

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

))))))	Docket DOT-OST-2019-0182
Notice of Proposed Rulemaking		

COMMENTS OF THE NATIONAL CONSUMERS LEAGUE AND CONSUMER ACTION

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Executive Summary

The Department of Transportation (“DOT” or “Department”) is uniquely positioned as the sole consumer protection agency with jurisdiction over the American airline industry. As such, it plays a critical role in helping the flying public seek redress when they encounter unfairness or deception in the air travel marketplace. The Department’s ability to regulate in this area is based in its § 41712 authority¹ to investigate and decide whether a domestic of foreign air carrier or ticket agent in engaged in unfair or deceptive acts or practices. Contrary to industry claims, the record of DOT enforcement activity shows that the Department has been very restrained in the use of this authority.

Given that DOT provides the sole avenue for consumer protection vis-à-vis the airline industry, we are very concerned that this proposal would significantly reduce the Department’s ability to effectively regulate this industry. In addition, public interest commenters believe that the DOT’s rationale for this proceeding is fatally flawed, based as it is in the airlines’ desire to further deregulate an already sparsely-regulated industry.

Even were we to take at face value the Department stated goal of providing regulated entities and other stakeholders with greater “regulatory certainty,” the manner in which the DOT proposes to do so is also flawed. The assumption that the Federal Trade Commission Act’s unfairness and deception definitions and the Commission’s enforcement and rulemaking procedures should be adopted by the DOT ignores the fundamental differences in the agencies’ jurisdictions and abilities to regulate in their respective economic spheres.

The proposed rules would not benefit consumers. Instead, they would give airlines even greater incentives to engage in the kinds of unfair and deceptive practices that Congress intended § 41712 to address. We therefore urge the Department to terminate this rulemaking.

¹ 49 U.S.C. § 41712. Online: <https://www.law.cornell.edu/uscode/text/49/41712>.

Introduction

The National Consumers League and Consumer Action (“public interest commenters”) hereby submits the following comments in response to the *Notice of Proposed Rulemaking* (“NPRM”) adopted by the Department of Transportation (“DOT” or “Department”) in the above-captioned proceeding.

Founded in 1899, NCL is America’s pioneering consumer and worker advocacy organization. Our non-profit mission is to promote social and economic justice for consumers and workers in the United State and abroad.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low- and moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

I. The Stated Rationale for Launching This Proceeding is Fatally Flawed and Undermines DOT’s Consumer Protection Authority

The DOT’s stated, and apparently sole, rationale for launching this proceeding is comments filed by the industry’s trade group, Airlines for America (“A4A”).² A4A’s comments urge the Department to adopt policies defining unfairness and deception consistent with the Federal Trade Commission’s and Federal courts’ interpretations of the FTC Act’s Sec. 5 authority.³ Based on a review of the comment record from the DOT’s October 2017 *Notice of Regulatory Review*,⁴ it appears that A4A was the only commenter (out of nearly 3,000 comments) to request such a rulemaking.

² NPRM at 4.

³ Comments of A4A. Docket DOT-OST-2017-0069-2753. Pg. 29. Online: <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2753>.

⁴ 82 FR 45750.

That the Department would launch such a far-reaching proceeding based on the comments of a single industry stakeholder suggests that the proposed rules are not intended simply to “provide regulated entities and other stakeholders with greater clarity and certainty” about the DOT’s exercise of its § 41712 authority.⁵ Instead, it appears that the DOT intends this proceeding to satisfy the deregulatory wishes of the airline industry⁶ by increasing the costs to the Department of conducting future enforcement actions and rulemakings under § 41712 . Should the DOT’s proposed rules be adopted, the DOT would almost certainly exercise its consumer protection authority even more tepidly than it currently does.

This outcome is not mere conjecture. Indeed, the DOT states as much in the NPRM, writing:

“This rulemaking could impose a social cost on the public if increased procedural requirements are adopted, as the opportunity cost of these enhanced procedural requirements could translate into the Department performing fewer enforcement and rulemaking actions. In addition, enhanced procedures would likely lengthen the time needed to complete these actions.”⁷

The probability that the DOT will reduce its already lackluster consumer protection enforcement and rulemaking under § 41712 is high, especially given the Department’s unique position as the sole consumer protection agency with jurisdiction over the U.S. airline industry. The DOT’s rationale for opening this proceeding is thus fatally flawed. This factor alone should be enough to convince the Department to terminate the proposed rulemaking immediately.

