

**DEPARTMENT OF TRANSPORTATION**

**4910-9X**

**Office of the Secretary**

**14 CFR Part 399**

**[Docket No. DOT-OST-2021-0142]**

**RIN 2105-AF03**

**Amendments to the Department's Procedures in Regulating 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 (Department or DOT) is amending the hearing procedures, set forth in 14 CFR 399.79, that are available when the Department proposes a discretionary aviation consumer protection rulemaking declaring a practice to be unfair or deceptive. This final rule simplifies the hearing procedures and allows the Department greater flexibility to conduct a hearing in a manner that would not unduly delay the aviation consumer protection rulemaking.

**DATES:** Effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**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, D.C., 20590, 202-366-9342, 202-366-7152 (fax); robert.gorman@dot.gov; kimberly.graber@dot.gov; blane.workie@dot.gov (e-mail).

## SUPPLEMENTARY INFORMATION:

### I. Background

#### A. *The Unfair and Deceptive Practices Statute and the Department's Recent Rulemaking*

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

On December 20, 2020, the Department published in the *Federal Register* a final rule titled "Defining Unfair or Deceptive Practices" (UDP Final Rule).<sup>1</sup> The UDP Final Rule was intended to provide regulated entities and other stakeholders with greater clarity about the Department's enforcement and regulatory processes with respect to aviation consumer protection actions under Section 41712.<sup>2</sup> It sets forth procedures that the

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<sup>1</sup> 85 Fed. Reg. 78707 (December 7, 2020); RIN 2105-AE72; Docket DOT-OST-2019-0182.

<sup>2</sup> 85 Fed.Reg. 78707.

Department would use when conducting future enforcement actions under the authority of Section 41712.<sup>3</sup> The UDP Final Rule also sets forth procedures, including evidentiary hearing procedures, that the Department would use when conducting future discretionary rulemaking actions under the authority of Section 41712.<sup>4</sup> Those procedures for evidentiary hearings are being amended through this rulemaking.

In addition, the UDP Final Rule defined the terms “unfair” and “deceptive” for purposes of Section 41712. The definitions were modeled after Federal Trade Commission (FTC) precedent; they also reflect the Department’s longstanding interpretation of those terms.<sup>5</sup> However, the UDP Final Rule did not fully resolve the meaning of unfair or deceptive. Executive Order (E.O.) 14036, “Promoting Competition in the American Economy,” issued by President Biden on July 9, 2021, directs the Department to “start development of proposed amendments” to its definitions of the terms ‘unfair’ and ‘deceptive’ in 49 U.S.C. 41712.<sup>6</sup> In keeping with this Executive Order, the Department intends to issue in the near future an interpretive rule that would more clearly apprise the public of the Department’s interpretation of the definitions of “unfair” and “deceptive” found in Section 41712, and as defined by the Department at 14 CFR 399.79.

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<sup>3</sup> 14 CFR 399.79.

<sup>4</sup> 14 CFR 399.75.

<sup>5</sup> 14 CFR 399.79(b); 85 Fed. Reg. 78708.

<sup>6</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

*B. Amendments to Evidentiary Hearing Provisions for Discretionary Aviation Consumer Protection Rulemakings*

The UDP Final Rule established the Department's procedures for hearings for discretionary aviation consumer protection rulemaking actions promulgated under the authority of Section 41712. The Department is revising those procedures after a careful review of recent changes in the Department's and FTC's internal policies and procedures relating to the issuance of rulemaking documents and concern that the existing hearing procedures for discretionary aviation consumer protection actions do not provide the Department with enough flexibility to adapt internal procedures to facilitate efficient rulemaking. The Department is concerned that the overly particularized rigidity of the existing procedures in the UDP Final Rule may have the unintended consequence of causing unnecessary delay. The Department has determined that although it remains useful to have specific procedures for evidentiary hearings, the procedures should be streamlined to provide greater flexibility and ensure that important consumer protection rulemakings are not unduly delayed.

