6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points), and paragraph 5–6.5i, which categorically excludes from further environmental review the establishment of new or revised air traffic control procedures conducted at 3,000 feet or more above ground level (AGL); procedures conducted below 3,000 feet AGL that do not cause traffic to be routinely routed over noise sensitive areas; modifications to currently approved procedures conducted below 3,000 feet AGL that do not significantly increase noise over noise sensitive areas; and increases in minimum altitudes and landing minima. As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. Accordingly, the FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71
Airspace, Incorporation by reference, Navigation (air).

The Amendment
In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:


§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021, is amended as follows:

Paragraph 6011 United States Area Navigation Routes.

Issued in Washington, DC, on August 23, 2022.
Scott M. Rosenbloom,
Manager, Airspace Rules and Regulations.
[FR Doc. 2022–18426 Filed 8–26–22; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION
Office of the Secretary
14 CFR Part 399
RIN 2105–ZA18
Guidance Regarding Interpretation of Unfair and Deceptive Practices

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).
ACTION: Guidance regarding interpretation of unfair and deceptive practices.
SUMMARY: The U.S. Department of Transportation (DOT or the Department) is issuing a guidance document to inform the public and regulated entities about DOT’s interpretation of the terms unfair, deceptive, and practices as it relates to its statutory authority to prohibit unfair or deceptive practices. The Department is taking this action to better define the terms unfair and deceptive in response to an Executive order issued by President Biden on July 9, 2021, on promoting competition in the American economy.
DATES: This final guidance document is effective August 29, 2022.
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, DC 20590, 202–366–9342, 202–366–7152 (fax); robert.gorman@dot.gov; kimberly.graber@dot.gov; or blane.workie@dot.gov (email).
SUPPLEMENTARY INFORMATION:
Background
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”).1 Section 41712(a) 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. In addition to this general provision, Congress has also defined two specific practices as being unfair or deceptive.2

1 In addition to section 41712, the Department’s authority to regulate unfair and deceptive practices is based in the Department’s 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.
2 See 49 U.S.C. 41712(b) [failing to notify the purchaser of such an electronic ticket of its...
The Department also has general authority to issue regulations necessary to carry out section 41712. Many of the Department’s existing aviation consumer protection rules were issued under the authority of section 41712, including but not limited to the tarmac delay rule,\(^3\) the full-fare advertising rule,\(^4\) the prohibition on post-purchase price increases,\(^5\) and the rules on oversales and denied boarding compensation.\(^6\)

Section 41712 does not define “unfair,” “deceptive,” or “practice.” On December 7, 2020, the Department issued a final rule titled “Defining Unfair or Deceptive Practices” (”UDP Final Rule”). In this rule, the Department noted that section 41712 was modeled on section 5 of the Federal Trade Commission (FTC) Act.\(^8\) The Department explained that while section 5 vests FTC with broad authority to prohibit unfair or deceptive practices in most industries, Congress granted the Department the exclusive authority to prohibit unfair or deceptive practices of air carriers and foreign air carriers. The Department noted that DOT and FTC share the authority to prohibit unfair or deceptive practices by ticket agents in the sole of air transportation.

Accordingly, DOT determined that it was appropriate to define the terms “unfair” and “deceptive” in ways that reflect both FTC precedent and DOT’s own long-standing interpretation of those terms. Specifically, DOT defined a practice as being unfair to consumers if “it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.”\(^9\) DOT defined a practice as being deceptive to consumers “if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A material matter is if it is likely to have affected the consumer’s conduct or decision with respect to a product or service.”\(^10\) Like FTC, the Department stated that proof of intent is not necessary to establish either unfairness or deception.\(^11\) The Department found it unnecessary to define “practice.”\(^12\)

Among its major provisions, the UDP Final Rule requires DOT to employ its definitions of “unfair” and “deceptive” when issuing future rulemakings or taking future enforcement action.\(^13\) The rule provided, however, that if Congress directs DOT by statute to issue regulations specifically declaring a practice to be unfair or deceptive, then DOT may do so without reference to the general definitions.\(^14\) The rule also clarified that if a specific regulation already applies to the conduct at issue, then the Department may rely on the terms of that regulation.\(^15\)