II. The Application of § 41712 Has Significantly Benefited Consumers and Does Not Require Additional Clarification or Codification

As the sole consumer protection agency with jurisdiction over the American airline industry, the DOT plays a unique and important role in promoting the interests of the flying

⁵ NPRM at 1-2.

⁶ Comments of A4A. (“DOT Should Rein In Its Overreaching Approach to Service Regulation”). Docket DOT-OST-2017-0069-2753. Pg. 6. Online: <https://www.regulations.gov/document?D=DOT-OST-2017-0069-2753>.

⁷ NPRM at 26.

public. In recent years, the DOT has exercised its § 41712 authority to promulgate important consumer protection rules that have benefited millions of American consumers. In spite of this, A4A argues that regulations such as those pertaining to tarmac delays,⁸ full-fare advertising,⁹ the prohibitions on post-purchase price increases,¹⁰ and on-time performance reporting requirement¹¹ are excessive exercises of the DOT's authority under § 41712.

In reality, the Department's actions were rooted in clear evidence of consumer harm and were appropriate uses of the DOT's authority to regulate unfair and deceptive acts and practices. These regulations were developed slowly and deliberately with adequate opportunity for public comment. For example, the tarmac delay rule was enacted after numerous incidents in which passengers were required to remain on board airplanes in deplorable conditions for hours.¹² Following the enactment of the tarmac delay rule, such inhumane incidents decreased dramatically.¹³ Similarly, the full-fare advertising rule was enacted in response to deceptive airline practices such as advertising a transatlantic flight for \$69, when the real price with taxes and fees was \$751.¹⁴

The record is clear that the DOT's use of its § 41712 authority in enacting the rules noted above has been judicious and developed in response to clear evidence of deception and unfairness in the air travel marketplace. The DOT should not simply accept A4A's characterization of the agency's actions as capricious and unmoored from sound public policy considerations.

⁸ 14 CFR § 259.4.

⁹ 14 CFR § 399.84.

¹⁰ 14 CFR § 399.88.

¹¹ 14 CFR § 243.11.

¹² See, e.g. Marco, Meg. "US Airways Cancels 530 Flights, Lets Passengers Sit on Tarmac 6 Hours With Overflowing Toilets, No Water," *Consumerist.com*. August 10, 2007. Online: <https://consumerist.com/2007/08/10/us-airways-cancels-530-flights-lets-passengers-sit-on-tarmac-6-hours-with-overflowing-toilets-no-wat/>.

¹³ Davidson, Jacob. "How the U.S. Quietly Fixed the Most Annoying Thing About Air Travel," *Money*. January 6, 2015. Online: <https://money.com/abu-dhabi-plane-delay-tarmac/>.

¹⁴ Leocha, Charlie. "Know the full-fare advertising rule for airlines." Travelers United. November 21, 2019. Online: <https://www.travelersunited.org/full-fare-advertising-rule-airlines/>.

Even if the Department takes at face value A4A's assertion that there is a need for clarification in the regulations, the DOT has already provided that clarity. As the NPRM notes, the Department recently took action to address the perceived lack of regulatory certainty regarding the application of the Department's § 41712 authority.¹⁵ Indeed, in December 2019, the DOT updated its procedural requirements for rulemaking and enforcement actions under the authority of § 41712.¹⁶ These align the DOT's enforcement and rulemaking procedures with the Department's regulatory philosophy.

Less than two months after these new procedural requirements took effect, the DOT issued this NPRM. DOT has not allowed sufficient time to evaluate the effectiveness of these updated procedures. Indeed, many of the new procedures required by the December 2019 Rule already codify the best practices around economic analyses and opportunities for appropriate public participation that this NPRM envisions. The proposed rules are therefore, at best, duplicative of existing Departmental policy.

III. Fundamental Differences Between the Federal Trade Commission and Department of Transportation Argue Against Wholesale Adoption of FTC Act's Unfairness and Deceptive Acts and Practices Definition.

The NPRM correctly notes that § 41712 is closely modeled after Section 5 of the FTC Act, 15 U.S.C. Sec 45 ("Section 5").¹⁷ While the FTC and DOT's authorizing statutes may be similar in this context, there are fundamental differences between the two agencies that must be accounted for. Simply adopting the FTC's interpretation and practices in the exercise of the DOT's authority to regulate unfair and deceptive acts and practices ignores these important differences.

First, the jurisdiction of the two agencies is significantly different. The FTC has authority to regulate unfair and deceptive acts and practices in virtually the entire economy, excluding certain industry sectors such as common carriers (including airlines) and non-profit

¹⁵ NPRM at 5-6.