1. Evidentiary Hearing Provisions as Established in the UDP Final Rule

Under the hearing provisions of the UDP Final Rule, if the Department proposes a new discretionary rulemaking declaring a practice to be unfair or deceptive, then any interested party may file a petition for an evidentiary hearing.<sup>7</sup> The petition must be directed to the attention of the General Counsel, and must be filed before the close of the

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<sup>7</sup> A discretionary rulemaking is one that is not mandated by statute. *See* 14 CFR 399.75(c).

comment period on the proposed rule.<sup>8</sup> To obtain an evidentiary hearing, the party must demonstrate that: (1) 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; (2) the ordinary public comment process is unlikely to provide an adequate examination of the issues to permit a fully informed judgment; and (3) the resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule.<sup>9</sup> Even if the petitioner establishes these elements, the General Counsel may still deny the petition if: (1) the hearing would not advance the consideration of the proposed rule; or (2) the hearing would unreasonably delay completion of the rulemaking.<sup>10</sup>

The existing procedures provide that if the General Counsel grants the petition, then a notice of the hearing must be placed in the *Federal Register*, identifying the specific issues that will be considered.<sup>11</sup> The General Counsel must develop procedures for conducting evidentiary hearings.<sup>12</sup> Interested parties must have a reasonable opportunity to participate in the hearing through the presentation of testimony and written submissions.<sup>13</sup> The General Counsel must appoint a “neutral officer” to preside over the

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<sup>8</sup> 85 Fed. Reg. at 78716-78717; 14 CFR 399.75(b)(1).

<sup>9</sup> *Id.* at 78716-78717; 14 CFR 399.75(b)(2).

<sup>10</sup> *Id.* at 78717; 14 CFR 399.75(b)(3).

<sup>11</sup> 14 CFR 399.75(b)(5).

<sup>12</sup> 14 CFR 399.75(b)(6)(i).

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

hearing, and must allow “a reasonable opportunity to question the presenters.”<sup>14</sup> After the hearing is closed, the neutral officer must place minutes of the meeting on the docket, along with proposed findings of fact on the disputed issues.<sup>15</sup> Interested parties who participated in the hearing must be given the opportunity to file “statements of agreement or objection” to the proposed findings.<sup>16</sup>

After the hearing, the General Counsel must consider the record of the hearing, along with the neutral officer’s findings, and determine whether to: (1) terminate the proposed rulemaking; (2) modify it by filing a new or supplemental notice of proposed rulemaking; or (3) finalize the rule without material changes.<sup>17</sup> Any of these choices must be accompanied by a notice in the *Federal Register* explaining the basis for the decision.<sup>18</sup>

## 2. *Evidentiary Hearing Provisions – Rationale*

The Department indicated in the UDP Final Rule that these evidentiary hearing procedures were consistent with Section 41712, which requires the Department to provide notice and an opportunity for a hearing before finding that a regulated entity is engaged in an unfair or deceptive practice.<sup>19</sup> The Department noted that hearing procedures would be helpful in cases where the Department’s proposed rulemaking may

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<sup>14</sup> 14 CFR 399.75(b)(6)(ii).

<sup>15</sup> 14 CFR 399.75(b)(6)(iii).

<sup>16</sup> 14 CFR 399.75(b)(6)(iv).

<sup>17</sup> 14 CFR 399.75(b)(7).

<sup>18</sup> *Id.*

<sup>19</sup> 85 Fed. Reg. at 78711.

be premised on complex or disputed issues of fact.<sup>20</sup> The Department also noted that the traditional notice-and-comment procedures of the Administrative Procedure Act “remain the default process,” and that a hearing may be granted only if an interested party shows that traditional notice-and-comment is inadequate.<sup>21</sup> The Department further noted that the General Counsel may deny a hearing upon a finding that the hearing would unreasonably delay the rulemaking.<sup>22</sup> The Department also explained that the Department had held evidentiary hearings on proposed aviation consumer protection rulemakings in the past, but had not codified nor fully publicized those procedures.<sup>23</sup> In summary, the Department recognized that hearing procedures may add time to the overall rulemaking process, but concluded that the hearing procedures, as written, would “promote fairness, due process, and well-informed rulemaking, without unduly delaying the proceeding itself.”<sup>24</sup>

### *C. Subsequent Developments on Evidentiary Hearing Procedures*

Recently, both the Department and the FTC have reexamined or revised their evidentiary hearing procedures for rulemakings. On April 2, 2021, the Department repealed most of 49 CFR Part 5, which included hearing procedures for high-impact and

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<sup>20</sup> *Id.* at 78712.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

economically significant rules issued by the Department.<sup>25</sup> The Department further indicated that it would review the substance of the Department’s rulemaking procedures in light of Executive Order 13992 (January 25, 2021). This Executive Order not only repealed a number of executive orders relating to the rulemaking process, but also directed agencies to “promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing” those repealed executive orders.