On July 9, 2021, the President issued Executive Order 14036, “Promoting Competition in the American Economy.”\(^16\) That Order directed the Department to take a number of actions to protect aviation consumers, including that the Department start development of proposed amendments to its definitions of the terms “unfair” and “deceptive” in section 41712. Pursuant to the Executive Order, DOT stated that it would fulfill the requirements of the Executive Order by issuing an interpretive rule (i.e., this guidance document) that would clearly apprise the public of the Department’s interpretation of the definitions of the terms “unfair” and “deceptive.”\(^17\)

### Guidance Regarding Interpretation of Unfair and Deceptive Practices

The purpose of this guidance document is to provide the public and regulated entities with greater transparency with respect to DOT’s Office of Aviation Consumer Protection (OACP)’s interpretation of the terms that are found in section 41712 and defined in the Department’s regulations at 14 CFR 399.79. This guidance document does not have the force and effect of law, is not legally binding in its own right, and will not be relied on by the Department as a separate basis for enforcement or other administrative penalty beyond the underlying authorities in statute and regulation.

### Elements of Unfairness

In the Department’s final rule titled “Defining Unfair or Deceptive Practices” (“UDP Final Rule”), DOT defined a practice as “unfair” if it “causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.”\(^18\) We will address each element in turn.

1. “Causes or Is Likely To Cause”

In keeping with FTC precedent, DOT is of the view that a practice may “cause” harm even if it is not the only cause of the harm, and even if it is not the most proximate cause of the harm.\(^19\) Moreover, the Department is not required to wait for substantial injury to take place before taking action against an unfair practice. The Department may take action against practices which are “likely to cause” substantial injury as well.\(^20\) When making such determinations, DOT examines not only the probability of the harm occurring, but also the magnitude of the injury if it does occur. As FTC has observed, “a practice may be unfair if the magnitude of the potential injury is large, even if the likelihood of the injury occurring is low.”\(^21\)

2. “Substantial” Injury

The UDP Final Rule uses the terms “harm” and “injury” interchangeably.\(^22\) The Department did not define “substantial injury” in the UDP Final Rule, other than observing that the term “would necessarily exclude trivial or speculative harm.”\(^23\)

Substantial injury would be determined by the totality of the circumstances. As FTC has written, “it is well established that substantial injury may be demonstrated by a showing of a small amount of harm to a large number of people, as well as a large amount of harm to a small number of people.”\(^24\) Substantial harm is typically of an economic nature. For example, the Department has found that delay in providing refunds to consumers constitutes substantial harm to consumers who did not receive the service they paid for and did not have

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\(^{13}\) 14 CFR 399.79(c).
\(^{14}\) 85 FR 78710.
\(^{15}\) 14 CFR 399.75[a](rulemaking): 399.75[b](enforcement).
\(^{16}\) 14 CFR 399.79(a).
\(^{17}\) 14 CFR 399.79(d).
\(^{19}\) Procedures in Regulating Unfair or Deceptive Practices,” 87 FR 5655 (Feb. 2, 2022).

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\(^{18}\) 14 CFR 399.79(b).
\(^{20}\) FTC has similar authority to declare a practice unfair if it is likely to cause substantial injury. See 15 U.S.C. 45(n).
\(^{21}\) LabMD at 10.
\(^{22}\) 14 CFR 399.79(b).
\(^{23}\) 85 FR 78710 n. 25.
\(^{24}\) LabMD at 9.
access to their money for a significant time. 25 However, it is well established that harm need not be financial in order to be substantial. For example, the Department found that delaying passengers on the tarmac for a substantial length of time without the opportunity to deplane or without adequate food, water, lavatory facilities, and medical attention imposes substantial harm. 26 Substantial harm may also be found in intangible injury, such as to an individual’s privacy or reputation. 27 Extended delays in obtaining relief, and the time and expense of pursuing a claim, can also constitute substantial harm. 28

