging in economic regulation of air transportation, to consider 16 matters, “among others, as being in the public interest and consistent with public convenience and necessity.”)

<sup>22</sup> See 49 U.S.C. 40101(a)(1), (4), (6), (7), (9), and (12).

<sup>23</sup> See 85 FR 11885 (intent is not required under Federal case law interpreting the FTC Act, and noting that the definition of “false advertisement” in the FTC Act makes no reference to intent to deceive).

<sup>24</sup> See 49 CFR 5.97 (“Where applicable statutes vest the agency with discretion with regard to the amount or type of penalty sought or imposed, the penalty should reflect due regard for fairness, the scale of the violation, the violator’s knowledge and intent, and any mitigating factors (such as whether the violator is a small business)”).

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.”<sup>26</sup> We sought comment, however, on whether a definition of “practice” was necessary.

We received relatively few comments on this issue. Consumer advocacy organizations largely did not address it. Spirit, Travel Tech, and FTC Commissioner Slaughter opined that a definition was not necessary. The NBAA and USTOA urged the Department to adopt a definition that reflected the Department’s current understanding, described above. A4A and IATA urged the Department to define “practice” as “a pattern of repetitive conduct that harmed multiple consumers rather than a single act.”<sup>27</sup> A4A and IATA stated that under this standard, one “mistaken advertisement” would not be a practice even if the same advertisement runs multiple times.<sup>28</sup> Relatedly, A4A and IATA urged the Department to refrain from taking enforcement action with respect to “a single act or isolated acts by a carrier,” and instead take action only if the conduct is repeated after a warning.<sup>29</sup>

After reviewing the comments on this issue, we remain of the view that it is not necessary to define “practice.” The Department notes that this issue will arise in relatively rare instances where the Department seeks to take enforcement action in an area where no specific regulation applies, and where there is a reasonable disagreement over whether the conduct reflects a truly isolated incident. In such cases, regulated entities will have the opportunity to be heard and to present evidence that the conduct at issue does not constitute a practice, as set forth in this rule.

### C. Rulemaking Proposals

In the NPRM, the Department proposed a hearing procedure that would be available when the Department proposed a discretionary aviation consumer protection rulemaking declaring a practice to be unfair or deceptive. To summarize, after the issuance of an NPRM, interested parties could request a formal hearing on the ground that the proposed rule raised one or more disputed technical, scientific, economic, or other complex factual issues. The General Counsel would have the authority to grant or

deny the hearing using criteria set forth in this rule. If the hearing is granted, an Administrative Law Judge or other neutral hearing officer would conduct the formal hearing using procedures adapted from the Administrative Procedure Act (APA) or similar rules adopted by the Secretary. The hearing officer would issue a detailed report on the disputed factual issue(s), after which the General Counsel would determine whether the proposed rule should be continued, amended, or terminated.

Consumer advocacy organizations strongly urged the Department not to adopt these hearing procedures. They argued that the Department did not demonstrate that the typical notice-and-comment procedures of the APA were inadequate to gather a proper factual basis for discretionary rulemakings. Some commenters noted that these hearing procedures were unnecessary given the updates to the Department’s general rulemaking procedures in 49 CFR part 5. They also contended that formal hearing procedures will inevitably create lengthy delays and numerous opportunities for regulated entities to lobby against the proposed rule. Some commenters argued that the proposed rulemaking has more liberal standards for granting a hearing than there are for denying a hearing; as a result, hearings will threaten to become the norm. Other advocates observed that the proposal does not have a clear mechanism for consumers to argue that a hearing is not necessary.

FTC Commissioner Slaughter commented on the FTC’s own experience with similar formal hearing procedures, which were imposed by Congress, known as “Mag-Moss” procedures.<sup>30</sup> Commissioner Slaughter argued that such hearing procedures do not make rulemaking impossible, but “the great difficulty of undergoing a Mag-Moss rulemaking compared with rulemaking under the APA should not be understated. The additional procedural requirements represent an enormous drain on staff resources, to say nothing of the additional time and effort they require of stakeholders.”<sup>31</sup> She argued that there is a growing bipartisan consensus for the FTC to issue privacy regulations not under Mag-Moss, but instead under APA procedures. Commissioner Slaughter argued that if the Department issues its own privacy regulations using the proposed formal hearing procedures, the

Department will “create a regulatory incongruence in which the Department is the slowest and least capable regulator in the privacy arena.”<sup>32</sup>

