THE SECRETARY OF TRANSPORTATION
WASHINGTON, DC 20590

February 19, 2016

Commissioner Věra Jourová
European Commission
Rue de la Loi / Wetstraat 200
1049 1049 Brussels
Belgium

Re: EU-U.S. Privacy Shield Framework

Dear Commissioner Jourová:

The United States Department of Transportation ("Department" or "DOT") appreciates the opportunity to describe its role in enforcing the EU-U.S. Privacy Shield Framework. This Framework plays a critical role in protecting personal data provided during commercial transactions in an increasingly interconnected world. It enables businesses to conduct important operations in the global economy, while at the same time ensuring that EU consumers retain important privacy protections.

The DOT first publicly expressed its commitment to enforcement of the Safe Harbor Framework in a letter sent to the European Commission over 15 years ago. The DOT pledged to vigorously enforce the Safe Harbor Privacy Principles in that letter. The DOT continues to uphold this commitment and this letter memorializes that commitment.

Notably, the DOT renews its commitment in the following key areas: (1) prioritization of investigation of alleged Privacy Shield violations; (2) appropriate enforcement action against entities making false or deceptive Privacy Shield certification claims; and (3) monitoring and making public enforcement orders concerning Privacy Shield violations. We provide information about each of these commitments and, for necessary context, pertinent background about the DOT's role in protecting consumer privacy and enforcing the Privacy Shield Framework.

I. Background

A. DOT's Privacy Authority

The Department is strongly committed to ensuring the privacy of information provided by consumers to airlines and ticket agents. The DOT's authority to take action in this area is found in 49 U.S.C. 41712, which prohibits a carrier or ticket agent from engaging in "an unfair or deceptive practice or an unfair method of competition" in the sale of air transportation that results or is likely to result in consumer harm. Section 41712 is patterned after Section 5 of the Federal Trade Commission (FTC) Act (15 U.S.C. 45). We interpret our unfair or deceptive practice statute as prohibiting an airline or ticket agent from: (1) violating the terms of its

privacy policy; or (2) gathering or disclosing private information in a way that violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing benefits. We also interpret section 41712 as prohibiting carriers and ticket agents from: (1) violating any rule issued by the Department that identifies specific privacy practices as unfair or deceptive; or (2) violating the Children's Online Privacy Protection Act (COPPA) or FTC rules implementing COPPA. Under federal law, the DOT has exclusive authority to regulate the privacy practices of airlines, and it shares jurisdiction with the FTC with respect to the privacy practices of ticket agents in the sale of air transportation.

As such, once a carrier or seller of air transportation publicly commits to the Privacy Shield Framework's privacy principles the Department is able to use the statutory powers of section 41712 to ensure compliance with those principles. Therefore, once a passenger provides information to a carrier or ticket agent that has committed to honoring the Privacy Shield Framework's privacy principles, any failure to do so by the carrier or ticket agent would be a violation of section 41712.

B. Enforcement Practices

The Department's Office of Aviation Enforcement and Proceedings (Aviation Enforcement Office) investigates and prosecutes cases under 49 U.S.C. 41712. It enforces the statutory prohibition in section 41712 against unfair and deceptive practices primarily through negotiation, preparing cease and desist orders, and drafting orders assessing civil penalties. The office learns of potential violations largely from complaints it receives from individuals, travel agents, airlines, and U.S. and foreign government agencies. Consumers may use the DOT's website to file privacy complaints against airlines and ticket agents.[1]

If a reasonable and appropriate settlement in a case is not reached, the Aviation Enforcement Office has the authority to institute an enforcement proceeding involving an evidentiary hearing before a DOT administrative law judge (ALJ). The ALJ has the authority to issue cease-and-desist orders and civil penalties. Violations of section 41712 can result in the issuance of cease and desist orders and the imposition of civil penalties of up to $27,500 for each violation of section 41712.

The Department does not have the authority to award damages or provide pecuniary relief to individual complainants. However, the Department does have the authority to approve settlements resulting from investigations brought by its Aviation Enforcement Office that directly benefit consumers (e.g., cash, vouchers) as an offset to monetary penalties otherwise payable to the U.S. Government. This has occurred in the past, and may also occur in the context of the Privacy Shield Framework principles when circumstances warrant. Repeated violations of section 41712 by an airline would also raise questions regarding the airline's compliance disposition which could, in egregious situations, result in an airline being found to be no longer fit to operate and, therefore, losing its economic operating authority.

[1] http://www.transportation.gov/airconsumer/privacy-complaints.

To date, the DOT has received relatively few complaints involving alleged privacy violations by ticket agents or airlines. When they arise, they are investigated according to the principles set forth above.

C. DOT Legal Protections Benefiting EU Consumers

Under section 41712, the prohibition on unfair or deceptive practices in air transportation or the sale of air transportation applies to U.S. and foreign air carriers as well as ticket agents. The DOT frequently takes action against U.S. and foreign airlines for practices that affect both foreign and U.S. consumers on the basis that the airline's practices took place in the course of providing transportation to or from the United States. The DOT does and will continue to use all remedies that are available to protect both foreign and U.S. consumers from unfair or deceptive practices in air transportation by regulated entities.

The DOT also enforces, with respect to airlines, other targeted laws whose protections extend to non-U.S. consumers such as COPPA. Among other things, COPPA requires that operators of child-directed websites and online services, or general audience sites that knowingly collect personal information from children under 13 provide parental notice and obtain verifiable parental consent. U.S.-based websites and services that are subject to COPPA and collect personal information from foreign children are required to comply with COPPA. Foreign-based websites and online services must also comply with COPPA if they are directed to children in the United States, or if they knowingly collect personal information from children in the United States. To the extent that U.S. or foreign airlines doing business in the United States violate COPPA, the DOT would have jurisdiction to take enforcement action.

II. Privacy Shield Enforcement

If an airline or ticket agent chooses to participate in the Privacy Shield Framework and the Department receives a complaint that such an airline or ticket agent had allegedly violated the Framework, the Department would take the following steps to vigorously enforce the Framework.

A. Prioritizing Investigation of Alleged Violations

The Department's Aviation Enforcement Office will investigate each complaint alleging Privacy Shield violations (including complaints received from EU Data Protection Authorities) and take enforcement action where there is evidence of a violation. Further, the Aviation Enforcement Office will cooperate with the FTC and Department of Commerce and give priority consideration to allegations that the regulated entities are not complying with privacy commitments made as part of the Privacy Shield Framework.

Upon receipt of an allegation of a violation of the Privacy Shield Framework, the Department's Aviation Enforcement Office may take a range of actions as part of its investigation. For example, it may review the ticket agent or airline's privacy policies, obtain further information from the ticket agent or airline or from third parties, follow up with the referring entity, and assess whether there is a pattern of violations or significant number of consumers affected. In

addition, it would determine whether the issue implicates matters within the purview of the Department of Commerce or FTC, assess whether consumer education and business education would be helpful, and as appropriate, initiate an enforcement proceeding.

If the Department becomes aware of potential Privacy Shield violations by ticket agents, it will coordinate with the FTC on the matter. We will also advise the FTC and the Department of Commerce of the outcome of any Privacy Shield enforcement action.

B. Addressing False or Deceptive Membership Claims

The Department remains committed to investigating Privacy Shield violations, including false or deceptive claims of membership in the Privacy Shield Program. We will give priority consideration to referrals from the Department of Commerce regarding organizations that it identifies as improperly holding themselves out to be current members of Privacy Shield or using the Privacy Shield Framework certification mark without authorization.

In addition, we note that if an organization's privacy policy promises that it complies with the substantive Privacy Shield principles, its failure to make or maintain a registration with the Department of Commerce likely will not, by itself, excuse the organization from DOT enforcement of those commitments.

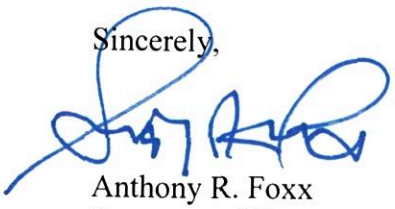
C. Monitoring and Making Public Enforcement Orders Concerning Privacy Shield Violations

The Department's Aviation Enforcement Office also remains committed to monitoring enforcement orders as needed to ensure compliance with the Privacy Shield program. Specifically, if the office issues an order directing an airline or ticket agent to cease and desist from future violations of Privacy Shield and section 41712, it will monitor the entity's compliance with the cease-and-desist provision in the order. In addition, the office will ensure that orders resulting from Privacy Shield cases are available on its website.

We look forward to our continued work with our federal partners and EU stakeholders on Privacy Shield matters.

I hope that this information proves helpful. If you have any questions or need further information, please feel free to contact me.

Sincerely,



Anthony R. Foxx
Secretary of Transportation