3. Not Reasonably Avoidable

For a practice to be unfair, the harm must not have been reasonably avoidable by the consumer. 29 For example, a lengthy tarmac delay imposes unavoidable harm because the passenger lacks the opportunity to deplane. It has also been the longstanding view of OACP that it would be an unfair practice for a carrier to fail to provide a refund, on request, for flights to or from the United States that were canceled or significantly changed by the carrier, in part because the harm was not reasonably avoidable by the traveler. We came to this conclusion even if the passenger purchased a “non-refundable” ticket. We concluded that a consumer acting reasonably would believe that he or she was entitled to a refund under U.S. law if the carrier cancelled or significantly changed the flight, regardless of the reason for the cancellation or significant change. We further concluded that a reasonable consumer would not believe that it is necessary to purchase a more expensive refundable ticket in order to be able to recoup the ticket price when the airline fails to provide the service paid for through no action or fault of the consumer, because reasonable consumers understand that “refundable” tickets are valuable because they ensure a refund if the passenger cancels the flight. 30 The Department has issued a notice of proposed rulemaking that would propose to codify OACP’s interpretation that section 41712 requires airlines to provide prompt refunds when a carrier cancels or makes a significant change and the passenger does not take an alternative flight offered by the airline, including when the original ticket purchased is non-refundable. 31 The Department looks at this element from the perspective of an ordinary consumer acting reasonably under the totality of the circumstances. For example, we have found that a passenger who triggered an airline’s fraud-detection system and lost frequent flyer miles could have reasonably avoided that harm by not repeatedly entering fictitious information into the airline’s reservation system. 32

4. Harm Not Outweighed by Benefits to Consumers or Competition

Finally, the harm must not be outweighed by benefits to consumers or to competition. Like FTC, the Department recognizes that some practices may be harmful to consumers in some respects, but beneficial to consumers in other respects. For example, offsetting benefits may include lower prices or a wider availability of products and services resulting from competition. The Department seeks to regulate practices that are harmful to consumers in their net effects. 33 Importantly, the Department does not compare the harm to the consumer against the benefits that the airline or ticket agent may obtain from the practice. 34 The Department’s determination to regulate an unfair and deceptive practice would also be informed by a regulatory impact analysis.

5. Public Policy Considerations

As we noted in the UDP Final Rule, DOT has a broad statutory responsibility to consider a wide variety of public policies enumerated by Congress. 35 In fact, Congress has directed the Department in carrying out its aviation economic programs such as regulations under section 41712 to consider certain enumerated factors as being in the public interest. These factors include “the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices” and “preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.” 36 DOT considers public policy as established by both the Executive branch (e.g., regulation, Executive Order 37) and the Legislative branch (e.g., statute, sense of Congress) of the Federal Government as appropriate, when determining whether a practice is unfair.

As a public policy matter, the Department has found that discriminatory conduct in and of itself constitutes an unfair practice. In this regard, orders of the Department and its predecessor Civil Aeronautics Board (CAB) support the position that violations of statutes that prohibit discrimination constitute unfair and deceptive practices. For example, the CAB determined that unlawful disparate treatment of consumers by a carrier in its ticket-by-mail procedures based on the consumer’s ZIP code, which had the effect of discriminating against African-Americans in New York City, is an
unfair practice. The Department has also consistently found that violation of the Air Carrier Access Act, which prohibits U.S. and foreign air carriers from discriminating against passengers with disabilities, is an unfair practice. Similarly, the Department has found that discrimination against individuals based on their race, color, national origin, religion, ancestry or sex is an unfair practice.

Elements of Deception

In the UDP Final Rule, DOT defined a practice as “deceptive” if it “is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer’s conduct or decision with respect to a product or service.” We will address these elements in turn.

1. Likely To Mislead a Consumer

First, the practice must be likely to mislead the consumer. As FTC has explained, express misrepresentations, implied representations, and omissions are all potentially actionable. A failure to provide services as promised (whether by contract or otherwise) can also be deceptive.

