



Consumer Federation of America



**Comments of Consumer Reports, Consumer Federation of America,
And U.S. PIRG**

**Department of Transportation Notice of Proposed Rulemaking
on
Defining Unfair or Deceptive Practices
Docket No. DOT-OST-2019-0182**

May 28, 2020

Consumer Reports, Consumer Federation of America, and U.S. PIRG submit these comments in the above-referenced matter. The Department's authority to determine and take enforcement action against unfair and deceptive practices under 49 U.S.C. 41712 is a critical means of protecting consumers. Transparency, clarity, and due process all certainly help promote informed compliance and appropriate conduct on the part of airlines and ticket agents. But current Department policies and procedures are already sufficient in this regard. The proposed new criteria and processes outlined in the Notice are not necessary for promoting these objectives in any way that cannot already be achieved – and essentially is already being achieved – without them. Moreover, imposing them on the Department runs substantial risk of hampering the appropriate exercise of its authority.

The Department has acted appropriately in its rulemaking and enforcement

Importantly, despite the repeated general assertions by the airline industry trade association Airlines for America (A4A), in its voluminous broadside criticisms filed with the

Department in December 2017,¹ there are no specific examples of instances in which the Department is shown to have acted arbitrarily or in excess of its authority. Indeed, if it had, the airline would always have the right to get the Department's action overturned on judicial review.²

The rules the Department has promulgated under its section 41712 authority have been well-founded, and provide important consumer protections. For example:

- Requiring full-fare advertising avoids misleading consumers as to the price they will pay – including add-on fees – and facilitates comparison shopping.
- Putting limits on tarmac delays protects passengers from being kept in extended limbo and subjected to extreme discomfort.
- Requiring compensation to ticketed passengers denied boarding due to over-selling incentivizes airlines to constrain their overbooking and ensures passengers whose travel plans are disrupted are reasonably compensated.

Nor has the Department's exercise of its enforcement authority been out-of-bounds. In one prominent example cited in its 2017 submission, A4A asserts that in July 2017:

DOT fined Frontier \$400,000 for failing 1) to provide the required written notice and 2) to inform passengers that they had the right to cash compensation rather than vouchers, even though the electronic vouchers that Frontier provided exceeded by many multiples the value of DOT's required denied-boarding compensation amount.³

The Department's order reveals, however, that the enforcement action was based on more than 200 complaints, received over a two-year period, showing that Frontier had repeatedly failed to comply with the procedures required when it oversells a flight. Often, it denied boarding to ticketed passengers without first asking, as required, if any passengers would *voluntarily* give up seats for compensation. Passengers forced to give up seats were often given a voucher, without being offered the option of cash or check, as required – and some Frontier agents mistakenly told the Department that a cash/check option was *not*

¹ Proposals for Fundamental Reform of DOT Economic Regulation and Enforcement, Comments of Airlines for America, Docket No. DOT-OST-2017-0069 (Dec. 1, 2017)[hereinafter "A4A December 2017 comments"].

² 5 U.S.C. § 706.

³ A4A December 2017 comments, Part 1, Appendix B, p. 17.

required. And when passengers *did* agree to voluntarily give up seats in exchange for a voucher, often the agent neglected to properly note it in the airline's reservation system, so that it often took several weeks of effort for the passenger to track down the record and be able to use the voucher. The enforcement action also involved 375 complaints, received during the same two-year period, about the airline failing to provide required wheelchair assistance to passengers with disabilities. The enforcement action was settled by consent decree; Frontier had the option to challenge it, but chose not to.⁴

Given that there is no substantiated indication of overreaching by the Department in enforcing section 41712, much less any pattern of overreaching or abuse warranting correction, it is not clear why any of these proposals needs to be formalized. Every one of them is something that can be more flexibly implemented, when and as appropriate, under the current enforcement regime. The effect of formalizing them is likely to be unnecessarily constraining the Department's enforcement authority, and subjecting consumers to unnecessary harm.

The FTC's rule regarding its authority is not an apt model for the Department

Despite similarities between the Federal Trade Commission's statutory authority and the Department's, the FTC's rule regarding how it applies that authority is not an apt model for the Department to rigidly adopt.

It should be noted that the Department's enforcement authority is already more limited than the FTC's in an important respect. The FTC has authority to take enforcement action against the first instance of an act that it determines to be unfair or deceptive. As the Department explains in the Notice, The Department has authority only if the unfair or deceptive conduct "rise[s] to the level of a practice."⁵ The Department explains that this generally requires proof that multiple consumers have been harmed at different times by the same repetitive conduct, or that the conduct reflects company policy.⁶ This additional hurdle largely eliminates even a theoretical potential for any "surprise" enforcement action to be taken against some isolated infraction that the airline could not have reasonably anticipated and taken steps to avoid or address. Of note, the airlines do not propose conforming the Department's enforcement authority to the FTC's in this respect.

More importantly, the FTC's authority differs from the Department's in a more fundamental respect: it is non-exclusive. As important as the FTC is as a source of consumer

⁴ Order 2017-7-8, July 21, 2017, <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/283986/eo2017-7-8.pdf>.

⁵ Fed. Reg. Vol. 85, No. 40, at 11885.