Ticket agents also urged the Department not to adopt formal hearing procedures, for many of the reasons cited by consumer advocates and Commissioner Slaughter. Travel Tech noted the incongruity of the Department requiring heightened hearing procedures only for its highest-cost rules and for discretionary aviation consumer protection rules, which generally do not impose nearly such a high economic burden.<sup>33</sup> Travel Tech also argued that the Department’s institutional expertise in aviation consumer protection matters ensures that formal hearing will generally not be necessary. Travel Tech contended that formal hearings should only be required when directed by Congress or under very limited and unusual circumstances.<sup>34</sup>

Airlines generally favored the proposal on the ground that it provides regulated entities with an opportunity to test thoroughly the factual assumptions on which discretionary consumer protections are based. They argued that such hearings are helpful to determine whether a market failure has taken place such that regulation is necessary.<sup>35</sup>

After careful review of the comments in this area, the Department has decided to retain a hearing procedure that would be available when the Department proposes a discretionary aviation consumer protection rulemaking declaring a practice to be unfair or deceptive. This is consistent with section 41712, 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

<sup>32</sup> *Id.* at 4.

<sup>33</sup> Comment of Travel Tech at 6–7.

<sup>34</sup> *Id.* at 9 (“Travel Tech thus proposes that a formal fact-finding hearing would only be appropriate in the very unusual circumstance when either Congress directs that a specific rule be adopted only after an on the record hearing or when the agency’s General Counsel finds that a specific factual issue critical to a claim that a particular practice is unfair or deceptive (and not an economic or policy consideration) is in dispute and cannot be adequately resolved through the usual notice-and-comment process.”)

<sup>35</sup> A4A Comment at 16, citing 49 CFR 5.11 (before initiating a rulemaking, the Department should identify “the need for the regulation, including a description of the market failure or statutory mandate necessitating the rulemaking”). See also comment of Spirit Airlines (arguing that the Department’s repealed NPRM on dissemination of ancillary fees to third party ticket sellers was based on conflicting/misleading information regarding passengers’ ability to get this information). Spirit also argued that the Department should engage in Advance Notice of Proposed Rulemaking (ANPRM) to gather comment on whether practices are unfair or deceptive.

<sup>26</sup> 85 FR 11885.

<sup>27</sup> Comment of A4A/IATA at 12.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 13.

<sup>30</sup> See 15 U.S.C. 57a (codifying the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Public Law 93–637 (“Mag-Moss”).

<sup>31</sup> Comment of Commissioner Slaughter at 3.

unfair or deceptive practice or an unfair method of competition. The Department sees value in offering additional hearing procedures for low-cost discretionary aviation consumer protection rules where scientific, technical, economic, or other factual issues are genuinely in dispute. At the same time, the Department recognizes the concerns raised by commenters that formal hearing procedures may add time to the rulemaking process. As such, the hearing procedures for discretionary aviation consumer protection rules set forth in this final rule differ from the procedures set forth in the Department's general rulemaking procedures in 49 CFR part 5 for the Department's high-impact or economically significant rules. For example, under this final rule, the General Counsel would be free to adopt more flexible rules for the hearing than would be required for a high-impact or economically significant rulemaking. The General Counsel also has more flexibility with respect to appointing an appropriate hearing officer for such hearings. Finally, the presiding officer is not required to issue a report; the officer need only place on the docket minutes of the hearing with sufficient detail as to reflect fully the evidence and arguments presented on the disputed issues of fact, along with proposed findings addressing those issues. By adopting hearing procedures for discretionary aviation consumer protection rulemakings that are less stringent and more flexible than the formal hearing procedures for high impact or economically significant rules, the Department ensures that interested parties have an opportunity to test factual assumptions on which discretionary consumer protection rulemaking actions are based, consistent with the underlying statutory authority under which the Department is regulating, while minimizing the likelihood of extensive delays or a drain on staff resources.

These procedures, as modified, reflect the Department's continued view that interested parties should have the opportunity to be heard when the Department proposes discretionary rulemakings that may be based on complex and disputed economic, technical, or other factual issues. We also note that the ordinary notice and comment procedures of the APA remain the default process: To obtain a hearing, the party requesting the hearing has the initial burden of showing that, among other factors, the ordinary notice and comment procedures are unlikely to provide an adequate examination of the issues to permit a fully informed

judgment. The rule retains the safeguard that the General Counsel may decline a hearing if it would unreasonably delay the rulemaking. We also generally disagree with commenters who stated that the standards for granting a hearing are necessarily more lenient than the standards for denying them.

