



Why DOT Should Interpret “Deceptive Practices” Using a “Reasonable Consumer” Standard

By David Heffernan and Brian Doll



The U.S. Department of Transportation’s (DOT’s) primary source of statutory authority to regulate airline consumer practices derives from section 411 of the Federal Aviation Act (codified at 49 U.S.C. § 41712), which prohibits air carriers and ticket agents from engaging in “unfair or deceptive practices”

and “unfair methods of competition.” DOT frequently cites section 41712, particularly its prohibition of “deceptive practices,” as primary (and often exclusive) statutory authority for a wide range of regulations and enforcement actions.¹ Although DOT has enjoyed this authority since Congress deregulated the domestic airline industry in the late 1970s and early 1980s, DOT has never conducted a rulemaking to interpret the term “unfair or deceptive practices.” That will change: DOT has initiated a rulemaking to “define the phrase ‘unfair or deceptive practices.’”²

DOT and the courts have recognized that section 41712 is “modeled” on the Federal Trade Commission’s (FTC’s) substantively identical authority under section 5 of the Federal Trade Commission Act.³ Neither section 41712 nor section 5 defines the terms “unfair” and “deceptive.” Unlike DOT, however, the FTC has published detailed formal interpretations of “unfairness” and “deception,” including multipart tests that require objective evidence (not merely the subjective judgment of a regulator) to support a finding of a violation. DOT now has proposed to codify those FTC definitions of “unfairness” and “deception” in DOT’s regulations.⁴

The FTC defines “deception” by relying on a “reasonable consumer” standard. The FTC does not regulate to protect the uninformed consumer, but, rather, assumes that consumers have a minimal obligation to seek out available information before making a purchase decision and should not expect the government to protect them if they fail to do so and are unhappy with their purchase. If, however, a vendor (whether by representation or omission) actually and materially misleads (or engages in conduct that is likely to mislead) consumers who have taken reasonable steps to inform themselves, the FTC may deem such conduct to be a “deceptive practice.” The FTC’s rationale is that such deceptive conduct distorts the information available to the reasonable consumer, and it therefore may be appropriate for the government to intervene in the marketplace to prohibit the conduct when the deception is material and reasonable

consumers were actually deceived.

DOT’s proposed definition of “deception” follows the FTC’s lead by relying on a “reasonable consumer” standard. DOT’s proposal, however, does not explain how to interpret the standard. This article addresses that issue. It begins by explaining how the FTC, in applying its test for “deception,” determines what constitutes “reasonable” consumer behavior. Next, the article examines how DOT has at times strayed from a “reasonable consumer” point of reference toward a more expansive approach to regulation and enforcement. Finally, the article concludes that DOT should adopt the FTC’s test for “deception” (as DOT has proposed) and, in doing so, rely solely on a “reasonable consumer” standard.

The FTC’s Deception Test Focuses on the “Reasonable Consumer”

The FTC has developed separate policy statements as to what constitutes “unfairness” and “deception” under section 5 of the FTC Act. These policy statements guide the FTC in its investigations and enforcement determinations. Under these policy statements, the FTC developed separate three-part tests for finding a practice to be either “unfair” or “deceptive.” The three elements of the FTC’s test for *deception* are:

1. There must be a representation, omission, or practice that actually misleads or is likely to mislead consumers;
2. The relevant test is whether a reasonable consumer (i.e., “a consumer acting reasonably in the circumstances”) would be misled; and
3. The representation, omission, or practice must be material (e.g., it must be likely to affect a reasonable consumer’s purchasing decision).⁵

The FTC’s “deception” test is exacting: in order for the FTC to find a “deceptive practice” violation of section 5, it must determine that a “reasonable consumer” was (or would be) materially and actually misled. The historical context of this test is important. For decades the FTC applied a very different standard, focusing on protecting consumers who were “the ignorant, the unthinking, and the credulous.”⁶ From the 1930s until the 1970s, in determining whether an advertisement was deceptive, the FTC and the courts viewed the public as a “vast multitude . . . who, in making

purchases, do not stop to analyze but too often are governed by appearances and general impressions.”⁷⁷ The U.S. Supreme Court noted that “[t]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.”⁷⁸ Thus, the FTC found deceptive an advertisement using the word “permanent” to refer to a hair-coloring product that would not actually recolor the user’s hair permanently.⁹ In a case that exemplified the FTC’s concern to protect the ignorant even if they represented only a minority of all consumers, the advertiser produced survey data showing that 91 percent of people who viewed its advertisement were not deceived.¹⁰ The FTC, however, sanctioned the advertiser on the basis that it had deceived nine percent of consumers, thereby violating the prohibition against deceptive practices under the “ignorant consumer” standard.¹¹ The FTC continued to apply a similar approach during the 1960s and the early 1970s.¹²