⁶ *Id.*

protection, it is not the sole source. Under our federal system, states have independent authority to protect their own citizens. They can supplement the FTC's authority by enacting and enforcing their own consumer protection laws prohibiting unfair or deceptive acts or practices. And most or all states have done so.⁷

In contrast, this state authority does not extend to protecting their citizens against harmful unfair and deceptive conduct by airlines. Because this authority is expressly preempted – denied the states – by the Airline Deregulation Act,⁸ consumers are entirely dependent on the Department for legal protection. In a number of instances, states have used their own authority to take enforcement action against unfair or deceptive business acts and practices that may have been beyond the reach of the FTC's interpretation of its authority.⁹ And more importantly, the states are free to do so as warranted by facts that come to their attention warranting enforcement. If the Department denies this enforcement authority flexibility to itself, there is no one to step up and fill the gap. (Of note, the airlines also do not propose conforming consumer protection law in this respect, either.)

For these reasons, we urge the Department to refrain from unnecessarily constraining its enforcement discretion. Instead, the Department should continue treating the FTC definitions of unfair and deceptive as generally useful guidance, but not turn them into a rigid line that would require the Department to forgo due consideration of harmful conduct that might fall outside that rigid line.

Adding Additional Hearing Rights Would Unnecessarily Impede Effective Rulemaking

Likewise, we urge the Department to refrain from erecting an unnecessary new procedural hurdle to its rulemaking authority in this area. Specifically, formalizing a new process for seeking a hearing on the record in the midst of any rulemaking is not necessary to ensure that all points of view can be expressed and carefully considered.

The public notice and comment process set forth in the Administrative Procedures Act (APA) has worked well for 75 years.¹⁰ It allows all views to be publicly aired and carefully

⁷ See generally Butler and Wright, Are State Consumer Protection Acts Really Little-FTC Acts?, 63 Fla. L. Rev. 163 (2011)(arguing that some of the state laws are too strong); National Consumer Law Center, Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws (2018)(arguing that some of the state laws are too weak).

⁸ 49 U.S.C. § 41713. E.g., *Morales v. TWA*, 504 U.S. 374 (1992); *American Airlines v. Wolens*, 513 U.S. 219 (1995); *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014).

⁹ See generally Cox, Widman, Totten, Strategies of Public UDAP Enforcement, 55 Harv. J. on Legis. 37 (2018); Dee Pridgen, The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws, *Antitrust L.J.* 81:911 (2017).

¹⁰ 60 Stat. 238-239, June 11, 1946.

considered. The APA's process ensures that those views are all taken appropriately into account, and that any resulting rule is not arbitrary. And any affected party can seek judicial review whenever it believes that to be warranted.

The notice and comment process is accessible to all interested parties, regardless of their financial and attorney resources. Of course, parties with superior financial and legal power can bring it to bear even in notice and comment; but the disparity is far less severe than with a live hearing, where the powerful can marshal relatively vast resources that consumer and other public interest groups are simply unable to come close to matching. Moreover, under current law, an interested party is always free to request an oral hearing, and the agency is always free to hold one whenever it deems that to be helpful.¹¹

Adding the proposed new formalized process for making and responding to additional hearing requests would be unlikely to yield useful information that cannot already be appropriately submitted and considered in the traditional APA rulemaking process. Instead, it is likely to tilt the disparity even further in favor of parties that have more powerful financial and legal resources.

Under the Department's proposal, the General Counsel would be required to hold an oral hearing on the record if an interested party 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.¹²

While these factors might all be relevant considerations, rigidifying them into the basis for a procedural right gives them outsized import. We can reasonably expect that in any proposed rulemaking, the airline industry will be able to find some issue that it can deem "scientific, technical, economic, or factual" to place in dispute. Therefore, we can reasonably expect that there would *always* be a request for a hearing.

¹¹ 5 USC 553(c).

¹² Proposed 14 CFR § 399.75(b)(2).

The hearing request could be denied if the General Counsel determines, with a detailed explanation, that (i) it “would not advance the consideration of the proposed rule” or (ii) “would unreasonably delay completion of the rulemaking.” But we could reasonably expect that a well-financed party pressing such a request would exert tremendous pressure on the General Counsel to grant it – and if denied, to appeal based on the new specific factors laid out in the rule. So denials, if any, would be confined to requests that are clearly frivolous and dilatory. And we could expect new hearings, likely multiple hearings, to become the norm.

This would inevitably cause significant delay in important rulemakings, and result in significant consumer harm that the Department is trying to prevent.

Conclusion

The airlines already have many avenues, formal and informal, which they make ample use of, to “establish a more collaborative approach to efficiently resolving customer service issues,”¹³ without the need for a more formalized restriction that would hamstring the Department’s sound and effective exercise of the enforcement authority entrusted to it by Congress.

Respectfully submitted,

George P. Slover
Senior Policy Counsel
Consumer Reports

Susan Grant
Director of Consumer Protection and Privacy,
Consumer Federation of America

Edmund Mierzwinski
Senior Director, Federal Consumer Program
U.S. PIRG

¹³ A4A December 2017 comments, Part 1, p. 38.