¹⁶ 84 FR 71714.

¹⁷ NPRM at 6.

organizations where the FTC lacks jurisdiction. In comparison, the DOT's jurisdiction under § 41712 is limited only to air carriers and (concurrently with FTC) ticket agents. The Commission's broad Section 5 authority is appropriate given the vast scope of its jurisdiction. In light of the breadth of this authority, the FTC decided to clarify its enforcement policy by adopting Policy Statements in 1983 on unfairness and deception. Congress codified the unfairness policy statement further in 1994 as USC § 45(n). In addition, the FTC Act itself outlines procedures for the promulgation of rules under Section 5 with specificity. By comparison, the DOT's § 41712 authority is already constrained by the fact that it only applies to unfairness and deception in the air travel marketplace.

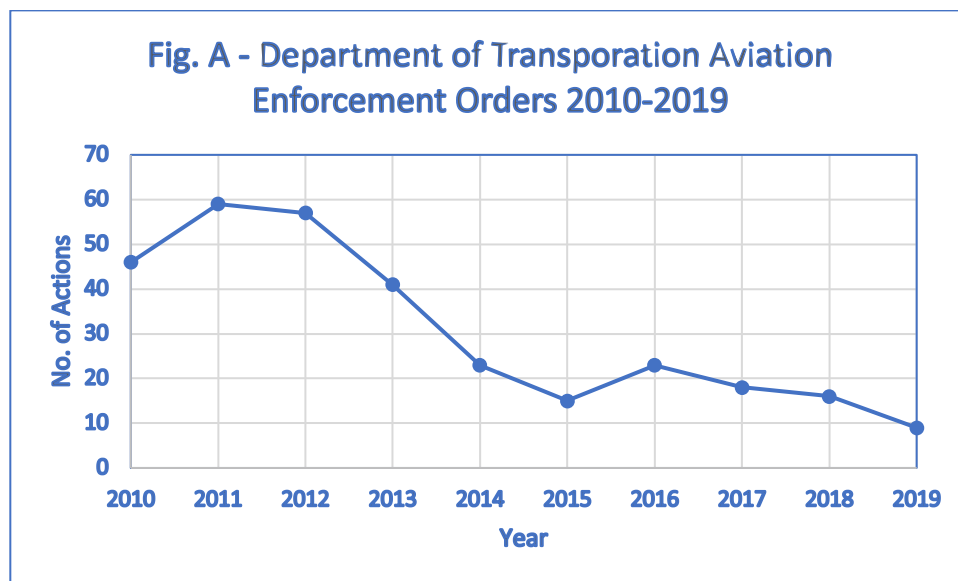
Second, the FTC's consumer protection authority and capacity are supplemented by the authority of state attorneys general and private litigants. State consumer protection agencies play a critical role in regulating unfairness and deception in the marketplace when federal agencies do not act. The FTC Act and state consumer protection laws are further backstopped by private rights of action in many states, allowing consumers (both individually and collectively) to seek redress in the courts for marketplace harms. By contrast, the DOT is the sole consumer protection agency in the United State with authority to regulate unfairness and deception in the air travel marketplace. States are preempted from economic regulation of the airline industry by the Airline Deregulation Act of 1978. And because of this broad federal preemption, consumers' options for seeking redress are limited to the federal courts (where significant barriers exist for individual or class-action plaintiffs) and small-claims courts. As a result, the kind of broad class-based litigation that has promoted consumer protection in other areas of the economy is virtually non-existent in the airline sector.

IV. The Low Number of DOT Enforcement Actions and Civil Penalties Runs Counter to Industry Claims of Regulatory Overreach

In its comments, A4A describes a DOT that has expanded its regulatory reach, thanks to an "overly expansive interpretation of its authority to regulate unfair and deceptive acts and practices under § 41712." A4A further paints a picture of a DOT that has disregarded its

obligation to demonstrate that claimed public interest benefits of its regulations outweigh the “thousands of costly and burdensome economic and service regulations” imposed on regulated entities.¹⁸

Such arguments do not withstand scrutiny. In truth, the DOT has been extremely restrained in the exercise of its § 41712 authority. In 2019, the Department issued the fewest aviation enforcement orders in a decade, totaling just \$2.2 million in civil penalties.¹⁹ Indeed, the frequency with which the DOT issues enforcement orders has steadily declined since 2010 (See. Fig. A).



Source: Department of Transportation. “Aviation Enforcement Orders” (Accessed May 26, 2020) Online:

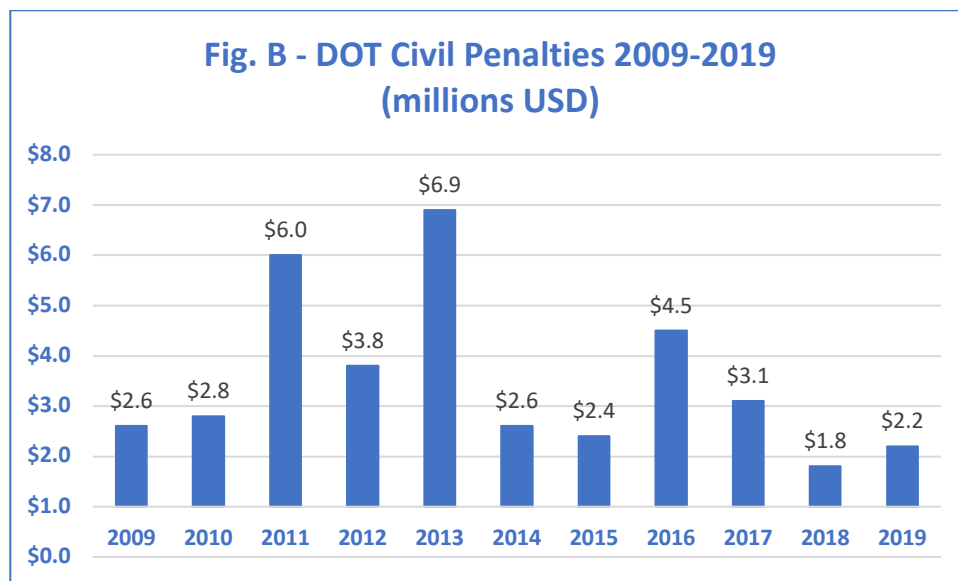
<https://www.transportation.gov/airconsumer/enforcement-orders>

If the DOT had engaged in the aggressive regulation-by-enforcement policy that A4A claims, one would expect to see a steadily rising number of enforcement actions over the past decade. Instead, the opposite is true.

¹⁸ See, e.g. Comments of A4A. Docket DOT-OST-2017-0069-2753. Pgs. 3-4.

¹⁹ Elliott, Christopher. “Airline fines have fallen to historic lows. That could be bad news for travelers.” *Washington Post*. December 4, 2019. Online: https://www.washingtonpost.com/lifestyle/travel/as-passenger-dissatisfaction-soars-airline-fines-hit-a-historic-low/2019/12/04/1a8c0922-1519-11ea-9110-3b34ce1d92b1_story.html.

A4A’s claim that aggressive DOT enforcement under § 41712 has created “costly and burdensome” regulations that outweigh the consumer protection benefits of regulation is equally indefensible. In terms of civil penalties, 2019 was the second-cheapest year in more than a decade for the airline industry at \$2.2 million in fines levied by the DOT, exceeding only 2018’s \$1.8 million. (See Fig. B)



Source: Department of Transportation. “Aviation Enforcement Orders” (Accessed May 26, 2020) Online: <https://www.transportation.gov/airconsumer/enforcement-orders>

If DOT enforcement actions are “costly and burdensome” to the airline industry, it is not apparent from the fines that the Department has levied over the last eleven years. Since 2009, DOT has imposed a total of \$38.7 million in civil penalties on airlines it oversees. For purposes of comparison, the eleven biggest U.S. airlines collected \$1.4 billion in baggage fees alone in the fourth quarter of 2019.²⁰ The threat of civil penalties, at least in monetary terms, is simply a drop in the bucket compared to overall airline revenues.

²⁰ Bureau of Transportation Statistics, Schedule P-1.2. Online: <https://www.bts.gov/content/baggage-fees-airline-2019>.

Indeed, the NPRM implicitly acknowledges that the DOT's current § 41712 enforcement practices do not impose significant costs on the airlines, stating "[t]he Department does not anticipate that this rulemaking will have an economic impact on regulated entities."²¹

If the Department's goal in this proceeding of providing "greater clarity and certainty" is to be taken at face value, it must also be expected that the proposed rules would have a positive economic impact on regulated entities (e.g. by reducing the threat of civil penalties and regulatory compliance costs). Instead, the DOT claims this proceeding will produce neither a negative nor a positive impact on regulated entities. This begs the question: If there is indeed a need for "greater clarity and certainty," shouldn't the enforcement metrics reflect this? We propose that the DOT's claim that airlines should have "greater clarity and certainty" is, in fact, simply a smokescreen for granting A4A's wish to further reduce the already infrequent number of consumer protection actions taken by DOT.

V. Adoption of Proposed Formal Hearing Procedures Will Create Strong Disincentives for DOT to Exercise Its Consumer Protection Authority.

The NPRM proposes a number of regulatory procedures that, if adopted, would likely further constrain the DOT's aviation consumer protection activity. The effect of these procedures will be to require that unnecessarily burdensome hurdles be overcome before any § 41712 enforcement action or rulemaking is completed by the Department. The proposed new procedures include:

- Allowing interested parties to request a formal hearing to address disputes over scientific, technical, economic or other factual issues when the Department issues a discretionary aviation consumer protection rulemaking;
- Requiring the DOT to publish a detailed explanation of the basis for a finding that a practice is unfair or deceptive when the Department issues a discretionary aviation consumer protection rulemaking; and

²¹ NPRM at 26.

- Requiring the DOT to publish an articulation of the Department’s basis for concluding that a particular practice is unfair or deceptive in aviation consumer protection enforcement proceedings.

These are unnecessary given the Department’s record of restrained use of its § 41712 authority. We expect that the record created by these new procedures will be scrutinized by regulated entities to identify every opportunity challenge the Department’s conclusions in court.

A comparison of the proposed rules to the FTC’s constrained rulemaking ability offers a cautionary tale. The Commission’s ability to promulgate discretionary rules regulating unfairness or deception is, in practice, is extremely limited since such proceedings are subject to the extensive hurdles posed by the Magnuson-Moss Warranty Federal Trade Commission Improvements Act (“Mag-Moss”).²² An analysis of rulemakings completed before and after the implementation of Mag-Moss rulemaking procedures shows the impact of such requirements on the ability of the FTC to exercise its Section 5 authority. Of the surviving rules promulgated by the Commission prior to Mag-Moss, the average rule took 2.94 years to complete. The seven post Mag-Moss Act rules were completed in an average of 5.57 years.²³

By comparison, when an FTC rulemaking is specifically mandated by Congress, the Commission’s ability to promulgate rules is significantly less constrained. For example, a sampling of twelve FTC Administrative Procedure Act (“APA”) rulemakings mandated by Congress between 1992 and 2009 took an average of less than ten months to complete.²⁴ The DOT’s exercise of its § 41712 authority is subject to the APA by default. This gives the Department flexibility to react relatively quickly to unfairness and deception via consumer

²² Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301-2312 (2012)).

²³ Lubbers, Jeffrey S. It’s Time to Remove the “Mossified” Procedures for FTC Rulemaking. The George Washington Law Review. Pgs. 1987, 1989. January 11, 2016. Online: <https://www.gwlr.org/its-time-to-remove-the-mossified-procedures-for-ftc-rulemaking/>.

²⁴ *Ibid.* 1991-1996.

protection rulemakings. This is entirely appropriate given the limited scope of the DOT's authority over the air travel marketplace. Nonetheless, the proposed rules would apply Mag-Moss style hurdles to DOT rulemaking. Enacting such barriers to DOT enforcement and rulemaking activity would inhibit the Department's ability to protect consumers in the air travel marketplace.

Taken together, these new procedures are likely to reduce the Department's already limited appetite for exercising its § 41712 authority to protect consumers in the airline marketplace. The fear of costly litigation is likely to have a chilling effect on rulemakings and enforcement proceedings. Even in cases where the legal risk is judged acceptable, the Department will need to balance the expenditure of additional resources to comply with the new Mag-Moss style procedural requirements against the consumer protection benefits of such actions. As a result, the Department will likely engage in even fewer consumer protection rulemakings and enforcement actions, a grim outcome for consumer protection.

Conclusion

As America's only consumer protection agency with authority to regulate unfairness and deception in the airline marketplace, the DOT is uniquely positioned to correct many of the harms that regularly befall airline passengers. While the public interest commenters believe that Department has exercised its § 41712 authority far too infrequently in recent years, the DOT retains a crucial role in promoting consumer protection in the airline industry.

For all of the reasons cited above, it is troubling that the Department is contemplating new rules that would further hobble its ability to protect the interests of the flying public. To add insult to injury, this NPRM appears to be prompted by the wishes of the regulated industry itself to be freed from its obligations to the flying public and to make its own rules without any federal oversight. In sum, public interest commenters do not believe that the proposed rules are necessary and urge the DOT to terminate this proceeding.