We also note that the Department's use of similar procedures to supplement traditional notice-and-comment is not new.<sup>36</sup> For example, in 2011, the Department's Bureau of Transportation Statistics held a public meeting to gather information about industry practices for processing and accounting for baggage and wheelchairs, in connection with a pending rulemaking.<sup>37</sup> More recently, the Department asked the Architectural and Transportation Barriers Compliance Board (Access Board) to hold a hearing to gather public input on potential new standards for on-board wheelchairs, also in connection with a pending rulemaking.<sup>38</sup> The Department recognizes certain differences between the public meetings that sometimes were held in the context of earlier rulemakings<sup>39</sup> and the hearings contemplated by this rule. For example, hearings will be held before a neutral officer, who must make findings on the record, while public meetings were previously led by staff from the government office involved in the rulemaking and findings were not separately summarized and placed on the record but rather were noted in the preamble if they were relied on in the rulemaking. Moreover, this rule clearly identifies procedures to all interested persons that hearings may be requested, while previously there was no formal process to request a public meeting so they were more likely to have been instituted by the Department or requested only by those parties that knew that the Department was open to holding public meetings in appropriate instances. In sum, while the hearing procedures reflected in the final rule may result in some additional delays to the rulemaking process beyond what

was experienced with public meetings, on the whole the new procedures will promote fairness, due process, and well-informed rulemaking, without unduly delaying the proceeding itself, and represent a reasonable and balanced approach consistent with the Department's rulemaking and enforcement policies.

#### *D. Enforcement Proposals*

In the NPRM, the Department proposed to codify certain enforcement practices. First, the Department proposed that before the Office of Aviation Consumer Protection determined how to resolve a matter involving a potential unfair or deceptive practice, it would provide an opportunity for the alleged violator to be heard and to present relevant evidence in its defense. Such evidence would include, but not be limited to, the following: (1) Evidence that the consumer protection regulation at issue was not violated; (2) evidence that the conduct was not unfair or deceptive (if no specific regulation applied); and (3) evidence that that consumer harm was limited or that the alleged violator has taken steps to mitigate the harm. The Department also proposed that when the Office issued a consent order declaring that a practice was unfair or deceptive, and no specific regulation applied to the conduct at issue, then the Office would explain the basis for its finding that the conduct was unfair or deceptive, using the definitions set forth in this rule. Finally, the Department clarified that if the Office took enforcement action against a regulated entity by filing a complaint with an Administrative Law Judge, then the entity would have the opportunity for notice and a hearing as set forth in 14 CFR part 302. We noted that these procedures reflected the longstanding practices of the Office of Aviation Consumer Protection.

We received few comments on this element of the proposed rule. Most consumer advocates did not opine on the issue, while National Consumers League and Consumer Action advised that they were unnecessary. Travel Fairness Now generally did not object to the measures, but urged the Department to declare that an unfair or deceptive practice with limited consumer harm would still be subject to enforcement action. Airlines and ticket agents generally supported these proposals.

In the final rule, we will adopt these measures as proposed in the NPRM. They reflect current practice, and afford reasonable due process to regulated entities. These specific measures are also consistent with the general principles set forth in the Department's

<sup>36</sup> See <https://cms7.dot.gov/regulations/rulemaking-process>, under "May an agency supplement the APA requirements?" ("We may use public meetings or hearings before or after a proposal is issued for a variety of reasons. Public meetings allow us to ask questions. They allow for interaction among participants with different views on the issues involved, and they provide a better opportunity for members of the public who believe they are more effective making oral presentations than submitting written comments.")

<sup>37</sup> See <https://www.regulations.gov/document?D=RITA-2011-0001-0280>.

<sup>38</sup> 84 FR 43100 (August 20, 2019); see <https://www.regulations.gov/document?D=ATBCB-2019-0002-0001>.

<sup>39</sup> E.g., 77 FR 25105 (April 27, 2012).

recent final rule relating to enforcement.<sup>40</sup>

#### *E. Privacy, Air Ambulance, and Frequent Flyer Programs*

The Department solicited comment on whether the general definitions of “unfair” or “deceptive” were sufficient to give notice to stakeholders of what constitutes unfair or deceptive practices with respect to the specialized fields of privacy, air ambulance service, and frequent flyer programs. While we did not receive specific comments related to frequent flyer programs, we did receive comment with respect to privacy and air ambulance service.

A4A asked the Department to declare that the Department has exclusive jurisdiction over airlines with respect to privacy practices. A4A also asked the Department to adopt detailed privacy regulations. A4A’s proposal would declare that “ mishandling private information may be considered an unfair or deceptive practice,” and that “specific examples of unfair or deceptive practices with regard to the private information of consumers include” violating the terms of the airline’s privacy policy, failing to maintain reasonable data security measures for passengers’ private information, and violating various privacy statutes.

We generally agree with the substance of A4A’s proposal; indeed, it appears to be adapted from the privacy page of the Department’s consumer protection website, which recites many of these principles.<sup>41</sup> Nevertheless, we decline to adopt it for procedural reasons. As noted above, one of the Department’s stated policies is to improve transparency and public participation in the rulemaking process. If the Department were to adopt detailed privacy regulations affecting air transportation and the sale of air transportation, it should first engage in the full notice-and-comment procedures of the APA, as well as the procedures set forth in this final rule.

Next, we received comments from insurers, air ambulance providers, and other interested parties about the regulation of air ambulance providers. The National Association of Insurance

Commissioners and nine researchers on health law, economics, and policy<sup>42</sup> urged the Department to declare that balance billing is an unfair practice because it imposes substantial harm on patients who had no ability to avoid the charges, without countervailing benefits to consumers or to competition. Separately, the researchers urged the Department to find that charging full out-of-network prices for air ambulance service is an unfair practice, in part because of its effect on the private insurance market. Air ambulance operators<sup>43</sup> argued that specific regulation of air ambulance providers in this rulemaking would be premature at best, because the Air Ambulance and Patient Billing (AAPB) Advisory Committee has been established to address these issues comprehensively. Air ambulance operators also argued that balance billing should not be considered an unfair or deceptive practice. They contend that much of the consumer harm from balance billing arises from the practices of insurers, rather than air ambulance providers (for example, by under paying out-of-network air ambulance bills, or denying claims that were medically necessary). They also argue that many patients who receive a large balance bill ultimately pay a small fraction of that amount out-of-pocket.

After consideration of the comments submitted on this issue, we decline to adopt specific regulations relating to air ambulance providers. Section 418 of the FAA Reauthorization Act of 2018 (FAA Reauthorization Act) requires the Secretary, in consultation with the Secretary of Health and Human Services, to establish an advisory committee to review options to improve the disclosure of charges and fees for air medical services, better inform consumers of insurance options for such services, and protect consumers from balance billing. The FAA Reauthorization Act also contemplates that the Advisory Committee’s report and recommendations will serve as the basis for future regulations or other guidance as deemed necessary to provide other consumer protections for customers of air ambulance providers.<sup>44</sup> We agree that the most prudent course of action is to allow the work of the

AAPB Advisory Committee to run its course, rather than to issue more detailed regulations relating to air ambulance providers in this final rule.

#### *F. Other Comments*

We will address briefly a number of comments that do not fall squarely within the categories described above. First, A4A and IATA urge the Department to adopt a “clear and convincing evidence” standard for enforcement of unfair and deceptive practices. We decline to enact such a burden of proof standard here, particularly in light of the fact that most enforcement cases are adjudicated not through the courts, but rather through voluntary consent orders. We also note that during these informal proceedings, regulated entities have the opportunity to present mitigating evidence as set forth above.

Next, A4A and IATA urge the Department to require the Office of Aviation Consumer Protection to present evidence on all of the elements of unfairness and deception, even in cases where a specific regulation enacted under the authority of section 41712 applies to the conduct in question. We decline this request because doing so would be unduly burdensome with limited or no benefit. By enacting a regulation under the authority of section 41712, the Department has already determined, after notice and comment, that the conduct in question is unfair or deceptive; in such cases, it should be sufficient to establish that the regulation itself was violated.<sup>45</sup> A4A and IATA also urge that they should be able to present mitigating evidence with respect to all of the prongs of unfairness and deception. We note that in informal enforcement proceedings involving the violation of specific regulations, regulated entities would have the opportunity to present relevant evidence, including evidence that consumer harm was limited.

Next, A4A and IATA argue that the Office of Aviation Consumer Protection should affirmatively furnish “exculpatory evidence” in its possession. We agree with this practice, and the Office is required to do so under the Department’s existing enforcement procedures, which are set forth in another rule.<sup>46</sup>

<sup>40</sup> See, e.g., 49 CFR 5.57 (“Enforcement adjudications require the opportunity for participation by directly affected parties and the right to present a response to a decision maker, including relevant evidence and reasoned arguments”); 49 CFR 5.59 (Department’s enforcement action should conclude with, among other things, a “well-documented decision as to violations alleged and any violations found to have been committed.”)

<sup>41</sup> <https://www.transportation.gov/individuals/aviation-consumer-protection/privacy>.

<sup>42</sup> See <https://www.regulations.gov/document?D=DOT-OST-2019-0182-0193>.

<sup>43</sup> Association of Air Medical Services, Air Methods, and PHI Health, LLC.

<sup>44</sup> For further information about the AAPB Advisory Committee, see <https://www.transportation.gov/airconsumer/AAPB> and the Committee’s docket, available at <https://www.regulations.gov/docket?D=DOT-OST-2018-0206>.

<sup>45</sup> See Comment of Travel Fairness Now (urging the Department to clarify that it will not use this final rule as a vehicle for repealing existing regulations, because they were well justified).

<sup>46</sup> 49 CFR 5.89 (duty to disclose exculpatory evidence).



### G. Formal Enforcement Proceedings

In the NPRM, the Department proposed to clarify that if regulated entities do not enter into a negotiated settlement with the Office of Aviation Consumer Protection with respect to potential violations of section 41712, then the Office may initiate a formal enforcement proceeding, and that hearings are available through this process. The Department did not receive comments on this provision, which restates current procedures found in 14 CFR part 302. In this final rule, the Department has made nonsubstantive editorial changes to the regulatory text such as adding a citation to a specific section of part 302. The Department has determined that good cause exists to dispense with notice and comment for these nonsubstantive editorial changes because they are ministerial in nature; therefore, public comment is unnecessary under 5 U.S.C. 553(b)(B).

### III. 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 (49 CFR Part 5)*

This final rule is a significant regulatory action under section 3(f) of E.O. 12866, “Regulatory Planning and Review” (Oct. 4, 1993), supplemented by E.O. 13563, “Improving Regulation and Regulatory Review” (Jan. 21, 2011). Accordingly, the Office of Management and Budget (OMB) has reviewed it under that Order. This final rule is issued in accordance with the Department’s rulemaking procedures found in 49 CFR part 5 and DOT Order 2100.6.

This rule primarily involves agency procedure and interpretation. It clarifies how the Department interprets the terms “unfair” and “deceptive” and requires enhanced departmental procedures for regulation and enforcement in the area of aviation consumer protection. Clarifying and explicitly defining terminology advances the Department’s goal of improved transparency. Adopting enhanced procedures for future rulemaking and enforcement activities will help to ensure that the activities are rooted in fairness, due process, and an adequate factual foundation. These goals are described in the Department’s final rule, “Administrative Rulemaking, Guidance, and Enforcement Procedures.”<sup>47</sup>

This rule aligns the Department’s policies and rules involving unfairness and deception in aviation consumer protection explicitly with principles adopted by the FTC. In the Department’s view, aligning the terms “unfair” and “deceptive” does not represent a substantive departure from past DOT practice. The definitions simply provide additional clarification to the public and regulated industries, and are not expected to affect the Department’s ability to prohibit unfair and deceptive practices. While clarifying the terms is not expected to lead to changes that would impact the Department, public, or any regulated entity, it provides a foundation for the other elements of this rule pertaining to future rulemaking and enforcement actions.

#### Effects on Future Rulemakings

This final rule will require the Department to use specific definitions of the terms “unfair” and “deceptive” when declaring certain practices to be unfair or deceptive in future discretionary rulemakings.

Specifically, this final rule requires the Department to support a finding of an “unfair” practice by demonstrating that the harm to consumers is (1) substantial; (2) not reasonably avoidable; and (3) not outweighed by offsetting benefits to consumers or competition. Similarly, it requires the Department to support a finding that a practice is “deceptive” by showing that: (1) The practice actually misleads or is likely to mislead consumers; (2) who are acting reasonably under the circumstances; (3) with respect to a material matter.

The Department has declared certain practices to be unfair or deceptive in several prior rulemakings, including the full fare advertising rule (14 CFR 399.84) and oversales rule (14 CFR part 250). In the supporting analysis for these rulemakings, the Department justified its finding of unfairness or deception without using the full three-pronged analysis for unfairness or deception found in this final rule.<sup>48</sup>

In other instances, the Department has based its discretionary regulations on both section 41712 and other statutes. For example, the rule requiring on-time performance information during booking (14 CFR 234.11(b)) was based on both section 41712 and section 41702 (requiring carriers to provide safe and adequate interstate air transportation).<sup>49</sup> While the Department partly relied on a finding of consumer

harm under section 41712 as the basis for that requirement, it did not engage in the full three-part analysis for unfairness found in this final rule.

Demonstrating support for findings of unfairness or deception requires an analysis of data, which is generally collected and organized as part of a regulatory impact analysis (RIA). Factors such as potential harm to consumers, benefits to consumers or competition, whether a consumer can avoid harm, and whether a harm is “material” relate to the economic benefits and costs of regulating a practice. These benefits and costs are analyzed in an RIA and offer a rationale for finding a practice “unfair” or “deceptive.”

The Department customarily prepares a RIA or other regulatory evaluation as part of the E.O. 12866 review process for rulemakings involving aviation consumer protection. Further, the Department’s final rule on “Administrative Rulemaking, Guidance, and Enforcement Procedures” requires that all rulemakings including a supporting economic analysis. The Department will therefore need to continue to collect, organize, and analyze data and facts to address economic impacts.

The Department’s current practice of collecting and analyzing data, either for E.O. 12866 or departmental review, allows it to generate the necessary factual basis to support an explicit discussion of unfair or deceptive findings with little additional effort. While this final rule may result in the Department expending additional resources to prepare future discretionary aviation consumer protection rules and supporting analyses, the resources are expected to be small and more than justified by better, more deliberative internal decisions. Better internal decisions will improve rulemaking efficiency by reducing the resources needed to follow E.O. 12866 processes. The additional procedures required by this rule are expected to result in improved regulations that achieve their goals of protecting consumers without imposing any more burdens on regulated industry than necessary.

This rule does not require that the Department review existing rules to determine whether previous “unfair” or “deceptive” declarations would have been supported by the criteria described above. Existing rules are subject to retrospective review requirements under the Department’s rulemaking procedures found in 49 CFR part 5, DOT Order 2100.6, and other legal requirements, as applicable. The Department will consider whether

<sup>48</sup> See 76 FR 23110 (April 25, 2011).

<sup>49</sup> See 73 FR 74586 (December 8, 2008) (NPRM: “Enhancing Passenger Airline Protections”).

<sup>47</sup> 84 FR 71714 (Dec. 27, 2019).



existing discretionary aviation consumer protection rules such as full fare advertising, oversales and refunds meet the standards found in this rule when performing the retrospective reviews, but it is not possible to judge the impact of this rule on the rules until the Department conducts the reviews. The Department considers many factors when conducting its retrospective reviews, including the continuing need for the rule and whether the rule has achieved its intended outcomes. It is unlikely that an existing rule would fail the standards set forth in this rule without failing existing standards that would prompt the Department to revise or rescind the rule. Judging the impact of this rule is confounded further because some existing rules do not rely solely on section 41712, as is the case with the rule requiring on-time performance information during booking noted above.

Under this rule, future discretionary rulemakings could be subject to a hearing procedure. The rule allows interested parties to request a hearing when the Department proposes a rule to classify a practice as unfair or deceptive, when the issuance of the NPRM raises one or more disputed technical, scientific, economic, or other complex factual issues, or when the NPRM may not satisfy the requirements of the Information Quality Act. Allowing interested parties an opportunity for a hearing ensures that they can test the information informing discretionary consumer protection regulations. However, following this rule's requirements to provide a sufficient factual basis to support an "unfair" or "deceptive" finding should reduce the need for the Department to hold such hearings.

Nevertheless, requests for hearings are expected to occur occasionally. While the Department lacks data that would allow it to distinguish the costs and time of conducting the hearings from the costs of conducting its normal business operations, the Department believes that any incremental costs and time would be small relative to the baseline scenario in which the Department did not enact the rule. Previous discretionary rulemakings involving unfair and deceptive practices in aviation consumer protection have attracted substantial interest from consumer advocates, airline industry advocates, and the general public. The Department engaged with these interested parties without the benefit of a formal process, and the engagements required investments of time and resources by the Department and interested parties. Because these

engagements were informal and with uncertain scopes, they were not as efficient as would be expected under a more formal process as would be the case under this rule. Without a formal process, parties tend to overinvest in preparation, incurring unnecessary costs, or underinvest, leading to additional engagements and administrative costs. For future rulemakings, establishing formal hearing procedures may reduce costs and time for both groups by increasing certainty about opportunities for engagement.

The hearing procedures established in this final rule are less stringent and more flexible than the hearing procedures for high-impact or economically significant rules detailed in the Department's general rulemaking procedures in 49 CFR part 5 and DOT Order 2100.6. In addition, the Department has experience using hearing procedures to supplement traditional notice-and-comment rulemaking, as described earlier for baggage and wheelchair accounting and for potential on-board wheelchair standards. Finally, the hearing procedures will provide consistency in the Department's exercise of its 41712 authority by mirroring the statute's hearing requirement to ensure rulemakings enacted under the same authority ensure due process, and are grounded in fairness and supported by an adequate factual foundation.

The Department believes that its experience with hearings, coupled with reduced complexity of the hearing procedures, will limit the additional staff resources needed to comply with the requirement and prevent it from leading to excessive delays in issuing aviation consumer protection rules. The General Counsel may also decline a hearing request if following the procedures would unreasonably delay the rulemaking. When deciding to decline a hearing request, the General Counsel will balance the impact of the hearing on departmental resources against the potential value of any information to be collected during the hearing process, and consider the quality of evidence presented, including but not limited to that presented by interested parties and in the Department's RIA and other supporting analyses.

#### Effects on Future Enforcement Actions

This final rule adds requirements for future enforcement actions analogous to the requirements for discretionary aviation consumer protection rulemakings. The Department will use the same definitions of unfair and

deceptive when taking enforcement action against an airline or ticket agent for unfair or deceptive practices. In future enforcement actions, the Department would also provide the airline or ticket agent with the opportunity to be heard and to present mitigating evidence. The opportunity for a hearing before a finding that any air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or an unfair method of competition already exists under section 41712. Finally, in future enforcement orders, if a specific regulation does not apply to the practice in question, the Department would explain the basis for its finding that a practice was unfair or deceptive.

As explained in the NPRM, the Department views these measures as a codification of existing practice, rather than a change in policy, because the Department has typically relied on the explicit definitions of "unfair" and "deceptive" in prior enforcement orders. Applying these terms and providing an opportunity for a hearing in enforcement proceedings is largely noncontroversial, and the Department received few comments on this element of the rule at the NPRM stage. The Department does not expect to need to expend additional resources in aviation consumer protection proceedings due to this rule, or expect that the rule will increase the amount of time needed to come to resolution. The Department believes that regulated entities could see some benefit, however, from upfront clarification of the guidelines and criteria that the Department follows when enforcing aviation consumer protection regulations involving unfair and deceptive practices.

This rule is not an E.O. 13771 regulatory action because it does not impose any more than *de minimis* regulatory costs. This final rule provides an additional mechanism for industry to provide input to the Department on its discretionary aviation consumer protection rulemakings. Private industry should not experience more than minimal additional costs relative to the status quo because it already engages in significant information exchange with the Department. Industry has the option of continuing use of historical mechanisms for providing input to discretionary aviation consumer protection, and is not required to make use of the alternatives set forth in this rule. The Department should not experience significant additional costs because it has considerable experience conducting analysis in support of aviation consumer protection rules as well as hearings analogous to those in

this rule. Such efforts are consistent with the Department's normal business operations, and any additional resources needs could be accommodated through a simple and temporary realignment of internal resources.

#### *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 has determined that this rule does not have a significant economic impact on a substantial number of small entities.

#### *C. Executive Order 13132 (Federalism)*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule 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 final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule 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 final rule.

#### *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 final rule 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 to 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.

#### *H. Privacy Act*

Anyone may search the electronic form of all comments received into any of OST's dockets by the name of the individual submitting the comment, or signing the comment if submitted on behalf of an association, business, labor union, or any other entity. You may review USDOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000, at 65 FR 19477–8.

#### *I. Statutory/Legal Authority for This Rulemaking*

This rulemaking is issued under the authority of 49 U.S.C. 40113(a), which grants the Secretary the authority to take action that the Secretary considers

necessary to carry out 49 U.S.C. Subtitle VII (Aviation Programs), including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders.

#### *J. Regulation Identifier Number*

A Regulation Identifier Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in Spring and Fall of each year. The RIN set forth in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### **List of Subjects in 14 CFR Part 399**

Consumer protection, Policies, Rulemaking proceedings, Enforcement, Unfair or deceptive practices.

For the reasons discussed in the preamble, the Department amends 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).

#### **Subpart F—Policies Relating to Rulemaking Proceedings**

■ 2. Section 399.75 is added to subpart F to read as follows:

##### **§ 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 § 399.79.

(b) *Procedural requirements.* When issuing a proposed regulation under paragraph (a) of this section 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) of this section 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 adhere to 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 hearing on the proposed regulation.

(2) *Grant of petition for hearing.* Except as provided in paragraph (b)(3) of this section, 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 (b)(2) of this section 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 paragraph (b)(2) or (3) of this section.

(5) *Hearing notice.* If the General Counsel grants the petition, the General Counsel shall publish notification of the hearing in the **Federal Register**. The document 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 hearing under this section shall be conducted using procedures approved by the General Counsel, 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 a neutral officer to preside over the hearing and shall provide a reasonable opportunity to question the presenters.

(iii) After the hearing and after the record of the hearing is closed, the hearing officer shall place on the docket

minutes of the hearing with sufficient detail as to fully reflect the evidence and arguments presented on the issues, along with proposed findings 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 proposed findings. The complete record of the hearing shall be made part of the rulemaking record.