The Department’s full-fare advertising rule is based on its authority to prohibit deceptive practices. Put simply, this rule requires advertised prices for air transportation to be the entire price to be paid by the customer to the carrier, or agent, for such air transportation. The Department based its rule on evidence that consumers believed that they were going to pay a particular advertised price for air transportation, only to find that the price was substantially higher due to additional taxes and fees. The rule also requires any charges that are listed as components of the entire price (e.g., taxes) not to be false or misleading.

We have also found that advertising a fare that is no longer available, or failing to have a reasonable number of seats available at the advertised fare, is deceptive. The Department has also found that an airline’s failure to comply with its publicly posted Customer Service Plan is deceptive, because the carrier failed to abide by its commitment to provide services as promised.

2. Acting Reasonably Under the Circumstances

Like FTC, the Department views deception from the perspective of an ordinary consumer acting reasonably in the circumstances. FTC has noted that entities are not responsible for the unreasonable interpretations of a handful of individuals, or for broad statements of feeling or opinion. Likewise, in the preamble to the UDP Final Rule, we noted that willful, intentional, or reckless consumer behavior that leads to self-imposed harm would likely not be covered.

However, if a representation may be interpreted in but reasonable ways, one of which is false, the entity may be liable for the misleading interpretation. Like FTC, the Department will look to all of the factors surrounding the statement to determine reasonableness, including how clear, conspicuous, and significant the representation is, the familiarity of the public with the product, and the availability of alternate sources for the information.

Practice

FTC has the statutory authority to prohibit unfair or deceptive “acts or practices” in or affecting commerce.
Section 41712, however, refers only to “practices.” In the UDP Final Rule, we explained that our aviation consumer protection regulations are always directed to practices of an airline or ticket agent, rather than isolated acts of individual employees. We also explained that our enforcement efforts include a determination that the conduct in question reflects a practice or policy affecting multiple consumers, rather than an isolated incident. We concluded that “in general, the Department is of the view that proof of a pattern or practice, or policy affecting multiple consumers, rather than a single isolated incident. On the other hand, even a single incident may be indicative of a practice if it reflects company policy, practice, training, or lack of training.”

Effective Date

This guidance is effective August 29, 2022.

Issued on or about this 15th day of August, 2022, in Washington, DC.

John E. Putnam,
General Counsel, U.S. Department of Transportation.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573
[Docket No. FDA–2021–F–0564]

Food Additives Permitted in Feed and Drinking Water of Animals; Fumonisin Esterase

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA, we, or the Agency) is amending the regulations for food additives permitted in feed and drinking water of animals to provide for the safe use of fumonisins esterase to degrade fumonisins present in poultry feed. This action is in response to a food additive petition filed by Biomin Holding GmbH.

DATES: This rule is effective August 29, 2022. See section V of this document for further information on the filing of objections. Either electronic or written objections and requests for a hearing on the final rule must be submitted by September 28, 2022.

ADDRESSES: You may submit objections and requests for a hearing as follows. Please note that late, untimely filed objections will not be considered. The https://www.regulations.gov electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of September 28, 2022. Objections received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic objections in the following way:

• Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting objections. Objections submitted electronically, including attachments, to https://www.regulations.gov will be posted to the docket unchanged. Because your objection will be made public, you are solely responsible for ensuring that your objection does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your objection, that information will be posted on https://www.regulations.gov.

• If you want to submit an objection with confidential information that you do not wish to be made available to the public, submit the objection as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

• Mail/Hand Delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• Written/paper objections submitted to the Dockets Management Staff, FDA will post your objection, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2021–F–0564 for “Food Additives Permitted in Feed and Drinking Water of Animals; Fumonisin Esterase.” Received objections, those filed in a timely manner (see ADDRESSES), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at https://www.regulations.gov or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit an objection with confidential information that you do not wish to be made publicly available, submit your objections only as a written/paper submission. You should submit two copies in total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of objections. The second copy, which will have the claimed confidential information redacted or blacked out, will be available for public viewing and posted on https://www.regulations.gov. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your objections and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.

Docket: For access to the docket to read background documents or the electronic and written/paper objections received, go to https://www.regulations.gov and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT:
Wasima Wahid, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl.