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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 255

[Dockets Nos. OST–97–2881, OST–97–3014, OST–98–4775, and OST–99–5888]

RIN 2105–AC65

Computer Reservations System (CRS) Regulations

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Final rule.

SUMMARY: The Department is amending its rules governing airline computer reservations systems (''CRSs'' or ''systems'') to eliminate most of the rules now and to terminate additional rules as of July 31, 2004. The Department is readopting the rules prohibiting display bias and adopting rules that prohibit systems from imposing certain types of contract clauses on participating airlines that would unreasonably restrict their ability to choose how to distribute their services. These rules will be effective during a six-month transition period.

DATES: This rule is effective on January 31, 2004.

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SUPPLEMENTARY INFORMATION:

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Table of Contents

Glossary

ASTA—American Society of Travel Agents.

Board—The Civil Aeronautics Board.

Booking fees—Fees paid by airlines and other travel suppliers when a travel agent makes or changes a booking in a system.

CRS—Computer reservations system.

Mandatory participation rule—The rule requiring each airline that has a significant ownership interest in a system to participate in competing systems at as high a level of functionality as it does in its own system, if the terms are commercially reasonable.

Network airlines—The airlines that operate hub-and-spoke route systems, especially the five largest airlines (American, Continental, Delta, Northwest, and United).

Non-airline system—A system that is neither owned nor controlled by any airline or airline affiliate.

OMB—Office of Management and Budget.

Participate—To make the services of an airline or other travel supplier available for sale through a system under a contract with that system.

Parity clauses—Clauses in participating airline contracts that require a participating airline to buy at least as high a level of service from the system as it does from any other system.

Productivity pricing—Pricing formula used in subscriber contracts that enables the travel agency to obtain lower CRS fees from a system if the travel agency meets minimum booking quotas established by the contract.

Section 411—49 U.S.C. 41712, recodifying section 411 of the Federal Aviation Act.

Subscriber—A travel agency that obtains CRS services under a contract with the system.

System—Computer reservations system.

Webfares—Discount fares offered by an airline through its own website and often through selected distribution channels.

A. Summary of Final Rule

In this proceeding we have reexamined whether our existing rules on computer reservations systems (''CRSs'' or ''systems''), 14 CFR Part 255, remain necessary and, if so, whether we should readopt them, with or without modifications. If we do not readopt the rules, they will expire on their sunset date, currently January 31, 2004. Our notice of proposed rulemaking asked for comment on these issues and proposed that most of the rules should be readopted. 67 FR 69366 (November 15, 2002). After reviewing the comments and the on-going changes in the airline distribution and CRS businesses reflected in those comments, we have concluded that most of the rules should be allowed to sunset on January 31, 2004. We believe, however, that we should adopt the rules prohibiting display bias and certain rules barring unreasonably restrictive requirements in the contracts between systems and their airline customers for a six-month transition period to provide an opportunity for the affected parties to prepare for complete deregulation of computer reservation systems. We intend to monitor developments in the industry during this period and beyond. We, of course, retain our authority to pursue future regulatory or enforcement actions against airlines or systems that engage in anti-competitive practices.

The systems' operations have been subject to rules for twenty years. Although the systems now are commonly called global distribution systems, or GDSs, we will continue to refer to them here as CRSs. The Civil Aeronautics Board (''the Board''), the agency that had been responsible for the economic regulation of the airline industry, originally adopted those rules in 1984. 49 FR 32540 (August 15, 1984), *aff'd, United Air Lines* v. *CAB,* 766 F.2d 1107 (7th Cir. 1985). After reexamining whether those rules were necessary and effective, we readopted them with some changes in 1992. 14 CFR Part 255, adopted at 57 FR 43780 (September 22, 1992).

When these rulemakings were held, one or more airlines or airline affiliates owned or controlled each system, airlines depended heavily on travel agencies for distribution, travel agents used a system to research airline service options and to make bookings, and each travel agency predominantly relied on one system to perform these tasks. Systems therefore did not need to compete for airline participants (a ''participant'' is an airline that agrees to make its services saleable through a system). The airlines that controlled the systems had the incentive and ability to use them to prejudice the competitive position of non-owner airlines and to provide information on airline services through the systems to travel agents that gave an undue preference to the services operated by the owner airlines. Competitive market forces did not discipline the prices and terms for services offered by systems to participating airlines.

Our goal in CRS rulemakings has been to prevent practices that were likely to harm consumers by substantially reducing airline competition or by giving travel agents and their customers inaccurate or misleading information on airline services. The rules block system practices that would cause consumers and their travel agents to receive misleading information and would distort airline competition. We adopted most of the rules under our authority to prevent unfair methods of competition in the sale of airline transportation, an authority that empowers us to prohibit practices that violate the antitrust laws or antitrust principles, but, in adopting the rules prohibiting display bias, we additionally relied on our authority to prevent unfair and deceptive practices in the marketing of air transportation.

We should adopt rules regulating industry practices only if they are reasonably necessary to prevent anti-competitive or deceptive practices that are likely to occur, and would cause significant consumer harm if they did occur, and that market forces are unlikely to remedy. Any rule must be effective and enforceable. Rules intended to address a serious competitive concern may have unintended consequences that may reduce efficiency and consumer choice. As we explained in our notice of proposed rulemaking, we will not adopt rules that address all potential problems, for such detailed regulations would necessarily impose significant burdens on the systems and interfere with legitimate business practices. 67 FR 69389. Our approach for determining whether rules are necessary is essentially the same as that recommended by the Justice Department. The Department of Justice states that regulation is appropriate ''only when (1) market participants have substantial and durable market power that will likely harm consumers directly, or will be exercised in ways that exclude or limit competition in contiguous markets, and (2) the regulation will likely be effective and enforceable without imposing significant costs of its own.'' Justice Department Reply Comments at 18.

Our rules included a sunset date, currently January 31, 2004, to ensure that we would review whether the rules remained necessary in light of on-going developments in the CRS and airline distribution businesses. 57 FR 43829–43830; 68 FR 15350 (March 31, 2003). This proceeding carries out that reassessment. The major changes that have occurred since our last major rulemaking underscore the need for such a reassessment.

All of the U.S. airlines that had controlled a system have divested their CRS ownership interests. As a result, none of the four systems now operating in the United States is owned or controlled by any U.S. airline or airline affiliate. Furthermore, airlines are selling an increasingly large share of their tickets through their Internet websites and a diminishing share through travel agencies using a system. The airlines' control over access to their webfares, the discounted fares originally offered only through individual airline websites, has enabled them to obtain lower fees from two of the systems. And travel agencies are increasingly demanding—and winning—contracts from the systems that give them more freedom to use alternative booking channels and to switch systems periodically.

Our examination of these developments has persuaded us that we should allow most of the existing rules to sunset upon their expiration. The major predicate for the rules has always been the systems' control by airlines. The U.S. airlines' divestiture of their ownership interests has eliminated that basis for the rules. While each system still has market power over most airlines, that power is diminishing. Moreover, the record does not show a likelihood that the systems would use that power to distort airline competition except potentially through the sale of bias.

On the other hand, we have determined that we should readopt, for a six-month transition period, the rules prohibiting display bias and rules prohibiting certain types of contract clauses in the systems' contracts with airlines. We are readopting the rules against display bias because we believe that, were the rules terminated immediately, systems might well be expected to bias their displays in ways that could mislead travel agents and their customers and prejudice airline competition. For that reason, we believe it is important to provide a measure of notice to the industry prior to the rules' termination and a concomitant opportunity to prepare for the absence of regulation.

Similarly, we are adopting for the same short transition period two rules governing the contracts between the systems and airlines: rules prohibiting parity clauses (a parity clause would require an airline to participate in that system at at least as high a level as it participates in any other system) and clauses requiring airlines to provide access to all webfares as a condition to any participation in a system. However, an airline is free to agree to such clauses. We believe that, were these prohibitions terminated immediately, the systems would have sufficient market power to impose contract terms on airlines that would unreasonably restrict the airlines' ability to bargain for better terms for participation. The transition period during which these prohibitions will be maintained will furnish the industry with reasonable notice of the forthcoming change with an opportunity to prepare for it. Our final decision is consistent with the recommendations made by the Justice Department.

The two rules on contract clauses and the rule prohibiting display bias therefore will sunset on July 31, 2004. We will actively monitor developments during the transition period and beyond and take appropriate investigative, enforcement, or regulatory action if we see evidence that systems or airlines are engaging in anti-competitive conduct in connection with airline distribution through the systems and other channels.

We will not readopt the other rules now in force, and we reaffirm our tentative decision not to adopt rules governing the use of the Internet in airline distribution. The rules that we are not readopting will automatically expire on January 31, 2004, their sunset date.

The elimination of most of the rules will ensure that government regulation does not interfere with market forces and innovation in the CRS and airline distribution businesses. The record indicates that market forces are beginning to discipline business practices in the CRS industry. Ending the broad regulation of CRS practices will enable each system and each airline to bargain over the terms on which CRS services should be provided, just as airlines obtain products and services from other suppliers under agreements negotiated by the parties. The systems will have the same ability to bargain with their other customers, the travel agencies. The resulting terms under which airlines and travel agencies obtain system services will likely reflect the interests of both sides better than if we maintained broad regulations restricting the parties' behavior. While we cannot predict exactly what will happen, we believe that ending most of the rules will produce the best results for consumers over time. We base this judgment on our experience with airline deregulation. Airline deregulation has provided lower fares and better service for consumers, in part by enabling new firms to enter the airline business. Several of the new airlines have followed new business plans that have provided great benefits for airline travelers. Airline deregulation has produced these benefits even though the deregulated airline industry has not operated in the manner expected by industry experts on the eve of deregulation. The deregulation of the CRS business should also benefit consumers, even though we cannot forecast how it will play out.

Our final rule also conforms to the limits imposed by Congress on our authority to regulate the airline and airline distribution businesses. Congress has given us the authority to prevent practices that violate the antitrust laws or antitrust principles and practices that are deceptive, but no comprehensive oversight authority over airline distribution. We are adopting only those rules that are necessary to prevent practices in the CRS business that would constitute unfair or deceptive practices, or unfair methods of competition.

We are aware that some participants in the airline distribution and CRS businesses may seek to engage in anti-competitive conduct that would reduce competition in the airline and airline distribution businesses and thereby harm consumers. A system, for example, might develop vertical ties with an airline that would cause the system to operate in a way that could prejudice airline competition. Some systems may seek to pursue practices that would reduce competition in the CRS business and preserve their market power over airlines. Even without specific regulations, any such practices could be unfair methods of competition and thus unlawful. We retain the authority to bring enforcement cases against firms that violate the statutory prohibition against unfair methods of competition, and we will take appropriate action if we have evidence of unlawful conduct. As Congress stated when it deregulated the airline industry, S. Rep. No. 95–631, 95th Cong., 2d Sess. (1978) at 52:

> Vigorous enforcement of antitrust policy is the discipline by which competition can remain free and markets can operate in a healthy fashion. Predatory behavior, market concentration, and other economic evils should be avoided and remedied by the Board when they exist.

See also H. R. Rep. No. 98–793, 98th Cong., 2d Sess. (1984) at 5: ''Although the airline industry has been deregulated, this does not mean that there are no limits to competitive practices. As is the case with all industry, carriers must not engage in practices which would destroy the framework under which fair competition operates.''

We will also actively monitor the systems' reactions to the substantial deregulation of their business, and we, of course, retain the power to reexamine our decision that all rules should terminate by July 31, 2004, if the systems' conduct or other developments makes such a reexamination necessary.

Our final rule departs from the proposals made by our notice of proposed rulemaking. Our notice proposed to eliminate two of the major rules, the rule barring discriminatory booking fees and the rule requiring airlines with a significant ownership interest in one system to participate in competing systems at an equivalent level if the terms for doing so were commercially reasonable, but to readopt most of the remaining rules. Our review of the rulemaking record up to that point suggested that rules were still necessary, notwithstanding the changes in the systems' ownership and the growing role of the Internet. 67 FR 69375–69384. The notice, however, did request comment on whether we should sunset more of the rules now, and we predicted that the rules would become unnecessary in a few years. 67 FR 69368, 69376, 69388–69389.

The comments and the continuing developments in airline distribution and the CRS business have convinced us that most of the rules are no longer appropriate. In particular, one of the systems, Worldspan, was owned by three U.S. airlines when we issued our notice of proposed rulemaking but was sold several months ago to two private venture capital firms. The airline distribution business has continued to evolve since we issued the notice. Airlines are selling more tickets through the Internet. Moreover, as we predicted, the airlines' control over access to their webfares has led some of the systems to offer airlines discounted booking fees in return for the ability to sell those fares. 67 FR 69381; Galileo Supp. Comments at 5–8. And the comments have shown that the systems' contracts with travel agencies are significantly less restrictive than they were even a few years ago. *See, e.g.*, ASTA Comments at 14–16.

That our final rule does not duplicate our proposal is consistent with the purpose of rulemaking procedures. The notice of proposed rulemaking was designed to obtain comments from interested persons on our tentative findings and our economic and policy analysis and to enable them to submit current information. We held a public hearing to give interested persons an additional opportunity to present their views and respond to our questions. The comments submitted in this proceeding, together with the on-going developments in the airline distribution and CRS businesses, have persuaded us that our proposals should not be made final. Those proposals, while reasonable in light of industry conditions two or three years ago, to a large extent no longer reflect current conditions.

We will begin our explanation of our final rule by updating our description of the CRS and travel agency businesses, and we address several procedural issues. We then discuss our conclusions on the need for adopting some CRS rules, including our findings that the systems continue to have market power over airlines, and discuss the question of our legal authority to readopt the rules and to apply them to systems that are not owned by airlines. We thereafter present the rationale for our decisions on each of the rule proposals.

Our notice of proposed rulemaking included a request for comments on whether we should clarify our policy on fare disclosures as regards the disclosure of travel agency service fees. We have decided to address that question in a separate rule.

We will refer to commenters by their common names (for example, ''Alaska,'' not ''Alaska Airlines''). References to comments and reply comments are to the pleadings filed in response to the notice of proposed rulemaking, not the pleadings filed in response to the advance notices of proposed rulemaking, which were discussed in the notice of proposed rulemaking. We will refer to the statutory provision that is the principal basis for our adoption of CRS rules, 49 U.S.C. 41712, by its traditional name, section 411, as we did in the notice of proposed rulemaking. The glossary at the beginning of this document gives the meaning of the abbreviations and technical terms used in this rule.

B. Background

Our notice of proposed rulemaking described in some detail the nature of the airline distribution and CRS businesses, including the travel agency business. 67 FR 69369–69375. Here we will update our factual description on the basis of the information provided by the comments and set forth the factual findings underlying our final decision.

1. The CRS Business

Airlines use several distribution methods: direct sales through their reservations agents, sales through ''brick-and-mortar'' travel agencies, sales through individual airline websites, and sales through on-line travel agencies. In the past, the ''brick-and-mortar'' travel agency channel produced the great majority of airline revenues for almost all airlines. In 1999 travel agencies sold almost three-quarters of airline tickets, almost all through off-line travel agencies. 67 FR 69369, citing Bear, Stearns & Co., ''Point, Click, Trip: An Introduction to the On-Line Travel Agency'' (April 2000) at 17. Since then the Internet has become an increasingly important distribution channel. Galileo states that the different channels' shares of total airline tickets in 2002 were as follows, Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 24:

	Percent
off-line sales by airlines	17
on-line sales by airlines	10
off-line sales by travel agencies	58
on-line sales by travel agencies	15

Until recently the great majority of all travel agency airline ticket sales, whether off-line or on-line, have been made through one of the systems.

Four systems operate in the United States: Sabre, Galileo, Worldspan, and Amadeus. Each of them was originally developed by one or more U.S. airlines (Amadeus entered the U.S. market by acquiring a U.S. system). Two of the systems—Sabre and Galileo—were no longer owned or controlled by any U.S. airlines when we issued the notice of proposed rulemaking. At that time, three U.S. airlines—American, Delta, and Northwest—owned Worldspan. Amadeus was then owned by three European airlines—Air France, Iberia, and Lufthansa—as well as by public shareholders (and has the same ownership today). Worldspan's airline owners sold that system to two private venture capital firms on June 30, 2003, after the issuance of our notice of proposed rulemaking. As part of that sale, the airline owners agreed to certain parity clauses and marketing commitments. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 20; Amadeus Comments at 32–33; August 1, 2003, Letter from Charles Simpson, Jr.; Sabre Supp. Reply at 4. Amadeus is now the only system with any airline ownership.

The systems that have no airline owners have marketing ties with their former owners. United markets Galileo, American markets Sabre, and Delta and Northwest have agreed to market Worldspan for several years following the closing of the system's sale. Amadeus Comments at 25, n. 24; Galileo Supp. Comments at 1–4. Southwest also markets Sabre, although Southwest never had an ownership interest in the system.

Each system's share of CRS airline bookings in the United States in 2002 was as follows, Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 18:

	Percent
Sabre	44.7
Worldspan	26.5
Galileo	19.7
Amadeus	9.2

Since 1999 the shares of Galileo and Amadeus have been declining, while Worldspan's share has risen sharply, from 19.3 percent to 26.5 percent. The growth in Worldspan's share in large part reflects its status as the booking engine for two of the three largest on-line travel agencies, Expedia and Orbitz.

Each system provides information and booking capabilities on the airlines that ''participate'' in it, that is, agree to make their services saleable through the system. The system obtains its availability information from the airlines' internal reservations systems, and it makes bookings in those systems, which are used by the airlines' own reservations agents and other staff members. The systems also provide information and booking capabilities for rental cars, hotels, and other travel services. Airline transportation is the most important travel service sold through the systems, and airlines obtain a larger share of their revenues from CRS bookings (sales made through the systems) than do other travel suppliers. 67 FR 69370.

An airline (or other travel supplier) participating in a system must pay fees for each booking transaction (the fees paid by participating airlines are usually called ''booking fees''). Airlines can participate at different levels. At higher levels the information provided travel agencies will be more timely and so more reliable, and travel agents can carry out tasks like reserving specific seats for their customers. An airline that chooses a higher level of participation must pay a higher booking fee. 67 FR 69370. Booking fees paid by airlines provide well over half of the systems' total revenues. 67 FR 69380.

The average airline booking fee per segment is $4.25. Because the average ticket includes more than one segment, the average booking fee per ticket is $11. United Reply Comments at 28; ''Upheaval in Travel Distribution: Impact on Consumers and Travel Agents,'' National Commission to Ensure Consumer Information and Choice in the Airline Industry'' (November 13, 2002), at 16. United alleges that its average booking fee per segment equals 3.3 percent of its average revenue per segment. United Reply Comments at 29. Sabre has stated that the effective booking fee per segment for its highest level of participation was $4.38 in 2002, about 2.4 percent of the average airline ticket price for tickets sold through Sabre. Sabre charges $2.12 per segment for airlines participating at its low level, Basic Booking Service. Sabre Comments at 14; Sabre Comments, Wilson Declaration at 6.

Sabre and Galileo have created programs that give participating airlines lower booking fees in return for a commitment to provide the system with all of their webfares. Under Sabre's Direct Connect Availability program (''DCA program''), an airline can obtain a 10 percent reduction in its booking fees, guaranteed for three years, in exchange for a commitment to provide the system with all of the airline's published fares, including its webfares. American, Continental, Delta, Northwest, United, U.S. Airways, and a number of smaller airlines now participate in this program. Sabre Supplemental Reply at 1.

Galileo first established its Momentum program, which gave airlines a 20 percent reduction in booking fees for tickets sold through participating travel agencies, if the airlines agreed to give Galileo access to all of their publicly-available fares. Travel agencies could participate in the program if they agreed to a reduction in their incentive payments from Galileo. United and U.S. Airways were the first airlines that joined this program. One of the travel agencies that joined the program was Rosenbluth International, the fourth largest U.S. corporate travel agency. Due to complaints from America West and other airlines, Galileo dropped the initial requirement that any airline participating in the Momentum program must upgrade its participation level to the highest level. More recently Galileo introduced Preferred Fares Select, which will enable airlines to obtain lower booking fees on all of their bookings if they agree to make all of their publicly-available fares saleable through Galileo. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 52–56; Galileo Reply Comments at 33–34; Galileo Supplemental Comments at 5–8; Sabre Comments, Fahy Declaration at 10–11.

The record does not indicate that Amadeus or Worldspan has introduced comparable programs.

Travel agencies often obtain CRS services at no cost or receive bonus payments in exchange for agreeing to use a system. ASTA states that in 2002 fewer than half of all travel agencies paid monthly fees for system services and that 60 percent of them received a signing bonus of some kind from the system that they were using. ASTA Comments at 17. The systems pay on average $1 to $1.50 per booking to travel agencies for using a system. Sabre Comments at 7.

As we stated in the notice of proposed rulemaking, travel agents have depended heavily on the systems to determine what airline services are available and to make bookings. There we cited statistics showing that travel agencies in 1999 sold almost three-quarters of all airline tickets and made 93 percent of their domestic airline bookings and 81 percent of their international airline bookings through a system. 67 FR 69369–69370. The record shows that since then the share of airline revenues produced by travel agents using a system has been declining. The Justice Department states that the share of revenues produced by ''brick-and-mortar'' travel agencies for the five airlines that own Orbitz has fallen from 76 percent in May 2000 to 67 percent in March 2002, primarily due to the growth in Internet sales. Justice Department Reply Comments at 14–15.

In the past, almost all U.S. airlines participated in every system. Southwest, which has participated only in Sabre and at a low level, was the major exception. JetBlue, which began operations in 2000, also participates only in Sabre and at the same level as Southwest. Sabre Comments at 38. Airlines that can avoid participation in every system focus their marketing efforts instead on direct sales to consumers, made through either the airline's website or its reservations agents. Airlines that have been participating in all of the systems, such as Alaska, have been shifting many of their bookings away from the travel agency channel, which required them to pay the systems' booking fees. *See, e.g.*, Alaska Comments at 5. The large network airlines nonetheless still obtain at least 60 percent of their revenues from bookings made by travel agents using a system, as discussed below. American, for example, states that over 70 percent of its bookings are made through the systems. American Reply Comments at 19. The share of total industry bookings made through the systems has been declining in part due to the growth of airlines like Southwest that do not depend on travel agencies for the major share of their revenues. American Reply Comments at 19.

The systems have played a major role in airline distribution because travel agents—the airlines' primary distribution channel—have relied so much on the systems for investigating airline service options and booking tickets, because the systems are so efficient. They electronically provide comprehensive information and booking capabilities on airlines and other travel suppliers. Each system presents displays that integrate almost all services offered in a market. Each system shows the schedules and fares offered by airlines in each market that are available for sale through travel agents using that system and whether seats are available on specific flights at specific fares (some fares are often not available through the systems, notably corporate discount fares and webfares). The system thus allows the travel agent to compare the schedules and fares offered by different airlines and determine which would best meet a customer's needs. The agent using a system can reserve a seat and issue a paper ticket or print an E-ticket.

On-line agencies also use systems—Travelocity uses Sabre, while Expedia and Orbitz use Worldspan, for example. 67 FR 69370. Orbitz and Expedia have been developing direct connection technologies which enable bookings to be made directly with an airline's internal reservations system, bypassing Worldspan. Sabre Comments, Fahy Declaration at 8–9.

Since the Board first adopted CRS rules, no firm has entered the CRS business. Until recently, entry into the CRS business would have been prohibitively costly and time-consuming. 67 FR 69381. This may no longer be true. Sabre Comments, Fahy Declaration at 8. New direct-connection technologies can enable firms to provide airline information and booking services that replicate at least some of the services provided by the systems. Galileo Comments at 42, n. 38. Orbitz, which now operates as an on-line travel agency, plans to make its services available to travel agencies through software being developed by Aqua. Orbitz continues to rely on Worldspan for some functions involved in the search and booking process. 67 FR 69373, 69374. Another commenter in this proceeding, AgentWare, is also offering travel agencies fare and schedule information and links to booking sites. Galileo Comments at 66–67.

The development of sources of airline information and booking capabilities on the Internet has created additional resources that travel agents can use. Travel agents are increasingly checking the fares and services offered on websites because some airline discount fares have not been sold through the systems. Travel agents, however, continue to make most of their airline bookings through a system. Using alternative booking channels is less efficient for travel agents, as discussed below. Nevertheless, the development of alternative sources of information and booking capabilities on the Internet, and the airlines' control over access to their webfares, have begun to make the systems responsive to market force discipline.

Corporate travel departments as well as travel agencies use the systems. A corporate travel department can book travel for its company's employees by accessing a system through the Internet or by Intranet (an internal corporate communications network based on Internet technology). 67 FR 69370.

Systems operate throughout the world. U.S. systems like Sabre and Worldspan market their services to travel agencies in foreign countries, and Amadeus is a major system in the Eastern Hemisphere. The systems had the following shares of worldwide CRS airline bookings in 2002, Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 18:

	Percent
Sabre	30.8
Worldspan	15.1
Galileo	26.4
Amadeus	27.7

The European Union, Canada, and other governments have regulations governing CRS operations. The United States has entered into a number of international air services agreements that require each party to ensure that the systems operating in its country and their owners do not subject airlines and systems from the other country to discriminatory treatment. 67 FR 69371–69372.

2. The Travel Agency Distribution System and the Business Relationships Between Travel Agencies and the Systems

The systems' practices have affected airline competition because of the importance of travel agents in airline distribution. The travel agency system has provided airlines with an efficient means of distribution. Travel agencies have acted as agents for virtually all airlines and generally hold themselves out to the public as sources of impartial advice on airline services and other travel services. 67 FR 69371.

In 2001, there were 18,425 travel agencies. The travel agency business is dominated by the largest travel agencies. In 2001, the 117 travel agencies with revenues of more than $50 million (as measured by sales of air transportation) accounted for 57.2 percent of all travel agency sales. The 1,015 travel agencies with revenues of $5 million to $50 million accounted for another 20.1 percent of all travel agency sales. ''Upheaval in Travel Distribution: Impact on Consumers and Travel Agents,'' National Commission to Ensure Consumer Information and Choice in the Airline Industry'' (November 13, 2002), at 113. *See also* Sabre Comments, Salop & Woodbury Declaration at Table 3 (Sabre's top five subscribers produced 25.7 percent of its total bookings, excluding Travelocity, and the top 100 produced 49.6 percent of its total bookings, excluding Travelocity).

As noted above, in 2002 the airlines obtained 58 percent of their bookings from ''brick-and-mortar'' travel agencies and 15 percent from on-line travel agencies. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 24. The three largest on-line travel agencies had the following shares of all on-line travel agency bookings in 2002: Travelocity, 28.5 percent; Expedia, 28.7 percent; and Orbitz, 21.3 percent. Sabre Comments, Salop & Woodbury Declaration at Table 2. Travelocity is a Sabre subsidiary, while Orbitz is owned by the five largest U.S. airlines—American, Continental, Delta, Northwest, and United. Travelocity has been using Sabre as its source of airline information and booking capabilities, while Expedia and Orbitz have been using Worldspan for these functions. Orbitz and Expedia have been developing direct connections with airlines that bypass Worldspan. Airlines that agree to be ''charter associates'' in Orbitz, which includes a commitment to make all publicly available fares available for sale through Orbitz, receive a rebate on their booking fees. 67 FR 69374.

The larger airlines still obtain most of their revenues from bookings made by travel agents. However, despite the continuing importance of travel agencies in airline distribution, the travel agency business has faced severe business problems in recent years, due to developments such as the airlines' elimination of base commissions (but not incentive commissions), the growing use of the Internet by many travelers, particularly leisure travelers, and the overall decline in airline traffic. *See* ''Upheaval in Travel Distribution: Impact on Consumers and Travel Agents,'' National Commission To Ensure Consumer Information and Choice in the Airline Industry'' (November 13, 2002). From 1994 to 2002, the number of travel agencies fell by 31 percent and the number of travel agency locations by 21 percent. ''Upheaval in Travel Distribution'' at 21. The number of travel agencies declined by 12 percent in the year ended September 2002 and by another 7 percent through April 2003. ASTA Reply Comments at 15–16.

The nature of the travel agencies' operations is important to this proceeding, because we must consider the impact of our decisions on the travel agencies' business and because the rules have covered some features of the relationships between the systems and travel agencies. However, providing support for travel agencies that would offset other economic developments is not within our statutory authority and therefore not a proper goal of this proceeding. This proceeding must be, and is, limited to preventing system practices and related airline practices that would harm consumers by significantly reducing airline competition.

A critical factor in our decision-making is that travel agencies, unlike most airlines, can choose which system to use. Most travel agencies need to use only one system, and for most travel agencies no system has features and information that are indispensable, as discussed below. Because most travel agencies are free to decide to use one system rather than its competitors, the systems compete vigorously for travel agency customers. As noted above, systems usually pay travel agencies for choosing one system rather than another. *See, e.g.*, 67 FR 69371; Sabre Comments at 7.

In past rulemaking proceedings, and in our notice of proposed rulemaking in this proceeding, we cited evidence that the systems' contracts with travel agencies often contained provisions that unreasonably restricted the travel agencies' ability to use more than one system or to use alternative electronic sources of airline information and booking channels. 67 FR 69405; 57 FR 43822. For example, each system formerly kept travel agencies from buying their own equipment and made them use equipment provided by the system for accessing its services. 57 FR 43796. The record further suggested that the systems' contracts with travel agencies typically included ''productivity pricing'' programs that imposed financial penalties on an agency that began using another system or other booking channel for making a substantial number of bookings, or that gave the agency incentive payments if it made most of its bookings through that system. 67 FR 69408. These types of restrictive contract provisions concerned us because they tended to preserve the systems' market power and denied airlines an opportunity to encourage travel agencies to use alternative electronic means for obtaining information on airline services and making bookings, such as direct links between a travel agency and an airline's own internal reservations system. Our notice observed, however, that the systems were giving at least some travel agencies more flexible terms. 67 FR 69405.

The proposals made by our notice fairly reflected industry conditions when the comments on our advance notices of proposed rulemaking were filed. Large Agency Coalition Comments at 7. However, the comments submitted in response to our notice of proposed rulemaking show that travel agencies since then have been successfully demanding more flexible contracts and winning the ability to use alternative booking channels. ASTA's October 2002 travel agency survey made the following finding (quoted in Sabre Comments at 151):

[CRS] vendors are introducing a new crop of more flexible contracts with less rigid productivity requirements and more pricing options. [C]ontract terms have gotten more favorable towards agencies with shorter overall length, lower required segments and a higher percentage of agencies receiving booking incentives.

See also Large Agency Coalition Comments at 7–14.

For example, subscriber contracts typically have a term that is substantially shorter than the maximum permitted by our rules. Our rules prohibit contracts with a term of more than five years and require a system to offer a three-year contract to any travel agency offered a five-year contract. 57 FR 43825. For some time after we adopted that rule, few travel agencies had contracts with a term of less than five years. 67 FR 69405. Now, however, many travel agencies have contracts that are no more than three years in length. The percentage of travel agencies with five-year contracts has declined from 85 percent in 1998 to 47 percent in 2002, while the percentage with three-year contracts has risen from 9 percent in 1998 to 39 percent in 2002. Almost 60 percent of Worldspan subscribers had five-year contracts in 2002, while only 35 percent of Sabre's subscribers had such contracts. Sabre Comments at 17–18; Sabre Comments, Fahy Declaration at 14–15.

Travel agencies, moreover, have a substantial ability to switch systems when their existing contract expires. Half of the responding agencies in the ASTA survey stated they intended to obtain competitive bids at the end of their current contract, while another third stated that they might seek competitive bids and only one sixth stated they definitely intended to continue using the same system. Sabre Comments at 153. Nonetheless, switching systems can impose significant costs on travel agencies, at least for smaller travel agencies. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 81.

When we last readopted the rules, we added a provision giving travel agencies the right to use their own equipment to access a system and to use third-party software. Before then, each system typically demanded that its subscribers use equipment provided by the system and barred subscribers from accessing other systems and databases from that equipment. 57 FR 43796–43797. Travel agencies are increasingly using their own equipment. Only 70 percent of travel agencies leased equipment from a system in 2002, while 85 percent did so in 2000. ASTA Comments at 14. Sabre alleges that it seeks to exit the equipment-leasing business, that 73 percent of the equipment used by Sabre subscribers will be provided by third parties by the end of 2003, and that 62.5 percent of their equipment was being provided by third parties as of November 2002. Sabre Comments at 131. Amadeus states that only one fourth of its subscribers rely entirely on equipment provided by Amadeus. Amadeus Comments at 45. Subscribers to other systems are more likely to use equipment provided by the system. ASTA represents that systems do not resist subscriber efforts to use their own equipment instead of equipment provided by the system. ASTA Comments at 15. Sabre represents that it does not enforce the provisions in its older subscriber contracts that barred the travel agencies from using Sabre equipment to access other systems. Its subscribers are free to use multiple systems. Sabre Comments at 17, n. 17, and 71. Amadeus has made a similar representation. Amadeus Comments at 45.

Sabre further represents that the larger travel agencies often have complete flexibility in using the systems. Sixteen of Sabre's 20 largest ''brick-and-mortar'' travel agency customers use multiple systems, and many use their own software to direct bookings to a specific system, often in order to maximize their incentive payments. Those 16 agencies produce 35 percent of Sabre's total volume from ''brick-and-mortar'' travel agencies. Sabre Comments at 71. However, as discussed below in our market definition analysis, each location of a travel agency that subscribes to more than one system tends to predominantly rely on one system rather than make substantial use of every system whose services are being purchased by the parent firm.

Using alternate booking channels and sources of information has become easier for travel agents in recent years. New software, for example, allows travel agents to conduct fare searches simultaneously through a system and airline websites. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 29. The systems allegedly do not seek to block their subscribers from using alternative booking channels and sources of information, and they help develop tools enabling travel agents to use alternative sources of information. Galileo Comments at 64, 66–67. In 2002, 98 percent of all travel agencies had Internet access, according to an ASTA survey. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 81.

However, despite the widespread use of the Internet by travel agents, they make relatively few bookings through the Internet. According to the ASTA survey, travel agents made only 10 percent of their bookings through websites, and most of those bookings were for tours booked through tour operator sites. ASTA Comments at 12. The inefficiency of using the Internet for airline bookings is probably the most important deterrent to a greater use of the Internet. *See* ''Upheaval in Travel Distribution: Impact on Consumers and Travel Agents,'' National Commission To Ensure Consumer Information and Choice in the Airline Industry'' (November 13, 2002), at 47–50.

Our notice further identified the systems' pricing practices as a factor that seemingly kept travel agencies from using alternative systems and booking channels. Each system's productivity pricing program generally gave travel agencies incentive payments if a subscriber used the system for a large majority of its bookings (or imposed financial penalties if it did not). We believed that such productivity pricing programs effectively deterred travel agencies from making significant use of alternative booking channels, such as airline websites. While we noted that the percentage of subscriber contracts with productivity pricing had been declining, most subscriber contracts still included productivity pricing. 67 FR 69408–69409.

The comments show that the systems' productivity pricing provisions have become significantly less widespread and less restrictive in the last few years. In 1998 91 percent of subscriber contracts had productivity pricing, but only 56 percent did in 2002. The average number of bookings required before a travel agency can obtain incentive payments has fallen from 252 in 1998 to 194 in 2002. ASTA Comments at 15; Sabre Comments at 69, 162. The Large Agency Coalition represents that the systems' incentive payment programs typically allow the travel agency to make up to thirty percent of its bookings outside the system before it suffers a financial penalty. Transcript at 231. Despite these changes, however, Sabre states that it has contracts with some small travel agencies that require the subscriber to use no system other than Sabre. Sabre argues that this requirement is reasonable under the circumstances because Sabre is providing support for the agency's operations that would otherwise not be economical. Sabre Comments, Salop & Woodbury Declaration at 20. Nonetheless, despite the greater flexibility allowed travel

agencies by recent productivity pricing arrangements, the record suggests that the systems' current contractual arrangements may still deter travel agencies from making many bookings through the Internet. Orbitz Comments at 23, n. 10; ASTA Comments at 26, n. 44, and 34–35; Travel Management Alliance Comments.

The increasing flexibility of the contracts obtained by travel agencies is the result of changes in the travel agency business. ASTA states that travel agencies must have a greater ability to respond to changing technology, especially the growth of the Internet. The increasing uncertainties of the travel agency business itself, moreover, are likely to encourage many travel agencies to avoid long-term commitments if possible. ASTA Comments at 14. The large travel agencies created in recent years have more bargaining leverage with the systems.

In the past, we have endeavored to prevent system practices that would deter travel agencies from using multiple systems. We reasoned that the systems' market power over airlines would be reduced if travel agencies had the ability to use alternative sources of airline information and booking capabilities. 57 FR 43797. Travel agency parties had encouraged those efforts. 67 FR 69391; 57 FR 43796.

The travel agency commenters in this proceeding assert, however, that rules designed to encourage travel agencies to use multiple systems will be futile. They contend that almost all travel agencies predominantly or entirely use one system. ASTA thus alleges, ASTA Comments at 3–4:

> Use of a single CRS is a function of the market reality that multiple CRS's are highly inefficient for travel agencies, who therefore do not employ them. No amount of realistically foreseeable inducement from competing CRS's or regulatory pressure from DOT is going to overcome the inefficiencies for most agencies of operating multiple CRS's in today's environment.

See also Transcript at 213.

Using more than one system is generally inefficient for travel agencies, because, among other things, it requires training staff members to work with different systems and will cause the booking records of different customers to be in different places. Cardinal Travel Service Comments; Galileo Comments at 64–65; Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 79; ASTA Comments at 23–24; Large Agency Coalition Comments at 20. At travel agencies that have multiple offices, each office tends to use one system even though the firm subscribes to several systems. Carlson Wagonlit Comments at 11.

Travel agencies, moreover, assertedly have no need to use multiple systems. Large Agency Coalition Comments at 20; Transcript at 236–237. While some travel agencies use multiple systems, they appear to make relatively little use of the secondary system. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 79–80. The Large Agency Coalition is a group of 22 large, corporate-oriented travel agencies, all but one of which was included in a recent listing of 84 top corporate travel agencies. Although many of the 22 use two or three systems, they typically do so because (i) the dominant airline in a city other than the agency's headquarters city insisted that the agency use the system affiliated with the airline, (ii) a newly-won corporate client wished to keep its existing system at an on-site location rather than switch to the agency's primary system, or (iii) the agency acquired another agency which had a contract obligating it to continue using another system. Large Agency Coalition Comments at 1–3. *See also* Transcript at 212.

3. Regulatory Background

The Board's rules, adopted in 1984, included an expiration date to ensure that we would reexamine the rules after they had been in force for several years. We therefore reexamined those rules through our rulemaking completed in 1992. 57 FR 43780 (September 22, 1992). We readopted the rules, because we found that CRS rules remained necessary then to protect airline competition and to help ensure that consumers did not receive inaccurate or misleading information on airline services. We based our decision on the systems' control by airlines and airline affiliates, which could still use their control of the systems to prejudice airline competition if there were no rules. Airlines then relied on travel agencies for distribution and had no practical ability to induce travel agencies to use systems charging lower fees, and travel agencies did not choose systems on the basis of their treatment of airlines. *See* 67 FR 69367, 69372.

The rules adopted by us regulate the operations of systems owned or marketed by an airline or airline affiliate insofar as the system was providing services to travel agencies.

The current rules (i) bar each system from using carrier identity as a factor for editing and ranking services, (ii) prohibit systems from charging airlines discriminatory booking fees, (iii) require each system to make available to any participating airline the booking and marketing data generated by the system from bookings for domestic travel made through the system, and (iv) prohibit certain types of restrictive contract provisions that unreasonably limit the travel agencies' ability to switch systems or use more than one system. The rules also require each system to provide non-owner airlines with information and booking capabilities as accurate and reliable as those provided the owner airline, and they give each travel agency the right to use its own equipment in conjunction with a system and to access other systems and databases from the same terminals used to access its primary system, unless the agency uses equipment provided by that system. The rules additionally require each airline with a significant CRS ownership interest to participate in other systems at as high a level of functionality as it does in its own system, if the terms for participation are commercially reasonable (this is the mandatory participation rule).

Five years after our last overall reexamination of the rules, we revised the rules in two respects. First, we prohibited systems from enforcing ''parity clauses'' against airlines that did not own or market a competing system. 62 FR 59784 (November 5, 1997). The parity clauses required each airline to buy at least as high a level of service from the system as it did from any other system. The parity clauses made it unnecessary for systems to compete for airline participation at higher levels of service. Secondly, we strengthened the prohibition against display bias by requiring each system (i) to offer at least one display that does not give on-line connections a preference over interline connections and (ii) to either list one-stop and other direct flights before connecting services or use elapsed time as a significant factor in selecting flight options from the database. 62 FR 63837 (December 3, 1997). We strengthened the rule in large part because of evidence that United had caused Galileo to create displays that prejudiced United's competitors. 62 FR 63840–63841.

C. Development of the Record in This Rulemaking

To ensure that the record in this proceeding would be as complete as possible and that all interested persons would have the opportunity to present their views and to respond to points made by other commenters, we have used procedures in addition to those required by the Administrative Procedure Act for informal rulemakings. We began this proceeding by issuing an advance notice of proposed rulemaking,

62 FR 47606 (September 10, 1997). We issued a supplemental advance notice of proposed rulemaking that asked interested persons to update the record and to comment on the implications of two developments, the Internet's growing role in airline distribution and the systems' shrinking airline ownership. 65 FR 45551 (July 24, 2000).

After reviewing the comments submitted in response to those notices, we issued our notice of proposed rulemaking on November 15, 2002. That notice, as stated above, proposed to readopt most of the existing rules but also asked for comments on whether the rules had become unnecessary. We additionally proposed to eliminate the mandatory participation rule and the prohibition against discriminatory booking fees. We tentatively concluded that we should not extend the rules to cover the distribution of airline tickets through the Internet. We asked for comment on whether we should change our policy statement requiring travel agents to disclose the full amount of airline fares to consumers so that travel agents would be obligated to state separately the amount of any travel agency service fee, as long as the fee did not exceed certain levels. We took into account the changes in the systems' airline ownership, although only Galileo and Sabre then had no airline owners. We tentatively believed that the systems might engage in practices that would undermine airline competition due to the marketing relationships and other ties that continued to exist between the systems and their former airline owners.

To make certain that interested persons had ample opportunity to present their evidence and positions on the issues, we established a lengthy comment period and asked for reply comments. 67 FR 69366. We later extended the comment period and reply comment period by two months and one month, respectively. 67 FR 72869 (December 9, 2002). To provide an additional opportunity for public participation, we also held a public hearing on May 22, where interested persons could present their views to a Department official, Michael W. Reynolds, the Deputy Assistant Secretary for Aviation and International Affairs, and answer his questions. 68 FR 25844 (May 14, 2003); 68 FR 27948 (May 22, 2003).

We received about 95 comments and 35 reply comments. The commenters included members of Congress, other Federal agencies, the systems, many U.S. and foreign airlines, many travel agencies and travel agents, firms that process the marketing and booking data sold by the systems, and several public interest groups. Because of the complexity of the issues and the varying effects of the rule proposals, the commenters do not share common views.

The Justice Department argues that we should readopt the rules prohibiting display bias and should not adopt any other rules except possibly transitional rules barring the systems from demanding most-favored-nation clauses in their contracts with participating airlines. Sabre, Worldspan, United, Expedia, and Travelocity contend that we should terminate all of the CRS rules. Amadeus, Galileo, Alaska, America West, Midwest, and U.S. Airways generally assert that most of the rules should be readopted. Orbitz, American, Continental, Delta, and Northwest argue that we should maintain some rules only for a transition period to ensure that the CRS industry's deregulation will succeed. The travel agency commenters largely support the continuation of rules governing the systems' contracts with their travel agency customers but object to any significant restrictions on the systems' incentive pricing programs. The public interest groups generally oppose continued regulation, but some argue that we should take action to prevent Orbitz' operations from reducing competition.

As stated above, we have determined not to make final our tentative proposals to readopt most of the rules. The comments on our notice of proposed rulemaking have shown that market forces in the CRS business are more effective than was shown by the comments submitted before we issued that notice: the airlines' control over access to their webfares has enabled them to obtain better terms for participation in some systems, the systems' subscriber contracts are giving travel agencies increasing flexibility to use alternative booking channels, and the airlines' share of revenues from travel agents has continued to decline. Furthermore, as a result of the Worldspan sale, no system is now controlled by U.S. airlines.

Before turning to the detailed discussion of the substantive issues, we will address the procedural questions raised by commenters.

D. Procedural Issues

For this proceeding we have followed the notice-and-comment procedures established by the Administrative Procedure Act for informal rulemakings, as we have done in all past CRS rulemakings. 67 FR 69369. We also held a public hearing and invited interested persons to submit reply comments as well as comments. These informal rulemaking procedures have given commenters a fair opportunity to present their evidence and policy and legal arguments and have enabled us to resolve the issues rationally and efficiently.

Some parties filed comments or reply comments after the due date for those documents. We have accepted all such documents, and we have considered them to the extent practicable.

Sabre's comments included several exhibits for which Sabre requested confidential treatment. Sabre thereafter concluded that some of these exhibits did not require confidential treatment, because their information was equivalent to that provided by other commenters without any request for confidential treatment. We were unable to work out an arrangement with Sabre on the remaining documents that would meet Sabre's interests in protecting the confidentiality of the information while satisfying our need to give all interested persons an adequate opportunity to review the information while preparing their comments. We are therefore returning those documents to Sabre, and we have not considered them at all in this rulemaking.

Some commenters requested a more formal hearing where they could cross-examine members of our staff and representatives for other commenters. We found such additional procedures would be unnecessary for the development of an adequate record in this proceeding. 68 FR 12883 (March 18, 2003).

Several commenters assert that the record is stale or incomplete. *See, e.g.*, Galileo Reply Comments at 9–13; ASTA Reply Comments at 4–8. We disagree. While our notice of proposed rulemaking cited some factual material that may not have reflected current conditions, the notice set forth our tentative factual findings, our reasoning on the economic and policy issues, and, most importantly, gave all interested persons ample opportunity to submit their own factual information. Any commenter who considered the factual record outdated or incomplete could have corrected any inadequacies by submitting current information. We believe that the record is more than adequate for our decision.

We also disagree with those commenters who contend that we cannot reach a rational decision on the issues without learning the details of the marketing and other on-going relationships between Worldspan and its former airline owners. *See, e.g.*, Galileo Reply at 10. In this proceeding we are considering what general rules,

if any, should be adopted that will regulate each system's operations, not whether specific features of the arrangements between Worldspan and its former owners may be unlawful as unfair methods of competition. The record is entirely adequate for us to determine what general rules should be adopted. If it becomes apparent that specific features of the relationships between Worldspan and its former owners present questions about possible violations of section 411, we can address those issues through our investigatory and enforcement powers. In addition, the record does not include information on the details of the relationships between Galileo and United, or between Sabre and American or Southwest. Some commenters, however, have submitted evidence on their experience with those relationships, and other commenters could have done so as well. That evidence indicates neither that we must obtain additional information nor that the existing relationships create a likelihood of anti-competitive behavior that would injure airline competition and that requires regulations.

Our notice of proposed rulemaking included an initial regulatory flexibility analysis as required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.* That analysis discussed the potential impact of our rule proposals on small entities and invited comments on that analysis. 67 FR 69423–69424. Travel agencies, several members of Congress, the Small Business Administration's Office of Advocacy, and some other commenters contend that we failed to comply with the Regulatory Flexibility Act, because our initial regulatory flexibility analysis allegedly failed to provide adequate analysis and an opportunity for comment on several rule proposals affecting travel agencies, particularly our proposal to restrict the systems' incentive payment programs. *See*, *e.g.*, June 9, 2003, Letter from Senators Snowe and Kerry; March 19, 2003, Letter from the Democratic Members of the House Committee on Small Business; Comments of the Small Business Administration Office of Advocacy; ASTA Comments at 51–54. We recognize the importance of the goal of ensuring that our rules do not unreasonably or unnecessarily affect small businesses and the importance of compliance with the Regulatory Flexibility Act. We believe that we have fulfilled our obligations under that statute. However, the issue is moot for the most part because we are not adopting the rule proposals that generated most of the complaints. In addition, certain other proposals sought by travel agency groups, such as a requirement that every airline make all publicly-available fares saleable through every distribution channel, are not alternatives that we have the statutory authority to adopt on the basis of the record in this proceeding. Our final regulatory flexibility analysis is set forth later in this rule.

We also conducted a review under 5 U.S.C. 610 of the CRS rules, Part 255, in this proceeding. As discussed below, we concluded that changes were necessary to relieve regulatory burdens and respond to changed circumstances.

E. The Need for Limited CRS Regulation

1. Introduction

We adopted the current rules because we found that regulations were necessary to prevent the systems from engaging in anti-competitive conduct that was likely to prejudice competition in the airline industry (for example, display bias and unjustly discriminatory booking fees). We additionally concluded that some practices followed by the systems represented efforts to preserve their market power over airlines (for example, subscriber contract provisions that kept travel agents from using alternative booking channels). We further determined that, if there were no rules, the systems would probably bias their displays, thereby denying travel agents and their customers impartial and information on airline services. 57 FR 43781–43787. In addition, as the Justice Department observes, the system owned by an airline that dominated a region had a substantially greater ability to obtain subscribers than did other systems. If that system operated in ways designed to prejudice the competitive position of rival airlines, it would reinforce its owner's dominant position in the airline market. Justice Department Reply Comments at 9.

We based these conclusions on our findings that airlines relied heavily on travel agencies for distribution, that travel agents generally used a system to determine what airline services were available and to make bookings, that each travel agency predominantly or entirely used one system for these tasks, and that the resulting need of almost all airlines to participate in each system meant that market forces did not discipline the prices and terms offered by the systems for airline participation. We further relied on the fact that each system was then owned and controlled by one or more airlines or airline affiliates. 57 FR 43781, 43790, 43794.

Recent developments, such as the systems' ownership changes and the growth of on-line bookings, have seriously eroded the basis for the findings on which the current rules were based. We must thus examine whether the regulation of system operations remains necessary. When we issued our notice, one system was still controlled by three U.S. airlines, and we tentatively found that the rules remained necessary because the systems still had market power over airlines and because the continuing ties between the systems and their former owners created a likelihood that systems would engage in conduct that would prejudice airline competition. 67 FR 69377–69384. We nonetheless invited comments on whether we should allow all of the rules to sunset, 67 FR 69368, and we stated that we anticipated that the on-going changes in the marketing of airline tickets could in time make the rules unnecessary. 67 FR 69376.

The commenters disagree on whether rules are still necessary. The Justice Department recommends that we maintain only the rules prohibiting display bias and possibly short-term rules barring certain types of most-favored-nation clauses in the systems' contracts with participating airlines. Some commenters, such as Expedia and United, contend that the rules should be terminated now. Sabre argues that no rules are necessary unless a system is still controlled by U.S. airlines. Other commenters, like Orbitz, American, Continental, and Northwest, contend that we should adopt regulations for a transition period to ensure that the ultimate deregulation of the CRS business will be effective. And still others, like Midwest, argue that the regulations are likely to remain essential for a number of years. Some commenters, like United, argue that we may not regulate non-airline systems at all and that we should not regulate systems owned or controlled by airlines.

2. Final Rule

We have concluded that market forces are beginning to discipline the systems' prices and terms for airline participation, and the systems' competition for subscribers is in large part eliminating contract provisions that substantially restrict travel agents from using alternative electronic sources of airline information and booking capabilities. Furthermore, the record does not contain evidence showing a likelihood that a system will engage in conduct designed to distort competition in the airline industry, except for display bias. Readopting most of the existing regulations would not be

justified without such evidence. For these reasons, we have determined to permit most of the rules to sunset upon their expiration on January 31, 2004.

The only exceptions are the rules that prohibit display bias and foreclose certain contract clauses with airlines that would maintain the systems' market power. We find that the systems continue to have market power over airlines, as argued by the Justice Department; that there is some potential for conduct by the systems that could prejudice airline competition (most notably the sale of display bias); and that systems could engage in practices that could unreasonably preserve their market power. For these reasons, we will adopt these rules for a six-month period in order to facilitate an orderly transition to a completely deregulated distribution marketplace. We retain the power to reexamine this decision if unexpected developments show that continuing regulation may be necessary. We are also prepared to take enforcement action if a system engages in conduct that appears to violate section 411.

We explain in this section why we have concluded that most of the current rules are no longer needed, and that the remaining rules will be maintained only for a short transition period. The several types of system conduct that create concern require separate discussion, because they involve different groups of system users—airlines, travel agencies, and travel agents and their customers—and the degree and effectiveness of market forces for each group is different. For airlines, the question is whether competition disciplines the prices and terms for CRS services offered airlines. For travel agencies, the question is whether the systems can engage in conduct that tends to preserve any market power they may have over airlines by unreasonably restricting a travel agency's use of alternative information sources and booking channels. For travel agents and their customers, the question is whether the systems could engage in display bias and similar practices that would lead to consumer deception and undermine airline competition. As a separate matter, we must determine whether, assuming that the systems do have market power over airlines, they are likely to pursue practices that would distort airline competition, even though no U.S. airlines now control any system.

Most commenters supporting continuing regulation assume that any rules should apply equally to all systems, whether or not owned and controlled by airlines. None of the commenters argues that Amadeus' ownership by three European airlines provides a basis for regulating that system if the others are unregulated. We agree. We doubt that the alliance relationships between each Amadeus owner and one or more U.S. airlines will substantially increase the potential for anti-competitive behavior affecting the U.S. airline market, especially since the Amadeus owners belong to different alliances. In addition, Amadeus has substantial public ownership, and its obligations to its public shareholders should lessen any potential for action by Amadeus designed only to distort airline competition in the United States. Amadeus also has the smallest market share in the United States. Amadeus Comments at 32–33; Sabre Comments at 4, n.6.

The primary basis for our rule proposals was our belief that the proposals appeared necessary to prevent system practices that would constitute unfair methods of competition and that market forces would not prevent those practices. We will begin our explanation of the need for maintaining some short-term, residual regulation with our analysis of the systems' market power over most airlines, an analysis that begins with our conclusions on market definition. We then discuss whether systems are likely to engage in conduct that would prejudice airline competition, preserve their existing market power, or give consumers and their travel agents misleading information on airline services. Despite our conclusion that the systems have market power over airlines, we are allowing most of the existing rules to expire because we find that the systems are not likely to engage in practices that would prejudice airline competition or tend to maintain their existing market power, except for display bias and the potential imposition of some contract clauses on participating airlines that would reduce the airlines' bargaining power. Because we conclude that the systems would probably sell display bias if our prohibition against doing so were immediately terminated, thereby misleading travelers, we have decided to retain that prohibition for a six-month transitional period to furnish the industry notice of the change.

Where we find short-term, transitional regulation necessary, our analysis is substantially the same for both airline and non-airline systems. Elsewhere, as discussed below, our conclusions that rules are not necessary stems in large part from the lack of any U.S. airline control of the systems now operating in the United States. If Orbitz enters the CRS business, there would again be a system controlled by U.S. airlines. However, we are unwilling at this time to adopt general regulations based upon Orbitz' potential entry.

3. Market Definition

In judging whether any regulation is necessary, the fundamental question is whether market forces would discipline system practices. If competition would do so, no rules should be necessary. *Cf.* Justice Department Reply Comments at 18.

When we adopted the current rules, we found that they were necessary because each system had market power over almost all airlines and market forces would not discipline the systems' anti-competitive practices. We also adopted rules governing subscriber contracts, even though we did not find that systems generally had market power over travel agencies, because the systems' contracts with travel agencies contained clauses that would maintain the systems' market power over airlines. 67 FR 69405. In the current rulemaking, we again made a tentative determination that the systems had market power over airlines.

Determining whether the systems have market power over airlines requires us to define the relevant market. The relevant market must contain all products or services that consumers—here the airlines—are likely to consider using for the same purpose. The relevant market includes all reasonably interchangeable products and services, because ''the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level.'' *United States* v. *Microsoft Corp.*, 253 F.3d 34, 51–52 (DC Cir. 2001), quoting *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (DC Cir. 1986).

In our notice of proposed rulemaking, we tentatively found that, for airlines, each system is a relevant market. Most airlines still obtain the great majority of their revenues from travel agents, each travel agency office normally uses only one system, and travel agents rarely make airline bookings outside a system. If travel agents routinely used several electronic sources of airline information and booking capabilities when making reservations for their customers, an airline could then afford to withdraw from one or more systems, because the travel agents' use of alternative systems would still enable the airline to obtain bookings. Travel agencies, however, typically rely entirely or predominantly on one system for investigating airline service options and making bookings. 67 FR 69375–69376, 69377–69381.

As a result, an airline that wants its services to be readily saleable by travel

agencies must participate in each system, because otherwise it will lose a significant amount of revenue. As the Justice Department had stated in an earlier rulemaking, quoted at 67 FR 69376:

> Each CRS provides access to a large, discrete group of travel agents, and unless a carrier is willing to forego access to those travel agents, it must participate in every CRS. Thus, from an airline's perspective, each CRS constitutes a separate market and each system possesses market power over any carrier that wants travel agents subscribing to that CRS to sell its airline tickets.

We further noted that, due to the economics of the airline industry, the addition or loss of a few passengers on an airline flight will determine whether the flight is profitable. The importance of marginal revenues in the airline business meant that airlines cannot afford to lose access to any significant distribution channel. In that regard, we quoted the statement of one industry economist, Daniel Kasper, 67 FR 69375:

> Airlines utilize many different distribution channels for the simple reason that they must do so in order to ensure that their products are easily accessible to the broadest possible array of prospective travelers. . . . Because attracting incremental passengers is critically important to an airline's profitability, each airline strives to match or surpass the visibility to purchasers enjoyed by its rivals. That is, airlines must compete for ''shelf space'' in any channel where consumers prefer to shop.

The comments support our tentative factual findings on market definition. First, most airlines still obtain the majority of their revenues from bookings made by travel agencies through a system. The Justice Department states that the five airlines that own Orbitz derived 65 percent of their total revenues in March 2002 from ''brick-and-mortar'' travel agency bookings. Justice Department Reply Comments at 14. America West states that 67 percent of its revenues in 2002 came from bookings made through the systems. America West Comments at 7. Alaska similarly states that it obtains 56 percent of its revenues from travel agencies. Alaska Comments at 5. Delta states that 55 percent of its revenues are produced by ''brick-and-mortar'' travel agencies and that another 10 percent are produced by on-line travel agencies through a system. Delta Reply Comments at 39. Sabre by itself produces about one-third of a typical airline's revenues. Orbitz Comments at 10. While the Justice Department suggests that the systems' use by on-line travel agencies (as opposed to ''brick-and-mortar'' travel agencies) adds little to their market power over airlines, because most consumers check two or more websites before making a booking on-line, the Justice Department agrees that the systems have market power due to their usage by ''brick-and-mortar'' travel agencies. Justice Department Reply Comments at 15. About 80 percent of CRS bookings made by travel agencies are made by ''brick-and-mortar'' agencies. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 24.

In arguing that the systems do not have market power, Sabre cites figures showing that less than half of all tickets will be sold this year by travel agencies using a system. *See*, *e.g.*, Sabre Comments, McAfee and Hendricks Declaration at 2; Transcript at 8. We believe that market shares based on revenues, not individual tickets, should be determinative. A firm's profitability directly depends on its total revenues, not on the number of units sold. The travelers who make bookings on-line tend to buy tickets that are sold at greater discounts. The travelers using ''brick-and-mortar'' travel agencies are more important to the airlines because they tend to buy the more expensive tickets. Justice Department Reply Comments at 16.

We agree with Sabre that the travel agencies' share of total bookings has been declining and will likely continue to decline. *See*, *e.g.*, Justice Department Reply Comments at 14. However, as noted, the large network airlines still obtain the large majority of their revenues from travel agencies using a system, a situation likely to persist for some time to come.

Business travelers—the travelers that produce a disproportionate share of the network airlines' revenues—have been reluctant to make bookings on-line or otherwise outside the travel agency channel. Justice Department Reply Comments at 16; NBTA Comments at 11–14. Consumers make about five times as many on-line bookings as do corporate travelers. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 26, n. 40. We recognize that a growing number of business travelers are booking on-line, but they appear to be doing so through websites offered by travel agencies using a system, or through one of the corporate booking firms acquired by systems like Sabre. Sabre Reply Comments at 34–35; American Reply Comments at 25.

It may well be that within several years even a large proportion of business travelers will book their air travel outside of travel agencies using a system, but they do not do so now. Most airlines, including the major network airlines, derive the large majority of their revenues from bookings made through a system. *See also* Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 29.

Secondly, travel agents continue to rely on systems for booking airline tickets. ASTA states that, on average, 87 percent of travel agency airline bookings are made through a system. ASTA Comments at 23. Galileo estimates that an even higher percentage of travel agency bookings are made through a system. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 25, n. 37. Travel agents generally have access to the Internet and use it, primarily for research on travel options, but they have not made much use of the Internet for airline bookings, as noted above, because using the Internet is significantly less efficient than using a system. ASTA Comments at 12–13.

Thirdly, to operate more efficiently, most travel agencies use only one system, as discussed above. While the largest travel agencies tend to have two or more systems, they do not seem to make substantial use of all of them. Those agencies typically rely predominantly on one system. The Large Agency Coalition states that its members—all large corporate travel agencies—do not subscribe to multiple systems in order to improve their ability to book airline travel, but because of continuing business relationships between the agency and the dominant airline in local markets, between some of their corporate customers and airlines, or between an acquired agency and its system. Large Agency Coalition Comments at 1–3. Carlson Wagonlit alleges that each of its branch offices relies predominantly on one system even though the travel agency firm subscribes to all of the systems: ''Using multiple CRSs at one location creates numerous operational difficulties related to training agents on multiple CRSs and because client information is maintained within the CRS.'' Carlson Wagonlit Comments at 11.

Fourthly, the airlines' dependence on marginal revenues requires them to participate in every significant distribution channel. No commenter denies that marginal revenues are critical in the airline industry. Sabre's experts agreed with our finding: ''Air transportation involves high fixed costs and low marginal costs. Thus a few incremental bookings can spell the difference between profit and loss.'' Sabre Comments, Salop & Woodbury Declaration at 29.

We are unconvinced by the claims of several commenters that airlines can nonetheless find substitutes for the

travel agency channel and that travel agents can use substitutes for the systems. We recognize that Southwest, JetBlue, and some other low-fare airlines operate successfully without obtaining many bookings from travel agents. Southwest and JetBlue reportedly obtain only 20 percent and 10 percent of their revenues, respectively, from travel agencies. Justice Department Reply Comments at 15, n.14. Other airlines, particularly the large network airlines, cannot now practicably end their reliance on the travel agency channel. The low-fare airlines have traditionally focused on attracting leisure travelers. As shown, leisure travelers are much more likely to book flights through the Internet without using a ''brick-and-mortar'' travel agency (or an on-line agency). Insofar as other airlines follow a business strategy that involves attracting business customers—the travelers most likely to use travel agencies—those airlines continue to be dependent on travel agencies for the largest share of their revenues and may have limited bargaining leverage against the systems, at least in the near future. The network airlines, moreover, tend to operate more complex hub-and-spoke route systems than the low-fare airlines, and that complexity limits their ability to obtain direct sales, unlike airlines such as Southwest that primarily operate point-to-point services. It may be that the network airlines would be more successful if they adopted the same business strategy as the low-fare airlines. They have not done so, however, and presumably could not do so without significant expense. American Comments at 17–21; 67 FR 69379. As a result, these airlines rely on travel agencies for the majority of their revenues. Our determination of the relevant market must rely on the choices actually made by airlines and consumers, not on the choices that some think they should make. *Cf. U.S.-U.K. Alliance Case*, Order 2002–1–12 (January 25, 2002) at 42–43.

We recognize that airlines have been shifting some bookings away from the travel agency channel to their own websites. This shift has been much stronger for low-fare airlines than for the large network airlines. Despite these efforts, some believe that the Internet is unlikely to produce more than 40 percent of airline revenues by 2005. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 23–24. Airlines have also taken steps to encourage travel agencies to bypass the systems. For example, American has an arrangement with American Express that enables that travel agency to make bookings directly with American. Amadeus Comments at 12–13. The record does not indicate that direct booking arrangements will substantially reduce the agencies' use of the systems for airline bookings any time in the near future. As shown, the larger airlines still obtain the large majority of their revenues from bookings made through the systems.

Several commenters contend that travelers can use alternative distribution channels and are not locked into the travel agency channel, or, alternatively, can switch between travel agencies if one agency uses a system that provides inferior service. *See*, *e.g.*, Sabre Comments at 59–65. We agree that consumers can choose where to book and need not book through a travel agency if they do not wish to, and that many consumers can easily switch between travel agencies. At least for corporate customers, however, changing agencies will impose some switching costs. Justice Department Reply Comments at 16, n.19. Airlines do not enjoy such choices. If a substantial number of travelers choose to use travel agencies, as they do, and if those travel agencies, with few exceptions, use only one system and do not readily make bookings outside the system, as is true, then each airline must participate in each system used by a significant number of travel agencies in order to avoid losing bookings from those agencies. As we stated in the notice, 67 FR 69378:

> The existence of one distribution channel that is attractive to a significant and growing number of travelers does not make that channel competitive with another channel that a larger if shrinking share of travelers finds preferable. With a very few exceptions, any airline that uses only one channel will not obtain the business of those travelers that prefer the other channel.

See also American Comments at 16–17 and Dorman Declaration at 5. While the airlines' customers have alternatives, that does not make irrelevant the question of whether systems have market power over airlines. *Cf. United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir., 2003); *In Re Visa Check/Mastermoney Antitrust Litigation,* E.D.N.Y. No. 96–CV–5238, April 1, 2003, Memorandum and Order at 5.

Some arguments made by the commenters opposing our preliminary analysis mischaracterize our reasoning. Sabre wrongly alleges that we concluded that systems have market power over travel agencies. Sabre Comments at 59, 71, 84. Nothing could be further from the truth. We expressly found that systems compete vigorously for travel agency subscribers, 67 FR 69371, 69405, and nowhere did we state that systems have market power over travel agencies. Sabre additionally misstates our analysis by asserting that we found that travel agencies control their customers. Sabre Comments at 59, 63.

Sabre has failed to show that the relevant market is not each system, but the broader market of providing travel information to consumers, or airline ticket distribution, a market in which each system's share would be relatively small. Sabre Comments at 57–59, 79. As a practical matter, airlines wishing to electronically provide information and booking capabilities to travel agencies currently have no effective substitute for participation in each system. Similarly, because travel agencies do not use multiple systems, Sabre's observation that no system has even a 50 percent share of the CRS business, Sabre Comments at 81, is irrelevant. Each system is a separate market insofar as airlines are concerned. Furthermore, each system has a dominant share of the CRS business at cities where its former airline owners were the dominant airlines. Justice Department Reply Comments at 22.

4. The Systems' Market Power Over Airlines

Because readopting CRS rules to block anti-competitive behavior will require a finding that the systems have market power over most airlines, we must determine whether they do have such power. If systems have market power over airlines, they will be able to charge them prices that exceed competitive levels, and the resulting costs will be passed on to consumers, even if many or most consumers can choose between different distribution channels when buying airline tickets.

We are following the definition of market power applied by the Supreme Court in antitrust cases. In *Eastman Kodak Co.* v. *Image Technical Services*, 504 U.S. 451 (1992), the Court stated that market power is the power ''to force a purchaser to do something that he would not do in a competitive market,'' 504 U.S. at 464, quoting *Jefferson Parish Hospital* v. *Hyde*, 466 U.S. 2, 14 (1984), and ''the ability of a single seller to raise price and restrict output,'' 504 U.S. at 464, quoting *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 503 (1969). The courts have similarly stated that a firm is a monopolist ''if it can profitably raise prices substantially above the competitive level.'' *United States* v. *Microsoft Corp.*, 253 F.3d at 51.

Our notice of proposed rulemaking stated our belief that each system still

has market power over most airlines. We noted in that regard that some airlines that had otherwise supported the elimination of most or all of the rules still conceded that the systems have market power. Northwest had thus stated, as quoted by us at 67 FR 69378:

> Sales to consumers made over the Internet, via both airline websites and online agents, have provided significant new competition to CRSs, but each CRS typically remains the only means by which to reach the travel agents who use that system. Each CRS therefore continues to have significant market power based on the travel agents to which it has exclusive access.

First, until now an airline or other firm could not practicably create competitive alternatives for the systems. Among other things, building a new system would be costly and time-consuming, and the great majority of travel agencies already had contracts to use an existing system. 67 FR 69381. Entry into the business has become easier, as argued by Sabre. Sabre Comments at 52–85. However, because travel agencies generally rely entirely or predominantly on one system for information and bookings on airline services, new entry is unlikely in the near term to eliminate the systems' existing market power.

Secondly, airlines have generally been unable to persuade travel agencies to use one system rather than another. If they could, they would have some bargaining leverage against the systems. Airlines could then shift business to systems offering better terms for airline participants and away from systems offering poorer terms. Because travel agencies do not pay booking fees, they have no direct incentive to use the system charging the lowest fees. The record suggests, in fact, that the incentive payment programs used by the systems encourage travel agencies to choose the system that is the most expensive for participating airlines. The systems then obtain subscribers typically by offering to give them bonus payments. The revenues used for those incentive payments come from the fees paid by participating airlines (and to a smaller extent by other travel suppliers). *See, e.g.*, American Reply Comments, Dorman Declaration at 2–4.

Airlines have had no effective incentives that they can offer travel agencies to encourage the use of one system rather than another, except in local markets where a dominant airline can influence travel agency choices by denying access to its corporate discount fares and marketing benefits to travel agencies that do not use its preferred system. As discussed in our notice of proposed rulemaking, airlines that dominate an area's airline markets, like Delta at Atlanta and American in southern Florida, can influence local travel agencies to use the airline's preferred system, because those travel agencies cannot easily succeed without the ability to sell the corporate discount fares offered by the area's major airline. 67 FR 69381.

Airlines have developed programs to encourage travel agents to agree to terms that offset some CRS costs, or to bypass the systems, but those programs do not yet seem to have had great success. American's ''Everyfare'' program gave travel agencies access to American's webfares if they agreed to assume the airline's booking fee liability. Amadeus Comments at 10–13. Northwest and other airlines have created websites designed for travel agent bookings. Sabre Supp. Reply at 2.

We recognize that airlines have been gaining bargaining leverage against the systems, a factor that caused us to propose the elimination of the mandatory participation rule and the rule barring discriminatory booking fees. Nonetheless, the systems currently have significantly greater leverage. An airline's greatest leverage for obtaining lower fees or better terms for participation will be a threat to withdraw from the system. If an airline withdraws, however, it will immediately begin losing bookings from that system, and those losses will not be entirely offset by increased bookings through the Internet. Any saving in CRS participation expenses will arrive later, and will not quickly offset the revenues lost from the reduction in bookings. Booking fees, after all, equal about two percent of the revenues obtained by an airline from sales made through a system. Orbitz Comments at 10, n.4. *Cf.* Amadeus Comments at 18–19.

It is true that an airline's withdrawal from a system will make that system less attractive to travel agencies, and over time the system will lose subscribers. Because the average travel agency contract has a term of three years, however, only a relatively small portion of the system's subscribers will have the ability to switch to another system in the short term.

Thus the airline's revenue losses from withdrawal will be substantial and begin occurring immediately, while the system's losses in subscribers will be gradual and occur only over a period of some months. In these circumstances, the system should have the upper hand in bargaining. *See, e.g.*, Orbitz Comments at 10.

An airline could also put pressure on the system by attempting to reduce the number of tickets sold through the system without withdrawing completely. One possibility would be to increase their efforts to encourage travelers to book directly with the airline. These lost sales would lower the systems' revenues, but may also increase the airline's distribution costs.

An airline could put pressure on the system by lowering its participation level, because doing so would make the system less attractive to travel agencies that frequently book the airline without drastically reducing the airline's bookings from that system's subscribers. The lower level of participation would make it somewhat harder for travel agents to obtain information and reliably make bookings, and could block travel agents from conducting functions that are important to their customers. These functionality differences would not lead to a loss of as many bookings as would withdrawal but presumably would still result in lower revenues from the travel agents using that system. On the other hand, the lower level of participation would have less impact on the system's ability to market itself to travel agencies in the future. We expect that airline changes in participation levels will give airlines bargaining leverage.

Our notice of proposed rulemaking predicted that the airlines' control over access to their webfares could enable them to obtain better terms for system participation. 67 FR 69381. As discussed above, Sabre and Galileo have begun programs that give airlines a discount from the standard booking fee levels in exchange for a commitment to provide all publicly-available fares, including webfares. The commenters disagree over the implications of these programs. Some commenters assert that airlines have gotten little in exchange for the commitments required of them. *See, e.g.*, American Reply Comments at 21–23. America West states that Orbitz has offered substantially larger fee reductions for airlines that agree to its most-favored-nation clause. America West Reply to Supp. Comments at 2–3. Other commenters contend that the programs demonstrate that airlines have bargaining power and that the systems do not have market power. *See, e.g.*, Sabre Reply Comments, Salop & Woodbury Declaration at 15–16.

We believe that the airlines' ability to change their participation levels and their control over access to webfares is reducing the systems' market power. Overall, however, we find that the systems currently still have market power over most airlines, although the continuing changes in airline distribution, particularly the growing importance of the Internet for airlines,

travel agents, and travelers, should continue to erode the systems' market power. Our finding that the systems have market power is consistent with the Justice Department's conclusions. Justice Department Reply Comments at 2, 16–17.

We disagree with Sabre's contention, first made in its reply comments, that the airlines' contracts with corporate customers keep systems from having market power. Sabre asserts that system practices cannot significantly affect airlines, because ''much business travel'' involves fares directly negotiated with specific airlines, often booked through direct links. Sabre Reply Comments at 36; Sabre Reply Comments, Salop & Woodbury Declaration at 7–9. Airlines obtain substantial amount of business from corporate customers that do not have such contracts, and the contracts do not normally bar employees from traveling on alternative airlines.

We have based our finding of market power on the industry's structural characteristics, not on an analysis of whether the systems' fees are at supracompetitive levels. The best evidence of a firm's monopoly power would be a showing that it has been able to profitably charge prices that significantly exceed competitive levels. Because direct evidence of this ability is usually not available in Sherman Act monopolization cases, the courts usually rely on market structure evidence to determine whether a firm has monopoly power. *United States* v. *Microsoft Corp.*, 253 F.3d at 51. We have taken the same approach here.

When we last compared the systems' prices with their costs, we concluded that the larger systems at least were charging supracompetitive prices. *See* 56 FR 12586, 12595 (March 26, 1991). We have not done such an analysis since then, as we noted in our notice, but stated our belief that the systems' booking fees were probably above competitive levels, because they were not disciplined by market forces. 67 FR 69382. t with our findings that the systems must compete for travel agency subscribers but do not compete for airline participants.

The airline commenters generally support our finding that booking fees are not disciplined by competition and contend that the fees substantially exceed competitive levels. They point out, for example, that the network airlines' financial crisis since 2001 has enabled them to drive down costs from other suppliers while the systems have been raising their fees and reporting large profits. *See, e.g.*, America West Comments at 7–9.

In response, the systems have denied that their fees are not disciplined by competition, and they argue that the fees are reasonable. They contend that their costs have been rising due to increased functionality provided airlines and the growing number of messages carried by their communications links. *See, e.g.*, Galileo Comments at 38–39. While the systems thus contend that several important cost factors have increased significantly in recent years, they have not submitted a detailed cost analysis that would show that their booking fees do not significantly exceed their costs, nor have they attempted to demonstrate that the booking fees charged before the beginning of the cited cost increases did not significantly exceed their costs.

We continue to believe that the systems' fees exceed competitive levels for the reasons set forth in the notice of proposed rulemaking. We have not seen evidence that the systems' fees generally respond to market forces, although two of the four systems have made modest concessions in exchange for access to airline webfares. However, we have not done an analysis of the systems' costs and revenues that would demonstrate that their fees exceed competitive levels. As explained above, a finding that the fees are at supracompetitive levels is not necessary for our determination that the systems have market power over airlines.

We also cannot accept Sabre's claim that bookings made through a system are relatively inexpensive for airlines while bookings made through airline websites are not (and that bookings made through airline websites are more expensive than those made by an airline's reservations agents). Sabre Comments, Wilson Declaration at 22. Sabre's analysis is belied by the efforts of virtually every airline to shift bookings to its own website. Several low-fare airlines have claimed that their ability to obtain most of their revenues from direct sales gives them a great cost advantage over other airlines. *See* American Reply Comments at 32. *See also* 67 FR 69373, 69374. Sabre in any event has failed to demonstrate that its calculation is valid. American Reply Comments, Dorman Declaration at 8–9; United Reply Comments at 35, n.96; America West Reply Comments at 27. *See also* Northwest Reply Comments at 19–20.

5. The Potential for System Conduct Undermining Airline Competition

Our finding that each system has market power over airlines is not sufficient by itself to justify the adoption of rules. To adopt rules regulating the systems in order to prevent potential unfair methods of competition, we should have evidence that, if there were no regulations, systems would likely engage either in anti-competitive conduct designed to preserve their market power, a subject discussed below, or in conduct intended to distort airline competition. Any such conduct would harm consumers, either by causing airlines to pay supracompetitive prices for CRS services or by denying consumers the benefits of lower fares and better service created by competition between airlines.

When each system was owned and controlled by one or more airlines or airline affiliates, experience demonstrated that systems were likely to engage in conduct designed to prejudice the competitive position of rival airlines, for example, by biasing displays against the owner airlines' competitors and charging competing airlines discriminatorily high booking fees. *See* 56 FR 12589. None of the systems now operating in the United States, however, is owned by a U.S. airline. Obviously a system that is not owned or controlled by a U.S. airline will not have the same incentives to prejudice the competitive position of rival airlines. Justice Department Reply Comments at 13–14; Sabre Comments, Salop & Woodbury Declaration at 26–30 and McAfee & Hendricks Declaration at 53–59. We must therefore determine whether a non-airline system (a system not owned or controlled by an airline or airline affiliate) is likely to engage in unfair methods of competition.

We have found, as shown, that the systems have market power over airlines. To the extent that they do, their booking fees may exceed the fee levels that would exist in a competitive market, and the service offered airlines by the systems may be below the level of service that would exist in a competitive environment. The systems' possession of market power, however, by itself would not justify rules regulating their practices. The antitrust laws permit firms with monopoly power to use that power as long as they do not engage in conduct that is designed to maintain or extend that power. ''[M]erely possessing monopoly power is not itself an antitrust violation.'' *United States* v. *Microsoft Corp.*, 253 F.3d at 51. As explained below in our analysis of our authority under section 411, we may prohibit unfair methods of competition, which are practices that violate the antitrust laws or antitrust principles.

Our notice of proposed rulemaking stated our belief that there was a risk that non-airline systems would engage

in anti-competitive conduct in order to prejudice airline competition. Each of the non-airline systems still had ties with its former U.S. airline owners, and each of the non-airline systems was being marketed by one or more of its former owners. The record suggested, moreover, that marketing airlines took actions favoring a system even when doing so appeared to be contrary to their interests in selling their own tickets. We therefore proposed to apply the rules, to the extent they were readopted, to non-airline systems. 67 FR 69383.

The systems continue to have marketing relationships and other relationships with their former owner airlines. *See, e.g.*, Amadeus Comments at 25, n.24; Galileo Supp. Comments at 3. The lack of control by any U.S. airline will not eliminate the possibility that a system would agree with an airline to engage in conduct that would undermine the competitive position of the airline's rivals. Each system, after all, continues to have market power over most airlines, and each of the larger airlines dominates some local markets, primarily at its hubs. A system and such an airline might agree that the system would change its operations so as to benefit the airline while the airline would use its local dominance to strengthen the system's marketing efforts. Justice Department Reply Comments at 19.

The record suggests that the systems are willing to sell preferential treatment to airlines at least insofar as display bias is concerned. Their willingness to do so is apparent from their own comments, which argue that we should allow systems to sell bias. Amadeus Comments at 53–54; Sabre Comments at 141–142. The Justice Department believes that the systems are likely to engage in display bias. Justice Department Reply Comments at 19–21. *See also* American Antitrust Institute Comments at 8. Our notice cited evidence that display bias is sold to suppliers in other travel industries. 67 FR 69383. Although Amadeus has denied that it biases its displays for hotels and rental cars, Amadeus Reply Comments at 12, n.16, the other systems' comments do not address this issue.

Apart from bias, however, the record does not indicate that systems are likely to seek to operate in ways designed to prejudice airline competition. Our notice of proposed rulemaking expressly invited commenters to submit evidence on whether systems had sought to distort competition in other travel industries. 67 FR 69383. One speaker at our public hearing stated that he did not know of any system practices that distorted competition in other industries, Transcript at 85, and one commenter asserted that there is no evidence of competitive harm resulting from the systems' treatment of firms in other travel industries. Worldspan Reply at 17. *See also* Transcript at 116–117, 151–154. The record further suggests that the marketing relationships between systems and airlines currently give the marketing airline little incentive to help the system and that marketing airlines, in fact, do little to help the system being marketed. American Comments at 30; Large Agency Coalition Comments at 14–15; Large Agency Coalition Reply Comments at 16–17. This suggests that the ties between airlines and systems may have weakened enough so that systems would have little interest in taking action that undermined airline competition in order to favor one airline. The Justice Department additionally believes that contractual arrangements between airlines and systems do not pose a sufficient threat to competition to justify the adoption of general rules at this time. Justice Department Reply Comments at 1–2. *See also* Expedia Reply Comments at 3, n.1. We note, nonetheless, Amadeus' complaint that American, Delta, and Northwest have recently tied a travel agency's ability to sell corporate discount fares with the use of the system affiliated with the airline. Amadeus Comments at 91–92. However, this tying affects competition between the systems and does not necessarily show that systems will engage in conduct designed to distort airline competition.

Furthermore, we cannot predict at this point what kinds of relationships may arise as a result of the CRS industry's deregulation. We do not wish to adopt rules now when we do not know what types of potential anti-competitive practices, if any, may occur. We therefore do not agree with the arguments of some commenters that rules should be maintained on the ground that systems have continuing marketing and other special arrangements with selected airlines. *See, e.g.*, Galileo Comments at 7–11.

We fully agree with the Justice Department, however, that there is a potential for contractual relationships between systems and airlines that would be designed to reduce competition in either or both the CRS and airline industries. The Justice Department has stated its intent to take action against any such agreements that violate the antitrust laws, and we also have statutory authority to take appropriate action if such contractual relationships appear to be unfair methods of competition that violate section 411. Under 49 U.S.C. 41708, formerly section 407 of the Federal Aviation Act, we can obtain copies of any agreements between airlines and systems if we see a need to investigate contractual relationships between systems and participating airlines.

6. System Practices that Preserve Market Power

While we have determined that most of the rules should not be readopted, even though each system continues to have substantial market power over airlines, we are readopting for a short transition period the rule prohibiting parity clauses and adopting an analogous rule prohibiting most-favored-nation clauses demanded as a condition for any participation in a system. These types of contract clauses would tend to maintain the systems' market power and reduce the bargaining leverage of participating airlines. Because we are essentially deregulating the CRS business notwithstanding the systems' market power, we decided to adopt the parity and most-favored-nation clause prohibitions for a period long enough allow affected parties to respond to the transition to complete deregulation.

We originally adopted the rule prohibiting systems from enforcing parity clauses (except as to airlines that owned or marketed a competing system) because three of the systems had imposed parity clauses on airline participants. These clauses required each airline to participate in the system at at least as high a level as it participated in any other system. Thus, for example, Sabre's parity clause required Alaska to participate in Sabre at the full availability level as long as Alaska participated in any other system at that level, even if Alaska considered Sabre's service at that level too costly or not as attractive as the comparable service offered by other systems. 62 FR 59786–59787, 59791–59792. Because these parity clauses eliminated some possibility of system competition for airline participants, and required each airline to buy a level of service that an airline might not wish to buy, we adopted a rule prohibiting the systems from enforcing airline parity clauses except as to airline participants that owned or marketed a competing system. 62 FR 59784.

We have concluded that this rule should be readopted for another six months. We are also adopting for the same period an analogous rule that will prohibit each system from requiring airlines as a condition to any

participation in the system to make all publicly-available fares saleable through the system. If we did not provide for an orderly transition, a contract clause requiring a participating airline to provide all webfares as a condition to participation, sometimes referred to as a most-favored-nation clause, would deny the airline the ability to use its control over access to its webfares as bargaining leverage to obtain better terms and prices for system participation. Such a clause would additionally tend to prevent the development of alternative sources of information and booking channels, for a travel agency would have less incentive to use alternatives if the system used by the agency already provided complete information on webfares. It is our expectation that the six-month period during which our prohibition on such clauses will remain in place will enable airlines to prepare more effectively for the termination of these rules.

On the other hand, we have decided not to readopt rules designed to prohibit system contract practices that would unreasonably restrict travel agency subscribers from switching systems or using alternative systems or booking channels. In the past, the systems engaged in subscriber contract practices that appeared to be designed to preserve their market power. Travel agencies accepted such contract clauses even though most travel agencies could choose between systems. 67 FR 69405. We therefore adopted rules barring subscriber contracts from having a term that exceeded five years and giving travel agencies the right to use their own third-party equipment and software in conjunction with a system.

As discussed above, the record shows that travel agencies in recent years have been obtaining more flexible contracts from the systems. The term of the average subscriber contract, for example, is well under five years. While most subscriber contracts still have productivity pricing clauses, the productivity pricing clauses in the contracts currently offered travel agencies do not seem to effectively block travel agents from using alternative booking channels. And travel agencies appear to have a substantial ability to switch systems at the end of their contract term. While systems may have some contracts that may be unreasonably restrictive, their contracts in general do not seem to block travel agents from obtaining information and making bookings outside the system. Moreover, the market is moving in a more competitive direction—travel agencies are obtaining more flexibility, not less, in their newest contracts.

As a result, the current record shows that rules regulating travel agency contracts are no longer necessary. Several airline commenters and Orbitz have argued that we should continue to regulate the systems' subscriber contract practices, because the existing contracts are alleged to unreasonably lock travel agencies into using their existing system. *See, e.g.*, Orbitz Comments at 46–49; America West Comments at 26–29; American Comments at 33–35; Continental Comments at 17–20; Delta Comments at 41–42. For the reasons discussed below in connection with the specific subscriber contract issues, the systems' current contracts do not appear to unreasonably keep travel agencies from using alternative booking channels.

7. The Systems' Ability To Engage in Display Bias

Display bias has been a concern since the systems were first developed. Experience has demonstrated that travel agents are likely to book one of the first services displayed by a system in response to a travel agent's request for information, even if services shown later in the display would better satisfy the customer's needs. If systems give preferential display positions to one airline's services, that display bias will harm airline competition and cause consumers to be misled. 57 FR 43801–43802, 43807–43808.

Our rules have prohibited systems from biasing their displays in order to prevent unfair methods of competition and deceptive practices. Display bias both prejudices airline competition, by reducing the airlines' ability to compete on the basis of the relative attractiveness of their schedules and fares, and causes travel agents to give misleading or incomplete advice to their customers.

Display bias is possible because of the way in which the systems present information on airline service options. The systems display information on computer screens. Each screen can display only a limited number of flights, so a system must use criteria for ranking the available flights. Display position is important, because travel agents are more likely to book the flights that are displayed first. The number of airline services available in most markets also requires the systems to edit their displays, because many services will be unattractive to travelers (Los Angeles-San Francisco travelers, for example, will not choose connecting services over Denver or Salt Lake City). Systems display airline services in several different ways. The display traditionally used by travel agencies ranks flights in a market on the basis of the criteria developed by the system and shows whether seats are available on the listed flights. Some systems rank flights in this type of display by listing all nonstop flights first, then one-stop flights and other direct flights, and finally connecting services. Others have ranked flights on the basis of relative quality, such as each flight's elapsed time or its displacement time (the time difference between the departure time requested by the traveler and the time of each flight). 67 FR 69370.

Every system also has a display that ranks flights on the basis of price, with the lowest being listed first. Travel agents use that display for customers whose major concern is finding the lowest fare. 67 FR 69370.

We have concluded that we should continue to prohibit display bias, both to prevent anti-competitive conduct, as recommended by the Justice Department, and to prevent consumer deception, but only for an additional six months. Were the rule terminated immediately, systems would likely be in a position to bias displays, as discussed above. Display bias could cause consumer harm by reducing airline competition and by causing travel agents to book customers at times on flights that do not best meet the traveler's needs.

Display bias can mislead travel agents (and thus their customers), because by definition it means ranking and editing airline services on some basis other than neutral criteria based on general consumer preferences. Before the Board adopted the rules on display bias, when each system was owned by one airline, systems constructed displays that put their competitors at a disadvantage by omitting services and fares offered by competing airlines that would be attractive to many consumers. Each system often listed flights operated by its owner airline above flights operated by competitors that better met the customer's travel requirements. 56 FR 12589. We later found it necessary to revise our rules on display bias because Apollo, Galileo's predecessor, created displays that essentially gave the connecting services operated by network airlines a preference over one-stop flights operated by point-to-point airlines. For example, Apollo could display an Alaska one-stop flight in the Seattle-Burbank market well after connecting services that left Seattle as much as an hour before the Alaska flight and that arrived in Burbank after the Alaska flight had landed. Apollo similarly displayed an Alaska one-stop Orange County-Seattle flight after connecting services that took substantially longer and that involved

connections at Salt Lake City or Phoenix. 61 FR 42208, 42212–42213 (August 14, 1996). Apollo at that time was owned by several airlines, not just by United, yet the owner airlines agreed to adopt a display that would benefit United while prejudicing the travel agents' ability to find the best service for their customers. 61 FR 42209.

Display bias also can reduce competition. Bias can shift enough passengers from disfavored airlines to a favored airline to make the former's flights unprofitable in the targeted markets. That can cause a disfavored airline to reduce or eliminate its service in those markets. As we stated above in our discussion of the systems' market power over airlines, the profitability of an airline flight often depends on marginal revenues, so the shift of traffic that may result from display bias can have large competitive consequences. Justice Department Reply Comments at 20, n.26. The resulting reduction in capacity and potentially in the number of competitors will enable the favored airline to raise fares and reduce service. Justice Department Reply Comments at 7. For example, two of the airlines that complained about the Apollo display discussed above—Alaska and Midwest Express—were point-to-point airlines whose services fared worst in the Apollo display. Alaska estimated that the display would reduce its annual revenues by $15 million, and Midwest Express estimated that its annual revenue losses would equal several million dollars. 62 FR 63837, 63841 (December 3, 1997).

Experience thus shows that bias can be effective, notwithstanding the travel agents' interest in finding and booking the services that best meet their customers' needs. As noted, travel agents tend to book one of the first flights displayed by the system. Travel agency customers depend on their travel agent to extract information from the system display, which only the travel agent sees. Travel agents generally work under time pressure that often keeps them from searching through several display screens to overcome the bias. ASTA Comments at 41; AAA Comments at 2; Carlson Wagonlit Comments at 16; British Airways Coments at 2–3. The systems can also hide the extent of their bias. 49 FR 32540, 32547 (August 15, 1984). A system arguably could choose to omit some services altogether. For example, Priceline, an on-line seller of airline tickets, agreed with Delta that Priceline would not sell seats offered by Delta's competitors on flights to or from Atlanta, Delta's hub. Justice Department Reply Comments at 20, n.27, and 30, n.37. As a result, bias could keep consumers in many cases from obtaining accurate and complete information on schedules and fares from travel agents relying on a system for their information.

Display bias, moreover, provides no apparent consumer benefits. It does not function like advertising, because it provides no information. In fact display bias ''would divert passengers without regard to airlines' prices or quality.'' Justice Department Reply Comments at 19. Display bias is also unnecessary to help travel agents who, due to a customer's demands, are interested in seeing only services offered by one airline. The rules do not bar systems from enabling travel agents to create displays listing the services of a single airline. *See also* Galileo Comments at 61 (Galileo subscribers can create displays tailored to the preferences of their customers, including customer airline preferences).

When we readopted the rules against display bias at the conclusion of our last overall reexamination of the CRS rules, we addressed several theoretical arguments that assertedly showed that display bias was ''beneficent.'' Some commenters argued that a flight's display position would not affect travel agency bookings, that display bias reflected the preferences of a system's subscribers, and that other airlines could buy display bias. We found that these arguments were disproven by experience. 57 FR 43786–43787.

Several commenters have presented somewhat similar arguments here that bias would not work and that there is no reason to prohibit it. While these commenters may be correct in predicting that bias today would not be as effective as it was in the past, we are not convinced that systems could engage in display bias without causing consumer harm.

Systems clearly wish to be able to sell bias. That indicates that they believe airlines will be willing to buy bias, and obviously airlines will be willing to buy bias only if they expect it to be effective. Past experience with system efforts to bias displays suggests that their expectation is correct.

We question whether airlines injured by display bias can practicably take steps to offset it. In response to our example of the Galileo display that harmed Alaska's display position, Mercatus argues that Alaska could have either outbid United for the bias or cut its fares to attract additional passengers. Mercatus Comments at 10. While Alaska may have had the ability to take some steps to offset the effect of the bias, Mercatus has failed to show that those steps would have been practicable. Our concern, moreover, is not limited to the Galileo display's impact on competition. The display also caused travel agents and their customers to receive incomplete or misleading information on the available service options. The display was designed to cause travel agents to book customers on airlines like United even when Alaska provided significantly better service.

Travel agents use the Internet at times to search for alternatives to the services displayed by a system. In theory, as argued by some commenters, the Internet's availability as a check on the quality of displays offered by a system would deter a system from biasing its displays. *See, e.g.*, Transcript at 123–124. We have doubts, however, whether travel agents regularly use the Internet as a test of a system's displays. As shown, travel agents are commonly pressed for time, which is why bias works—travel agents often do not wish to take the time required to search several screens to find the best service for a customer. The many complaints from travel agents about the unavailability of webfares on the systems, and their assertions that almost no travel agency is interested in using more than one system due to the inefficiencies involved, is a further indication that travel agents making a booking for a customer are unlikely to search several sources of information before selecting a flight to recommend. Sabre's evidence is consistent with this conclusion. A 2001 survey indicated that only 11 percent of the travel agents with Internet access had booked airline tickets on the Internet, that 13 percent often used the Internet to check for lower fares, and that 23 percent occasionally used the Internet for that purpose. Sabre Comments, Salop & Woodbury Declaration at 12. We assume that the number of travel agents using the Internet to check for other services will grow significantly, but not by such an extent as to make display bias ineffective.

Travel agencies, moreover, cannot quickly shift to a different system if the system they are using biases its displays. While travel agencies have some ability to switch systems, many agencies would likely incur significant costs by switching from one system to another. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 81.

Any display bias by the systems would not be comparable to the practice of grocery stores selling preferential shelf positions to their suppliers. Unlike the grocery store shelf, which the shopper sees and can easily scan, the traveller never sees the system display

used by a travel agent, and systems can create display bias that obscures the service alternatives to a much greater extent than the shelf position used by grocery store suppliers. Airlines would be willing to buy bias because it would be effective, and its effectiveness means it is likely that a significant number of consumers will be booked on inferior services when other services would better meet their needs.

Delta contends that bias should not prevail if travel agencies really desire unbiased displays. Delta Reply Comments at 25. As noted, however, the systems assume they can sell display bias, and experience indicates that systems have some ability to hide the extent of the bias. Furthermore, the travel agents' interests are not our only concern—we wish to ensure that travel agency customers can obtain accurate information, and to prevent the harm to airline competition that could result if CRS display bias reappeared.

A travel agency customer's ability to go to another travel agency if one travel agency provides bad advice due to its use of a system that biases its displays would not prevent display bias from causing harm. The consumers' ability to switch travel agencies would deter bias if customers find out that better service was available and know that the travel agent booked the inferior service because the travel agent was using a system that provided inferior displays. That seems improbable. Customers instead are unlikely to know why the travel agent did not book the better service. Customers might assume that the better service was sold out, or that the better fare was not available when a customer's booking was made, as we concluded in our last major CRS rulemaking. 57 FR 43787. *See also* American Antitrust Institute Comments at 11. Furthermore, travelers with confidence in their ability to obtain accurate fare information on the Internet would be less likely to use a travel agent to book their tickets.

While we conclude that systems are likely to bias displays in the absence of rules prohibiting such bias, we believe that on-going developments are likely to reduce the systems' market power over airlines over time. We further expect that these developments will enable travel agents and their customers to easily use alternative sources of information to an extent that should deter the kind of display bias that would significantly mislead travel agents and consumers. Accordingly, we have decided to retain the prohibition against display bias only for a transitional period of six months, with a termination date of July 31, 2004. Our expectation is that the notice provided by this transition period will help to accelerate developments in the market that reduce the harm display bias might otherwise engender.

F. The Department's Statutory Authority To Regulate CRS Practices

Having concluded on economic policy grounds that some rules will remain necessary for the next six months, and that the remaining rules should cover all systems, not just those owned by airlines, we must address our statutory authority to adopt the rules and make them applicable to both airline and non-airline systems.

The basis for our adoption of CRS rules has been our authority under section 411 of the Federal Aviation Act, recodified as 49 U.S.C. 41712, to prohibit unfair and deceptive practices and unfair methods of competition by airlines and ticket agents in air transportation and the sale of air transportation. Section 411 states, ''[T]he Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.'' If the Secretary ''finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.'' Congress modelled our authority under section 411 on the Federal Trade Commission's authority under section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, to prohibit unfair and deceptive practices and unfair methods of competition in other industries. *United Air Lines*, 766 F.2d 1107, 1111–1112 (7th Cir. 1985). In enforcing section 411, we must consider the public interest factors set forth in 49 U.S.C. 40101. 68 FR 3293, 3294 (January 23, 2003). Because section 411 limits our authority to practices affecting airline distribution, we may not regulate the systems' treatment of other travel suppliers, such as hotels, rental cars, and Amtrak. 67 FR 69389.

As noted, section 411 covers airlines (both U.S. and foreign) and ''ticket agents.'' The statute defines a ticket agent as ''a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.'' 49 U.S.C. 40102(a)(40).

The courts have construed the meaning of deceptive practices and unfair methods of competition. A deceptive practice is one that will tend to deceive a significant number of consumers. *United Air Lines*, 766 F.2d at 1113. An unfair method of competition is a practice that violates antitrust laws or antitrust principles. We may therefore prohibit some airline conduct permitted by the antitrust laws. *See, e.g., Pan American World Airways* v. *United States*, 371 U.S. 296, 306–308 (1963); *United Air Lines*, 766 F.2d at 1114.

When several airlines sought judicial review of the original CRS rules, the Seventh Circuit affirmed the Board's adoption of the rules on the ground that section 411 authorized the Board to prohibit anti-competitive conduct even though the systems' conduct might not violate the antitrust laws. *United Air Lines* v. *CAB*, 766 F.2d 1107. The Board's underlying findings were very similar to those used in our past rulemakings. The Court stated that the Board's finding that some of the systems had substantial market power was sufficient to authorize the Board's regulation of CRS practices: that finding ''would bring their competitive practices within the broad reach of section 411,'' for the Board ''can forbid anticompetitive practices before they become serious enough to violate the Sherman Act.'' The Court reasoned that the types of conduct prohibited by the Board on antitrust grounds—price discrimination and denying a competitor access to an essential facility on equal terms—were ''traditional methods of illegal monopolization'' that the Board could prohibit, even though no system had a monopoly under Sherman Act standards. *United Air Lines*, 766 F.2d at 1114. In determining whether the Board properly held that display bias was a deceptive practice, the Court viewed the test as whether the practice would tend to deceive a significant number of consumers. 766 F.2d at 1113.

While Section 411 allows us to prohibit some conduct that is not prohibited by the antitrust laws, it does not give us broad authority to regulate practices in the airline and airline distribution businesses. Airlines are generally free to determine how to distribute and sell their services, including sales through travel agencies, as long as they do not violate antitrust principles. The antitrust laws allow individual firms to choose how to distribute their products and services as long as they do not violate one of the provisions of those laws. 67 FR 69384, citing *Paschall* v. *Kansas City Star Co.*,

727 F.2d 692 (8th Cir. 1984) (en banc); and *Auburn News Co.* v. *Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981).