By the 1960s, however, the FTC and courts began to question the ignorant consumer standard. In May 1963, the Second Circuit reversed an FTC decision finding fault with a Sterling Drug advertisement that cited a study of its Bayer aspirin product compared with four other pain relievers.¹³ The FTC found that the advertisement could mislead “our hypothetical, sub-intelligent, less-than careful reader”¹⁴ The Second Circuit, however, disagreed, finding that Sterling Drug had used facts from the study and that it was not deceptive to highlight that the U.S. government had funded the study.¹⁵ In another 1963 case after *Sterling Drug*, the FTC concluded that “a representation does not become ‘false and deceptive’ merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.”¹⁶ By the late 1970s, the ignorant consumer standard was the target of increasing criticism: as one scholar argued, “[a] small segment of the population can always be identified who will misinterpret the clearest communication. Thus, a demand that the law protect all—even the trusting and the unthinking—is indeed an extreme position.”¹⁷

In 1978, the FTC faced a backlash after it issued the so-called “kid-vid” proposed rule that sought to impose severe restrictions on television advertising targeted at children, including a total ban on such advertising in some circumstances.¹⁸ The rationale for this proposed rule (which was not adopted) was that children are the ultimate ignorant consumers, too easily susceptible to deception based on advertising specifically targeted at them.¹⁹ Following a public

outcry,²⁰ Congress intervened to halt the rulemaking.²¹ Congress ultimately allowed the FTC’s funding to lapse, which shut down the FTC briefly before its funding was restored.²² A *Washington Post* editorial condemned the FTC as the “national nanny.”²³ This proved to be a significant turning point for the FTC, which culminated in the FTC’s issuance of separate Policy Statements on Deception and Unfairness, which remain in effect today.²⁴ The Policy Statement on Deception specifically rejected the “ignorant consumer” standard in favor of the “reasonable consumer” standard that the FTC continues to apply today.²⁵

DOT Has Regulated Deception Expansively, Not Merely to Protect the “Reasonable Consumer”

DOT has stated in enforcement orders that it finds the FTC’s standard for deception focusing on protecting the “reasonable consumer” to be “instructive,”²⁶ noting that “[a] practice is deceptive if it misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue (one that is likely to affect the consumer’s decision with regard to a product or service).”²⁷ DOT, however, has not specifically adopted or applied the FTC’s three-part test for “deception.” Instead of explaining the specific criteria or standards it uses to identify deceptive practices, DOT has merely invoked section 41712’s broad prohibition against deceptive practices as authority to promulgate a number of regulations and take enforcement action against carriers for a wide range of conduct.

DOT has specifically cited section 41712 as authority for adopting and enforcing regulations prohibiting “deceptive practices” relating to codeshare disclosures,²⁸ lengthy tarmac delays,²⁹ full-fare advertising,³⁰ post-purchase price increases,³¹ ticket refunds,³² oversales and denied boarding compensation,³³ and the 24-hour reservation-hold rule.³⁴ The cases cited in footnotes 29–35 in this Article are relatively recent, but the DOT, like its predecessor, the Civil Aeronautics Board, has relied for decades on section 41712 as exclusive statutory authority for a wide range of enforcement actions without further refining its approach to applying that authority.³⁵

DOT’s historical failure to formally adopt the FTC’s three-part deception test has caused it to apply less rigorous, and apparently subjective, standards for finding deceptive practices. While DOT has not addressed the point directly, numerous DOT actions to prohibit deceptive practices appear to have relied on an “ignorant consumer” standard, rather than a “reasonable consumer” standard. Below are just two examples.

The Southwest “Free” Advertising Case

In May 2012, DOT published “guidance” that prohibits airlines from advertising “free” air travel if the purchaser is required to pay any applicable taxes or fees.³⁶ In 2017, Southwest Airlines offered a Companion Pass

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promotion under its Rapid Rewards frequent flyer program whereby California Rapid Rewards members could benefit from a “Fly One. Get One Free*” deal. Southwest used an asterisk to disclose on the same page (in the body of the advertisement and not merely in a footnote) that the promotion did not include government taxes and fees. DOT deemed this to be an “unfair or deceptive practice” under section 41712. DOT stated that Southwest’s advertisement was “misleading” because it advertised a “fare” as “free” even though passengers were responsible to pay applicable taxes and fees (which, for the majority of passengers, was \$5.60 each way).³⁷ In view of DOT’s threat to levy “substantial” enforcement penalties, Southwest decided to terminate the Companion Pass promotion despite tens of thousands of consumers having already taken advantage of it. There was no evidence that Southwest’s offer had misled or confused any consumers, and neither Southwest nor DOT received any consumer complaints about the offer.

The Southwest Airlines Companion Pass “free” ticket offer, with its prominent disclosure of the requirement that consumers pay the taxes and fees associated with their zero-fare ticket, likely would have passed muster under the FTC’s policy because there was no objective evidence of any consumer deception or harm.³⁸ The net effect of DOT’s action was to deprive many additional consumers the benefit of Southwest’s offer.

The Lufthansa Website Malfunction Case

In 2015, DOT assessed a \$30,000 civil penalty against Lufthansa for engaging in “unfair and deceptive practices” arising from a technical malfunction on the airline’s website that temporarily disabled the booking function for certain advertised fares.³⁹ DOT presented no evidence of intent to deceive on the part of Lufthansa. In fact, DOT did not dispute Lufthansa’s position that the malfunction was inadvertent. In terms of consumer harm, only a single consumer complained to DOT about the malfunction. Lufthansa responded that if the consumer had called its toll-free booking phone number, the airline would have sold her the fare. At no point during the malfunction were seats unavailable for purchase at the listed fares, and Lufthansa took immediate corrective action to fix the problem with its online booking function. This included proactively contacting the affected passenger and honoring the quoted fare.

It seems inconceivable that DOT’s case against Lufthansa could satisfy the FTC’s “deception” test. Under that test, DOT would have to show that reasonable consumers were (or were likely to be) “misled” as result of a material misrepresentation or omission by Lufthansa. The only potential “misrepresentation or omission” was the fact that the Lufthansa website offered a fare that, for technical reasons, was temporarily unavailable for purchase via that website. DOT, however, never provided

any evidence that more than one consumer was affected by the temporary malfunction. In addition, the one consumer who complained was able to purchase the fare; thus, the malfunction was not “material.” The FTC defines a reasonable consumer as one who takes reasonable steps to inform herself about a purchase. In the circumstances presented in the Lufthansa case, a reasonable consumer who wishes to purchase a fare that is advertised on an airline’s website but is unable to complete the purchase online due to a technical issue with the website surely would call the toll-free phone number prominently displayed on the airline’s website and inquire as to the fare’s availability and how to book it (which would result in her purchase of the fare by phone or other means). A temporary website malfunction of an airline’s website may be suboptimal from a customer-service perspective, but it should hardly be treated as an “unfair or deceptive practice,” particularly absent evidence that any consumer was actually harmed.

Thus, DOT’s approach has deviated from the FTC’s focus on the reasonable consumer test, and in ways that have led to a more market-interventionist regulatory approach. This result conflicts with DOT’s congressional mandate to “plac[e] maximum reliance on competitive market forces.”⁴⁰ Reliance on a reasonable consumer standard would acknowledge this mandate and more appropriately allow market forces to operate while reserving the government’s authority to intervene in limited circumstances when diligent consumers are actually and materially deceived.

Conclusion

DOT has claimed that it models its interpretation of its statutory “unfair or deceptive practices” authority on the FTC’s interpretation of the same phrase. But as shown, that has not, in fact, always been the case. DOT’s pending rulemaking provides it an opportunity to codify such an interpretation into a regulation. In doing so, DOT should follow the FTC and adopt a test for determining “deception” that relies on the “reasonable consumer” standard. The FTC, after an extensive prior history of regulation to protect the “ignorant consumer,” has long used a “reasonable consumer” test, which strikes an appropriate balance between allowing market forces to operate while enabling the FTC to intervene if a merchant engages in conduct that would materially mislead a consumer who acts “reasonably in the circumstances.” This “reasonable consumer” standard makes clear that the government will not intervene in any or all circumstances to protect consumers from buyer’s remorse or ill-informed purchasing decisions. If, however, an airline or ticket agent materially and actually misleads consumers by representation or omission, thereby frustrating a reasonable consumer’s ability to obtain the accurate information necessary to make an informed purchasing decision, the reasonable consumer standard would allow DOT to take appropriate enforcement action for violating section 41712.

Endnotes

1. See *infra* notes 30–36 and accompanying text.
2. Defining Unfair or Deceptive Practices, 85 Fed. Reg. 11881 (proposed Feb. 28, 2020) (to be codified at 14 C.F.R. pt. 399) (hereinafter Notice of Proposed Rulemaking or NPRM).
3. 15 U.S.C. § 45(a); NPRM at 11883 (“The Department’s unfair and deceptive practices statute, section 41712, is closely modeled after Section 5 of the FTC Act”); Ass’n of Discount Travel Brokers, DOT Order 92-5-60 (May 29, 1992) (Docket No. 46280). See also *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 303 (1963), quoting *American Airlines v. North American Airlines*, 351 U.S. 79, 82 (1956) (The predecessor to section 41712 “was patterned after [section] 5 of the Federal Trade Commission Act and ‘we may profitably look to judicial interpretation of [section] 5 as an aid in the resolution of . . . questions raised . . . under [section 41712]’”).
4. NPRM at 11882–9.
5. Fed. Trade Comm’n, Policy Statement on Deception 1 (1983) (Letter from James C. Miller III, Chairman, FTC, to John D. Dingell, Chairman, H.R. Comm. on Energy and Commerce) (hereinafter FTC Policy Statement on Deception), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf. See *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984). The FTC has characterized deception as a subset of unfairness. See *Int’l Harvester Co.*, 104 F.T.C. 949, 1060 (1984); *Figgie Int’l, Inc.*, 107 F.T.C. 313, 373 n.5 (1986) (“[U]nfair practices are not always deceptive but deceptive practices are always unfair.”), *aff’d*, 817 F.2d 102 (4th Cir. 1987).
6. *Aronberg v. Fed. Trade Comm’n*, 132 F.2d 165, 167 (7th Cir. 1942).
7. *Id.*
8. *Fed. Trade Comm’n v. Standard Educ. Soc’y*, 302 U.S. 112, 116 (1937).
9. *Gelb*, 39 F.T.C. 694, 698 (1944).
10. *Rhodes Pharmacal Co.*, 49 F.T.C. 263, 265 (1952).
11. *Id.*
12. *Firestone Tire*, 81 F.T.C. 398, 415 (1972) (evidence of potential deception of 15 percent of individuals who viewed an advertisement was sufficient to deem the advertisement to be a deceptive practice); *Benrus Watch Co.*, 64 F.T.C. 1018, 1032 (1964) (finding deception based on evidence that 14 percent of consumers who viewed an advertisement were deceived).
13. *Fed. Trade Comm’n v. Sterling Drug*, 317 F.2d 669, 672 (2d Cir. 1963).
14. *Id.* at 675.
15. *Id.* The court pointed out that the FTC’s reliance on an ignorant person standard was selective. *Id.* at 676–77 (“Unlike the standard of the average reader which the Commission avidly endorses throughout these proceedings, it here would have us believe that he is linguistically and syntactically sensitive to the difference between the phrases ‘as gentle as’ and ‘no more upsetting than.’ We do not find that the Commission has reason to believe that this will be the case, and we therefore reject its contentions.”).
16. *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963).
17. Larry T. Pleiss, *Deceptive Advertising and the Federal Trade Commission: A Perspective*, 6 PEPPERDINE L. REV. 439, 452 (1979).
18. 43 Fed. Reg. 17,967, 17,969 (notice of proposed rulemaking on children’s advertising, Apr. 27, 1978) (the proposed rule would have banned “all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising”); see also Teresa M. Schwartz & Alice S. Hrdy, *FTC Rulemaking: Three Bold Initiatives and Their Legal Impact*, 90th Anniversary Symposium of the Federal Trade Commission Consumer Protection Panel 11 (2004) (hereinafter Schwartz & Hrdy), https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/040922schwartzhrdy.pdf.
19. See Schwartz & Hrdy, *supra* note 18, at 11.
20. Brian Fung, *The FTC Was Built 100 Years Ago to Fight Monopolists. Now, It’s Washington’s Most Powerful Technology Cop*, WASH. POST (Sept. 25, 2014, 11:30 AM), https://www.washingtonpost.com/news/the-switch/wp/2014/09/25/the-ftc-was-built-100-years-ago-to-fight-monopolists-now-its-washingtons-most-powerful-technology-cop/?utm_term=.3d82b7e310af (the FTC received thousands of comments criticizing the proposed rule).
21. Schwartz & Hrdy, *supra* note 18, at 11. Congress sought to terminate the “kid-vid” rulemaking following six weeks of hearings but later passed a bill that would have permitted it to go forward under a different theory. *Id.*; *Federal Trade Commission Improvements Act of 1980*, Pub. L. No. 96-252, 94 Stat. 374. The FTC, however, decided to abandon the rulemaking. 46 Fed. Reg. 48,710, 48,712 (Oct. 2, 1981) (codified at 16 C.F.R. pt. 461).
22. Merrill Brown, *Congress Revives FTC with an Injection of Funds*, WASH. POST (May 2, 1980), <https://www.washingtonpost.com/archive/politics/1980/05/02/congress-revives-ftc-with-an-injection-of-funds/00bb18e5-b01a-40b7-bc2a-b0c2806ece1a/>.
23. *The FTC as National Nanny*, WASH. POST (Mar. 1, 1978), <https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f77>.
24. Michael Pertschuk, *REVOLT AGAINST REGULATION* 69–70 (1982).
25. See FTC Policy Statement on Deception, *supra* note 5, at 2 (“The act or practice must be considered from the perspective of the reasonable consumer”). As described above in text, the reasonable consumer standard is part of the FTC’s three-part test for deception.
26. *Edelman*, DOT Order 2018-5-32 at 3 n.3 (Docket No. DOT-OST-2017-0037) (May 28, 2018); *Kaushik Shridharani*, DOT Order 2018-2-18 at 4 n.7 (Feb. 23, 2018) (Docket No. DOT-OST-2015-0189).
27. *Edelman*, DOT Order 2018-5-32 at 3; *Sbridbarani*, DOT Order 2018-2-18 at 3–4; *Joel Hayes*, DOT Order 2016-12-11 at 3–4 (Dec. 14, 2016) (Docket No. DOT-OST-2014-0077).
28. 14 C.F.R. § 257.4. See, e.g., *Alaska Airlines*, DOT Consent Order 2014-6-15 (June 27, 2014) (Docket No.

DOT-OST-2014-0001); Skyscanner Limited, DOT Consent Order 2014-4-2 (Apr. 1, 2014) (Docket No. DOT-OST 2014-0001); WK Travel, DOT Consent Order 2014-1-1 (Jan. 2, 2014) (Docket No. DOT-OST 2014-0001) (imposing civil penalties for alleged violations of § 41712 for failure to disclose codeshare arrangements to consumers).

29. 14 C.F.R. § 259.4. *See, e.g.*, Icelandair, DOT Consent Order 2018-5-42 (June 1, 2018) (Docket No. DOT-OST-2018-0001); British Airways, DOT Consent Order 2018-5-28 (May 22, 2018) (Docket No. DOT-OST-2018-0001); All Nippon Airways, DOT Consent Order 2018-3-21 (Mar. 26, 2018) (Docket No. DOT-OST-2018-0001); Compañía Panameña de Aviación, DOT Consent Order 2018-3-20 (Mar. 23, 2018) (Docket No. DOT-OST-2018-0001) (imposing civil penalties for alleged violations of § 41712 for failing to comply with their contingency plans for lengthy tarmac delays).

30. 14 C.F.R. § 399.84. *See, e.g.*, TAME Linea Aerea del Ecuador, DOT Consent Order 2018-5-26, (May 22, 2018) (Docket No. DOT-OST-2018-0001); Vietnam Airlines, DOT Consent Order 2018-5-29, (May 22, 2018) (Docket No. 180001); Frontier Airlines, DOT Consent Order 2016-12-5 (Dec. 9, 2016) (Docket No. 160002) (imposing civil penalties for alleged violations of § 41712 for failing to provide the full price of air transportation in the first display of the fare quoted to consumers during the booking process).

31. 14 C.F.R. § 399.88. *See, e.g.*, Norwegian Air Shuttle, DOT Consent Order 2018-3-28 (Mar. 29, 2018) (Docket No. 180001); Voyager Travel, DOT Consent Order 2014-8-9 (Aug. 14, 2014) (Docket No. DOT-OST 2014-0001); Global Target International, DOT Order 2014-2-14 (Feb. 20, 2014) (Docket No. DOT-OST 2014-0001) (imposing civil penalties for alleged violations of § 41712 for increasing the price of fares after consumers had already purchased their tickets without obtaining the consumers' written consent to the potential for such an increase).

32. 14 C.F.R. Parts 259, 374. *See, e.g.*, American Airlines, DOT Consent Order 2017-7-9 (July 21, 2017) (Docket No. DOT-OST-2017-0001); Silver Airways, DOT Consent Order 2016-9-18 (Sept. 29, 2016) (Docket No. 160002) (imposing civil penalties for alleged violations of § 41712 for failure to provide customer refunds in a timely manner).

33. 14 C.F.R. Parts 250, 259. *See, e.g.*, Air Canada, DOT Consent Order 2018-5-27 (May 22, 2018) (Docket No. DOT-OST-2018-0001); Frontier Airlines, DOT Consent Order 2017-08-27 (Aug. 29, 2017) (Docket No. DOT-OST-2017-0001); JetBlue Airways, DOT Consent Order 2016-12-4 (Dec. 9, 2016) (Docket No. DOT-OST 2016-0002) (imposing civil penalties for alleged violations of § 41712 for failing to provide denied boarding compensation to passengers or produce accurate copies of the required denied boarding statement upon

request at airport ticket counters and boarding gates).

34. 14 C.F.R. § 259.5(b)(4). *See* American Airlines, DOT Consent Order 2015-11-3 (Nov. 5, 2015) (Docket No. 150002) (imposing a civil penalty for alleged violations of § 41712 for cancelling tickets prior to the expiration of the 24-hour reservation hold period).

35. *See, e.g.*, Delta Air Lines, Inc. Enforcement Proceeding, C.A.B. Order 79-9-140 (Sept. 24, 1979 (Docket No. 33512) (finding that Delta violated the predecessor provision to § 41712 by advertising Dallas/Ft. Worth–London service without disclosing a required connection and aircraft change at Atlanta involving a 90-minute layover); Trans World Airlines, Inc. Discount Fare Advertising Enforcement Proceeding, C.A.B. Consent Order 80-6-29 (June 5, 1980) (Docket No. 37009) (finding that TWA violated the predecessor provision to § 41712 by advertising fares “with no restrictions” while imposing a limit on the number of seats available at those fares); Hotwire, Inc., DOT Consent Order 2002-10-7 (Oct. 4, 2002) (Docket No. DOT-OST-2002-12273) (finding that Hotwire violated § 41712 by “failing to describe fully the markets used in its comparison advertisements.”).

36. U.S. DEP'T OF TRANSP., OFFICE OF AVIATION ENFT & PROCEEDINGS, GUIDANCE ON THE USE OF THE TERM “FREE” IN AIR FARE ADVERTISEMENTS AND DISCLOSURE OF CONSUMER COSTS IN AWARD TRAVEL (May 17, 2012), https://www.transportation.gov/sites/dot.gov/files/docs/Use_of_the_word_free_in_fare_advertisements_0.pdf.

37. *See* Robert W. Kneisley, *DOT's Regulation of “Unfair or Deceptive Practices”: Reform is Urgently Needed*, 31 AIR & SPACE LAWYER, no. 3, 2018, at 1.

38. The FTC allows merchants to advertise “free” goods or services, subject to “clear and conspicuous” disclosure of all applicable terms and conditions. 16 C.F.R. § 251.1(c) (“When making ‘Free’ or similar offers all the terms, conditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.”). This requires more than “a footnote . . . to which reference is made by an asterisk or other symbol placed next to the offer.” *Id.* The FTC continues, “[a]ll of the terms, conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service.” *Id.*

39. Lufthansa German Airlines, DOT Order 2015-1-17 (Jan. 22, 2015) (Docket No. DOT OST 2015-0002)

40. 49 U.S.C. § 40101(a)(6); *see* ABC Aerolineas, S.A. de C.V., d/b/a Interjet v. U.S. Dep't of Transp., 747 F. App'x 865, 867 (D.C. Cir. 2018) (noting that DOT's limited statutory authority requires “maximum reliance on competitive market forces”).