Meanwhile, on July 22, 2021, the FTC announced that it streamlined its rules of practice regarding evidentiary hearings for rulemakings that would declare a specific act or practice to be unfair or deceptive.<sup>26</sup> For example, the FTC eliminated the requirement that the evidentiary hearing be conducted by an Administrative Law Judge (ALJ); instead, hearings may be conducted by a neutral presiding officer appointed by the FTC Chair.<sup>27</sup> The FTC also eliminated other rules, including: (1) a requirement that the

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<sup>25</sup> DOT Final Rule, “Administrative Rulemaking, Guidance, and Enforcement Procedures,” 86 Fed. Reg. 17292 (April 2, 2021) (effective May 3, 2021), repealing most of 49 CFR Part 5, which had been found at 84 Fed. Reg. 71714 (December 27, 2019, effective January 27, 2020). Despite this repeal, the hearing procedures for aviation consumer protection rulemakings found in 14 CFR 399.75 remained intact.

<sup>26</sup> “Revisions to Rules of Practice,” 86 Fed.Reg. 38542 (July 22, 2021). Pursuant to the FTC Act, the FTC is required to “provide an opportunity for an informal hearing” before issuing a rule declaring a specific act or practice to be unfair or deceptive. 15 U.S.C. § 57a(b)(1)(C); Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975 Pub.L. 93-637. The FTC Act also sets forth the basic requirements for such a hearing. 5 U.S.C. §57a(c). The FTC’s rules of practice implementing the FTC Act originally contained provisions that went beyond what the FTC Act itself called for.

<sup>27</sup> *Id.* at 38546, 38551. Under the FTC’s new rules, the Chief Presiding Officer appoints the presiding officer for the hearing. *Id.* at 38549; 16 CFR 1.13(a). The FTC Chair is the Chief Presiding Officer, unless the Chair appoints another Commissioner or an individual “who is not responsible to any other official or employee of the Commission.” 16 CFR §0.8.

hearings include “direct examination” of individuals who present their views at such hearing; (2) rules relating to compelling documents and testimony; and (3) a requirement that Commission staff produce a report analyzing the rulemaking record, along with an additional period for interested parties to comment on the report.<sup>28</sup> The FTC reasoned that its amendments would allow for transparent public participation in the rulemaking process while avoiding unnecessary procedural delays to effective rulemaking.<sup>29</sup>

## **II. Discussion of Revisions to Rule on Evidentiary Hearings**

The Department maintains the view that it remains useful to have specified procedures for evidentiary hearings because it may be beneficial to hold evidentiary hearings before completing certain discretionary aviation consumer protection rulemakings. When structured properly and used judiciously, evidentiary hearings should help to ensure that the Department’s assumptions relating to economic, technical, and other matters are based on a solid foundation. The Department also sees value in publicizing and standardizing the procedures for evidentiary hearings, given that the Department’s use of such hearings is not new. With publicly available standards, evidentiary hearings should serve to promote robust public participation in the rulemaking process by all stakeholders. At the same time, the Department finds that it is important to balance the need for robust public participation with the need for procedures that provide the Department with enough flexibility to ensure important rulemakings are not bogged down by overly prescriptive procedural constraints. Accordingly, the

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

<sup>29</sup> *Id.* at 38552.

Department has modified its evidentiary hearing procedures to promote flexibility and efficiency.

First, the Department has simplified the standard for granting a hearing to a “public interest” standard. The question of whether a hearing is in the public interest will turn on a number of factors, including but not limited to the novelty and complexity of the issues, the degree to which a public hearing would illuminate those issues beyond what could be accomplished in the notice-and-comment process, and the degree to which a public hearing would delay the underlying proceedings. The public interest standard is designed to encourage the General Counsel to consider not only the elements outlined in the UDP Final Rule, but also any other unique factors that may be relevant to the specific rulemaking at issue.

The Department has also amended the level of proof necessary for the grant of a public hearing from a “plausible” standard to a “credible and convincing” standard; the petitioner would be required to make a “credible and convincing prima facie showing that granting the petition is in the public interest.” The Department is of the view that the “credible and convincing evidence” standard best serves to ensure that the usual notice-and-comment procedure of the APA remains the default procedure. The new standard also ensures that the petitioner presents a strong basis from which the General Counsel may conclude that expending the resources required for a public hearing is justified.

The Department has also modified its procedures for granting or denying an evidentiary hearing. Under the UDP Final Rule, the General Counsel was required to issue a detailed statement of reasons for *denying* a petition, but there was no similar requirement if the General Counsel *granted* the petition. The Department is of the view

that the General Counsel should issue an explanatory statement of the basis for the decision in either granting or denying the petition. However, the statement need not be overly detailed; it should set forth with sufficient clarity the basis for the decision that it is or is not in the public interest to hold an evidentiary hearing. Such a requirement will promote fairness and transparency in the Department's rulemaking processes.

The Department has also afforded the General Counsel greater discretion to appoint an appropriate hearing officer for the evidentiary hearing. The UDP Rule currently requires the General Counsel to appoint a "neutral officer" to preside over the hearing, implying that Department staff working on the rulemaking may not preside over the hearing. Under this new rule, the General Counsel has broader discretion to appoint an appropriate hearing officer from within or outside the Department to conduct the hearing.

Next, the Department now allows the hearing officer greater flexibility with respect to when and how testimony is presented at the hearing. The UDP Final Rule required "a reasonable opportunity to participate in the hearing through the presentation of testimony and written submissions" and "a reasonable opportunity to question the presenters." The new rule eliminates these requirements and allows the hearing officer greater discretion to determine whether testimony, written submissions, and/or cross-examination are appropriate given the unique circumstances of each hearing.

The Department has simplified the requirements for the hearing officer's report after the hearing is closed. The UDP Final Rule provided that, 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.”<sup>30</sup> In this new rule, the hearing officer is simply required to place on the record the minutes with sufficient detail as to fully reflect the evidence and arguments presented on the issues and not the proposed findings addressing the disputed issues of fact identified in the hearing. The findings would be provided by the Department in subsequent documents that modify, terminate, or maintain the proposed rule.

Finally, the Department has amended the procedures that take place after the hearing is closed. The new rule clarifies that in keeping with current practice, *all* interested parties (not just those who participated in the hearing) may file statements or comments in the docket after the hearing is closed.

### **III. Administrative Procedure Act**

Under the Administrative Procedure Act, the normal notice and comment procedures do not apply to an action that is a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(A). Since this final rule revises only internal processes applicable to the Department’s administrative procedures, this is a rule of agency procedure for which notice and comment are not required.

#### **Rulemaking Analyses and Notices**

##### *A. E.O. 12866 and DOT Regulatory Policies and Procedures*

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. The Department does not anticipate that this rulemaking,

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<sup>30</sup> 14 CFR 399.75(b)(6)(iii).

which amends the Department's internal procedures, will have an economic impact on regulated entities.

*B. Regulatory Flexibility Act*

Since notice and comment rulemaking is not necessary for this rule, the analytical provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612) do not apply.

*C. Executive Order 13132 (Federalism)*

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (August 4, 1999), and DOT has determined that this action will not have a substantial direct effect or federalism implications on the States and would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Therefore, consultation with the States is not necessary.

*D. Executive Order 13175 (Tribal Consultation)*

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 rulemaking 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. National Environmental Policy Act*

The agency has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, “Procedures for Considering Environmental Impacts” (44 FR 56420, October 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). Paragraph 4.c.6.i of DOT Order 5610.1C 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 agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

### List of Subjects in 14 CFR Part 399

Consumer protection, policies, rulemaking proceedings, enforcement, unfair or deceptive practices.

For the reasons set forth in the preamble, the Department of Transportation amends 14 CFR part 399 as follows:

#### **PART 399-- STATEMENTS OF GENERAL POLICY**

1. The authority citation for part 399 continues to read as follows:

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

2. Section 399.75 is amended by revising paragraph (b)(2) through (b)(7) as follows:

(b) Procedural Requirements

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(2) *Decision on petition for hearing.* The petition shall be granted if the petitioner makes a clear and convincing showing that granting the petition is in the public interest. Factors in determining whether a petition is in the public interest include, but are not limited to:

(i) Whether 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) Whether the ordinary public comment process is unlikely to provide an adequate examination of the issues to permit a fully informed judgment;

(iii) Whether the resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule;

(iv) Whether the requested hearing would advance the consideration of the proposed rule and the General Counsel's ability to make the rulemaking determinations required by this section; and

(v) Whether the hearing would unreasonably delay completion of the rulemaking.

(3) *Explanation of decision.* If a petition is granted or denied in whole or in part, the General Counsel shall provide an explanation of the basis for the decision,

(4) *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.

(5) *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.

(ii) The General Counsel shall arrange for a hearing officer to preside over the hearing.

(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. The complete record of the hearing shall be made part of the rulemaking record.

(iv) Interested parties shall be given an opportunity to file statements or comments after the hearing.

(6) *Actions following hearing.*

(i) Following the completion of the hearing process, the General Counsel shall consider the record of the hearing, and shall make a reasoned determination whether to terminate the rulemaking; to proceed with the rulemaking as proposed; or to modify the proposed rule.

(ii) If the General Counsel decides to terminate the rulemaking, the General Counsel shall publish a 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.

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

3. Section 399.75 is further amended by deleting paragraph (b)(8).

Issued this 21st day of January, 2022, in Washington, D.C., under authority delegated in 49 CFR 1.27(n).

/original signed/

John E. Putnam,

Deputy General Counsel.