

**Before the
OFFICE OF THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590**

In the Matter of)	
)	
)	Docket No. DOT-OST-2019-0182
Defining Unfair or Deceptive Practices)	
)	85 Fed. Reg. 11,881
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**COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE**

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Introduction

On behalf of the Competitive Enterprise Institute (“CEI”), I respectfully submit these comments in response to the Office of the Secretary of Transportation’s (“OST”) Notice of Proposed Rulemaking on Defining Unfair or Deceptive Practices (“NPRM”).¹

CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective.² CEI’s interest in OST’s Aviation Consumer Protection Authority (“ACPA”) dates back several years, following a series of questionable rulemakings initiated under the ACPA.³ Our comments below broadly support the ACPA rule changes contemplated in the NPRM.

Proposed ACPA Rule Revisions Would Benefit Consumers, Producers, and Regulators

In 1978, Congress enacted the Airline Deregulation Act, laying the basis for a greatly expanded, more competitive, and lower-priced airline industry. But in recent years, criticism has mounted over allegations that OST has increasingly misused its authority to protect consumers from unfair or deceptive practices to subvert airline deregulation. Recent OST rulemakings on airfare advertising, ticket refundability, and tarmac delays have been cited by critics as examples of a backdoor re-regulatory trend at OST.⁴

At the International Air Transport Association Legal Symposium in New York on February 20, 2020, Transportation Secretary Elaine Chao announced that OST will propose a rule to update policies and procedures for the ACPA,⁵ which refers to OST’s statutory authority under 49 U.S.C. § 41712 to police unfair or deceptive practices.

This proposal would align OST’s authority with a similar authority long held by the Federal Trade Commission (“FTC”), improving transparency and accountability for regulated entities, consumers, and regulators alike. The FTC Act amendments of 1994,

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1. Defining Unfair or Deceptive Practices, *Notice of Proposed Rulemaking*, DOT-OST-2019-0182, 85 Fed. Reg. 11,881 (Feb. 28, 2020) [hereinafter NPRM].
 2. See About CEI, <https://cei.org/about-cei> (last visited Apr. 15, 2020).
 3. Marc Scribner, *Congress Must End Department of Transportation’s Abuse of “Unfair and Deceptive Practices” Authority*, Competitive Enterprise Institute blog (May 21, 2014), available at <https://cei.org/blog/congress-must-end-department-transportations-abuse-unfair-and-deceptive-practices-authority>.
 4. *Id.*
 5. Remarks as Prepared for Delivery by U.S. Secretary of Transportation Elaine L. Chao to the International Air Transport Association (IATA) Legal Symposium, U.S. Department of Transportation website (Feb. 20, 2020), available at <https://www.transportation.gov/briefing-room/international-air-transport-association-iata-legal-symposium> (last visited Apr. 15, 2020).

among other things, codified longstanding internal FTC policy in dealing with claims of unfair or deceptive acts or practices and a growing body of case law.

Specifically, two necessary standards of proof to the broad statutory prohibition on unfair or deceptive acts and practices were added at 15 U.S.C. § 45(n). The first requires that in order for conduct to be qualify as unfair or deceptive, it must be “likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves.” The second requires that conduct “not [be] outweighed by countervailing benefits to consumers or to competition.”

These reforms enjoyed broad bipartisan support. Similar language was included in the Dodd-Frank Act of 2010 covering the enforcement responsibilities of the Consumer Financial Protection Bureau.⁶ Unfortunately, while bipartisan recognition of this problem exists in virtually every other consumer protection context at the federal level, Congress to date has not taken up reform to OST’s similar Section 41712 ACPA.

This failure to act enabled regulators in recent years to engage in a variety of re-regulatory activities. These include new restrictions on airfare advertising and how consumers may be informed of taxes and fees on their air travel,⁷ outlawing true nonrefundable ticketing and thereby incentivizing carriers to increase airfares,⁸ and an inflexible tarmac delay rule suspected of increasing flight cancellations.⁹ All of these new consumer protection regulations have been criticized as perversely harming consumers and/or competition, but without the FTC-style standards of proof, the scales were tipped in favor of those seeking new economic regulations.¹⁰

Making matters worse, the evolution of the aviation travel services market in the Internet age has created a conflict between OST and FTC jurisdictions over online ticket agents and ticket marketing. The FTC has broad authority over these activities and is the expert Internet commerce regulator in the U.S., although in the case of online ticket agents, it has abdicated this responsibility to OST. Improving regulatory consistency provides another compelling reason for OST to align its ACPA rulemaking and enforcement powers with similar authorities long held by the FTC, although there is a case for Congress to eliminate this regulatory redundancy by authorizing the FTC as the sole consumer protection regulator of online ticket agents.¹¹

6. 12 U.S.C. § 5531(c)(1).

7. 14 C.F.R. § 399.84(a).

8. 14 C.F.R. § 259.5(b)(4).

9. 14 C.F.R. § 259.4(b)(1).

10. Scribner, *supra* note 3.

11. James C. Cooper, *The Costs of Regulatory Redundancy: Consumer Protection Oversight of Online Travel Agents and the Advantages of Sole FTC Jurisdiction*, 17 N.C. J.L. & TECH. 179 (2015).

OST's proposal would add comparable standards of proof to Section 41712 ACPA enforcement and rulemaking.¹² The NPRM also proposes codifying internal agency procedures for allowing alleged violators to present evidence defending themselves against possible enforcement or rulemaking activities derived from OST's ACPA.¹³

To be sure, both of these proposed amendments to 14 C.F.R. Part 399 would improve airline and ticket agents' defensive positions at the Department and in court, but it will also require officials to more clearly explain themselves along the way and give consumers better insight into how decisions are made that affect air travel service prices and quality.

Conclusion

For these reasons, we strongly support the NPRM's contemplated changes to ACPA rulemaking and enforcement procedures as beneficial to consumers, regulated entities, and regulators. We appreciate the opportunity to submit comments to OST on this matter and look forward to further participation.

Respectfully submitted,

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12. NPRM, *supra* note 1, at 11,889–90.

13. *Id.*