(7) *Actions following hearing.* (i) Following the completion of the hearing process, the General Counsel shall consider the record of the hearing, including the hearing officer's proposed findings, 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 document 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) *Interagency review process.* The hearing procedures under this paragraph (b)(8) 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 § 399.79.

## Subpart G—Policies Relating to Enforcement

■ 3. Section 399.79 is added to subpart G to read as follows:

### § 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) Informal enforcement proceedings will be conducted pursuant to the policies and procedures found in 49 CFR part 5, subpart D. 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 Consumer Protection 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) of this section; 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 Consumer Protection 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 Consumer Protection may issue a notice instituting an enforcement proceeding before an administrative law judge pursuant to 14 CFR 302.407. After the issues have been formulated, if the matter has not been resolved through pleadings or otherwise, the parties will receive reasonable written notice of the time and place of the hearing as set forth in 14 CFR 302.415.

Issued this 24th day of November, 2020, in Washington, DC, under authority delegated in 49 CFR 1.27(n).

**Steven G. Bradbury,**  
General Counsel.

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## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 3

#### RIN 3038-AE46

#### Exemption From Registration for Certain Foreign Intermediaries

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (CFTC or Commission) is adopting amendments (Final Rule) revising the conditions set forth in the Commission regulation under which a person located outside of the United States (each, a foreign located person) engaged in the activity of a commodity pool operator (CPO) in connection with commodity interest transactions on behalf of persons located outside the United States (collectively, an offshore commodity pool or offshore pool) would qualify for an exemption from CPO registration and regulation with respect to that offshore pool. The Final Rule provides that the exemption under the applicable Commission regulation for foreign

located persons acting as a CPO (a non-U.S. CPO) on behalf of offshore commodity pools may be claimed by such non-U.S. CPOs on a pool-by-pool basis. The Commission is also adopting a provision clarifying that a non-U.S. CPO may claim an exemption from registration under the applicable Commission regulation with respect to a qualifying offshore commodity pool, while maintaining another exemption from CPO registration, relying on a CPO exclusion, or even registering as a CPO, with respect to its operation of other commodity pools. Additionally, the Commission is adopting a safe harbor by which a non-U.S. CPO of an offshore pool may rely upon that exemption, if it satisfies several enumerated factors related to its operation of the offshore commodity pool. The Commission is also adopting an amendment permitting U.S. affiliates of a non-U.S. CPO to contribute initial capital to such non-U.S. CPO's offshore pools, without affecting the eligibility of the non-U.S. CPO for an exemption from registration under the applicable Commission regulation. The Commission is also adopting amendments to the applicable Commission regulation originally proposed in 2016 that clarify whether clearing of commodity interest transactions through a registered futures commission merchant (FCM) is required as a condition of the registration exemptions for foreign intermediaries, and whether such exemption is available for foreign intermediaries acting on behalf of international financial institutions.

**DATES:** The effective date for this Final Rule is February 5, 2021.

**FOR FURTHER INFORMATION CONTACT:** Joshua B. Sterling, Director, at 202-418-6056, [jsterling@cftc.gov](mailto:jsterling@cftc.gov); with respect to the finalization of the 2016 Proposal: Frank N. Fisanich, Chief Counsel, at 202-418-5949 or [ffisanich@cftc.gov](mailto:ffisanich@cftc.gov); with respect to all other aspects of this release: Amanda Lesher Olear, Deputy Director, at 202-418-5283 or [aolear@cftc.gov](mailto:aolear@cftc.gov); Pamela Geraghty, Associate Director, at 202-418-5634 or [pgeraghty@cftc.gov](mailto:pgeraghty@cftc.gov); Elizabeth Groover, Special Counsel, at 202-418-5985 or [egroover@cftc.gov](mailto:egroover@cftc.gov), Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW, Washington, DC 20581.

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## I. Background

### A. Statutory and Regulatory Background

Section 1a(11) of the Commodity Exchange Act (CEA or Act)<sup>1</sup> defines the term "commodity pool operator" as any

<sup>1</sup> 7 U.S.C. 1a(11). See also 17 CFR 1.3 (defining "commodity interest" to include, inter alia, any contract for the purchase or sale of a commodity for future delivery, and any swap as defined in the CEA); Adaptation of Regulations to Incorporate Swaps, 77 FR 66288, 66295 (Nov. 2, 2012) (discussing the modification of the term "commodity interest" to include swaps). The Act is found at 7 U.S.C. 1, *et seq.* (2018), and the Commission's regulations are found at 17 CFR Ch. I (2020). Both are accessible through the Commission's website, <https://www.cftc.gov>.