Similarly, the courts have held that the FTC's comparable authority to prohibit unfair methods of competition in other industries does not empower that agency to regulate business conduct in order to make an industry more competitive. In *E.I. DuPont de Nemours & Co.* v. *FTC*, 729 F.2d 128, 140 (2d Cir. 1984), the Second Circuit stated, ''[I]n the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not 'unfair' in violation of section 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.'' In *DuPont* the court therefore vacated an FTC order prohibiting certain types of pricing conduct in an oligopolistic industry, which the FTC had prohibited in the belief that the industry's pricing would then become more competitive. The FTC had not found that the pricing conduct at issue violated the letter or the spirit of the antitrust laws or was otherwise ''collusive, coercive, predatory, or exclusionary.'' *See also Official Airline Guides, Inc.* v. *FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980).

Our decision that most of the existing rules should be allowed to sunset follows from our conclusions that those rules are no longer necessary. That decision also reflects the limits placed by Congress on our authority to regulate airline distribution practices. As a result of Congress' decision to deregulate the airline industry, we may not require firms in the airline distribution business to change their practices without finding that those practices will violate section 411.

We based our proposal to readopt rules proscribing display bias on both our authority to prohibit deceptive practices and our authority to prohibit unfair methods of competition. No one has contested our authority to regulate the systems' display practices under our authority to prohibit deceptive practices, if the systems are ticket agents and our regulations are consistent with the First Amendment (several commenters dispute these assumptions). The argument over our authority to readopt the proposed rules involves both of our tentative conclusions that the statutory definition of ticket agents includes the systems and that system practices at issue could be unfair methods of competition. We address these issues in detail below.

In our notice of proposed rulemaking, we observed that section 411 also authorizes us to prohibit unfair practices by airlines and ticket agents, not just deceptive practices and unfair methods of competition, but that we had not relied on that authority as a basis for readopting CRS rules. 67 FR 69384. The FTC has advised us that the FTC has adopted a strict definition of ''unfair practices'' under the FTC Act and that Congress has since codified the Commission's definition. FTC Comments at 1–3. In its reply comments, America West briefly suggests that we should bar systems from charging supracompetitive booking fees on the ground that such fees violate public policy. America West Reply Comments at 16, n.30. We are unwilling to adopt America West's suggestion. We have not previously based the CRS rules on our authority to prohibit unfair practices, and we do not now intend to rely on that authority, when our notice did not propose to do so and other commenters have not had the opportunity to comment on America West's suggestion.

1. Whether Non-Airline Systems Are Ticket Agents Subject to Section 411

The U.S. airlines' divestiture of their CRS ownership interests requires us to resolve whether we may directly regulate the systems under section 411, because we based our authority to regulate system practices in the past on the systems' airline ownership. Neither we nor the Board ever decided that issue in the earlier rulemakings. 67 FR 69385. We tentatively concluded in our notice of proposed rulemaking that the systems were ticket agents subject to section 411. After considering the comments on this issue, we conclude that we may directly regulate the systems under section 411, even though most of them no longer are controlled by airlines. However, we are also adopting a rule barring airlines from attempting to induce systems to create displays that would not comply with the standards established by our rule prohibiting systems from engaging in display bias.

A few commenters have suggested that we need not decide whether section 411 authorizes us to directly regulate the systems, because each of the existing systems has ties with its former airline owners. We decline this invitation to avoid the issue. Achieving all of our goals without directly regulating the systems would be difficult. Neither relying on the existence of marketing relationships between the systems and airlines nor barring airlines and travel agencies from doing business with systems that engage in unacceptable practices would provide a sound basis for regulating all of the systems' operations.

Section 411 authorizes us to regulate the systems directly if they are ''ticket agents'' within the meaning of our statute. As noted above, the statute defines a ticket agent as ''a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.'' 49 U.S.C. 40102(a)(40). Our notice of proposed rulemaking tentatively concluded that systems are ''ticket agents.'' 67 FR 69384–69385.

Sabre, Galileo, United, Expedia, Travelocity, and ASTA contend that systems are not ticket agents. Amadeus and America West, on the other hand, support our tentative conclusion that the systems are ticket agents subject to section 411.

After considering the comments, we conclude that the systems are ticket agents and that we may therefore prohibit them from engaging in unfair and deceptive practices and unfair methods of competition in the sale of air transportation.

As we explained in the notice, the systems are active participants in the sale of air transportation, not just communications links. 67 FR 69384–69385. The systems enable travel agents to conduct booking transactions, require airlines to accept any bookings made by a travel agent through the system, make credit card authorizations, and issue tickets. They charge airlines fees based on booking transactions. A system operates a central computer that collects information on airline schedules and fares and the availability of seats, arranges that information under its own editing and ranking criteria in displays that are provided to travel agents, and provides a booking capability enabling travel agents to make airline reservations for their customers. The systems also require airlines to allow any system user to make bookings on the airline through the system. *See, e.g.*, Amadeus Reply at 34–35; America West Reply Comments at 7–8. When the booking is made through the system, either through its own central computer or by a direct connection feature in a participating airline's internal reservations system, the travel agent's purchase is complete.

The systems' contracts with participating airlines reflect their function as an integral part of the distribution of airline tickets, not just as a communications link. America West's contracts with Sabre and Worldspan

thus state respectively that the parties ''desire to enter an agreement concerning the booking of reservations [and] the sale of the Participating Carrier's air services through SABRE'' and ''[t]he parties desire to enter into an agreement and provide for the distribution of the services of Participating Carrier through the WORLDSPAN system.'' America West Comments at 13, 14.

In our view, the systems thus sell, offer for sale, and arrange for air transportation, activities which bring them within the statutory definition of ticket agent, because they are also carrying out these functions as a principal or agent.

The statutory definition of ''ticket agent'' states that anyone carrying out the listed functions as ''principal or agent'' is a ticket agent. This definition should cover everyone involved in selling, offering for sale, or arranging for air transportation no matter what status they may have under agency law principles. A person involved in the sale or offering for sale of airline tickets must be either a principal or agent. We do not see any third category of actor that would be applicable here, and the commenters arguing that the systems are not ticket agents do not contend that they are acting in some capacity other than principal or agent. We think Congress included the phrase ''as principal or agent'' to ensure that all persons conducting the listed functions were covered, whether or not they were acting as an airline's agent, acting under their own authority, or acting under someone else's authority. By using the terms ''principal or agent,'' Congress did not mean to make a person's status as ticket agent depend on whether that person was a party to an agency relationship. Congress surely meant to make section 411 applicable to persons who committed unfair methods of competition or unfair or deceptive practices while engaged in the sale or offering for sale of transportation, even if that person acted entirely independently.

We believe that the systems operate as principals in the offering for sale and arranging for air transportation. The systems act as independent firms that are involved in the distribution of airline services. The commenters arguing that systems cannot be ticket agents largely ignore the statute's inclusion of persons who act as principal and assume that a showing that a system is not an agent necessarily means it cannot be a ticket agent. *See, e.g.*, United Reply at 10–12. This implicitly assumes that the principal in the transaction must be the carrier. The statute, however, states that a ticket agent is ''a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as principal or agent'' performs one of the listed functions, such as the sale of air transportation. Congress thus determined that other persons participating in the distribution process, not just the airline, could be principals and would be ticket agents. The commenters' arguments that the systems cannot be agents suggests that they must be acting as principals.

The commenters opposing the systems' inclusion within the definition of ''ticket agent'' argue that the systems are not the airlines' agents. They contend that the systems' contracts with participating airlines specifically disclaim any agency relationship. *See, e.g.*, United Comments at 6–7. This argument misses the point—as shown, if the systems are not the airlines' agents, they must be acting as principals. To some extent, however, the systems may be operating as the airlines' agents, for example, in obtaining credit card authorizations for sales made through the systems. Amadeus Comments at 27. While the commenters arguing that systems are not ticket agents cite the systems' participating airline contracts, which state that no agency relationship is being created, the contracts' statements on the parties' relationships are not binding on us. *See, e.g., Board of Trade* v. *Hammond Elevator Co.*, 198 U.S. 424, 437–438 (1905); *State Police Ass'n of Massachusetts* v. *C.I.R.*, 125 F.3d 1, 7 (1st Cir. 1997).

Furthermore, we disagree with the argument made by some commenters that travel agents are the airlines' agents and that the systems, therefore, cannot be agents of the airlines. *See, e.g.*, Sabre Comments, Fahy Declaration at 21–22. This argument assumes that only one party in any each transaction can act as the airline's agent. We see no logical reason why only one party can act as an airline's agent in the course of a traveller's purchase of airline tickets.

The statute states that a person is a ticket agent if the person ''sells'' or ''offers for sale'' air transportation. The systems sell and offer for sale air transportation because they present the travel agent with air service options that the agent can purchase through the system. A system tells the travel agent what flights are being operated, what the fares are, and whether seats are available at each fare, and enables the travel agent to book the seat and pay for it on the customer's behalf by entering specified keystrokes. If the travel agent follows the proper procedures for making the booking, the airline is obligated by its contract to accept the booking as valid, whether or not any record of the transaction appears in the airline's internal reservations system. The system thus offers air transportation for sale and sells it.

We further find that each system ''holds itself out as selling, providing, or arranging for air transportation.'' As discussed, each system offers for sale and sells air transportation. A system also arranges for air transportation, because it enables the travel agent to choose the services best suited for the travel agent's customer and enables the agent to book whatever combination of services may be required by the customer. The system holds itself out as performing these functions, because it has informed its subscribers (and potential subscribers) that it offers these functions.

We do not agree with the contention made by some commenters that the systems may not be deemed as holding out the sale, provision, or arranging for air transportation, because no system deals directly with the public or holds itself out to the public as offering airline tickets for sale. *See, e.g.*, Sabre Reply Comments at 15. Travel agents, after all, act as the travelers' agent, not just as the airlines' agent, and any representations made to a travel agent are necessarily representations made to the travel agent's principal, the customer. The statute, moreover, does not state that the ticket agent must offer to sell air transportation directly to the public, and we see no reason why such a limitation should be read into the language of the statute.

We therefore conclude that each system is a ticket agent. Interpreting ''ticket agent'' as including the systems would enable us to apply section 411 to firms whose critical role in airline distribution enables them to substantially affect airline competition and the accuracy of information provided consumers.

At the same time, our reading of the term ''ticket agent'' will not make firms providing only information on airline services or communications links subject to section 411. As shown, the systems do much more than just provide information or a communications facility because they are active participants in the sale of air transportation. As we explained in the notice, when a consumer uses the telephone to buy goods and services, the telephone line links the consumer with the firm selling the product or service, and the consumer conducts the transaction directly with the retailer. In contrast, a travel agent using a system to make a booking communicates

exclusively with the system, not the airline, unless the travel agent uses a direct access feature that enables travel agents to obtain information and make bookings directly with an airline's internal reservations system. Furthermore, telephone companies do not choose which data will be sent to the listener, but the systems edit their displays of airline services. More importantly, a telephone company has no apparent interest in whether transactions conducted by telephone are honored by the parties. Each system, in contrast, requires airlines to accept bookings made through the system and imposes fees based on the number of transactions made by subscribers, not on the number of messages transmitted by them. Similarly, as described above, the systems' productivity pricing arrangements with subscribers award incentive payments (or impose penalties) based on the number of transactions made by the subscriber, not the number of messages, as discussed above.

The contentions made by the commenters arguing that systems are not ticket agents are not persuasive. On the ground that the large majority of CRS bookings are now made directly with an airline's internal reservations system, Sabre characterizes the systems as communications links. Sabre Comments, Fahy Declaration at 23. However, Sabre concedes that a significant fraction of its bookings are not made directly in an airline's internal system. Furthermore, the widespread use of direct access (referred to as seamless connectivity by Sabre) does not negate the systems' role as distributors of airline transportation, not mere communications links. The system, not just the airline's internal reservations system, creates a record of the booking transaction, the passenger name record. Sabre Comments, Fahy Declaration at 23. The system, moreover, created the display that enabled the travel agent to choose which flights to book.

Our notice of proposed rulemaking cited the passive booking capability offered travel agencies by the systems as an example showing that the systems were more than communications links. 67 FR 69385. In response, Sabre argues that a passive booking—a booking record stored in the system's computer but not sent to any airline's internal reservations system—cannot support our conclusion that systems are active participants in the distribution channel because passive bookings are ''not active.'' Sabre Comments at 28 and Fahy Declaration at 23. The systems'' creation of the passive booking functionality, however, demonstrates that they operate as more than just communications links. As Sabre states, a passive booking does not cause any communication to go to an airline's internal reservations system. The passive booking functionality, however, benefits many travel agents. Sabre Comments at 28. Travel agents can use the passive booking function to issue tickets for customers who booked their seats directly with the airline and to facilitate group bookings. 67 FR 69400. The systems created the functionality in order to assist their customers, the travel agencies, in their sale of airline services. This effort by the systems additionally confirms their role as active participants in the sale and offering for sale of air transportation.

Sabre further argues that the system contracts requiring participating airlines to accept all bookings made through a system do not show that the systems are active participants in the sale of air transportation. Sabre contends that the systems require airlines to accept all such bookings, even if they have no record of the transaction, as a result of travel agent demands and to avoid libel attacks. Sabre Comments at 27, n.29. Sabre has understated the importance of the systems' requirement. Firms operating as communications links, like a telephone or telegraph company, would not normally require the alleged recipient of a message to assume the obligation of complying with the message, whether or not the recipient actually received it. The requirement that airlines honor bookings made by subscribers demonstrates the systems' role as participants in the sales process.

Sabre additionally notes that the systems operate automatically as machines, unlike human travel agents, which assertedly shows that a system operates only to provide information and process transactions. Sabre Comments, Fahy Declaration at 22. We disagree. On-line travel agencies also operate automatically, except when a customer needs advice or has a problem, but surely no one would argue that an on-line travel agency is not a ticket agent because the great majority of its bookings are made on-line without human intervention. More importantly, the systems were not created by machines—they were developed by people, who also decide what services will be offered, how the systems will be marketed, and what kinds of contractual relationships they will have with their airline and travel agency customers, and who carry out these business strategies. The machines have not chosen the algorithms used to edit and rank air services, and they do not determine the types of restrictions, if any, included in the systems' contracts with participating airlines and travel agencies.

We are aware of the statement made in *United Air Lines* v. *CAB* that suggests that section 411 does not authorize us to regulate the practices of non-airline systems. In the course of affirming the Board's rules, which by their terms covered only systems owned by airlines, the Court stated, ''[T]he Board's rules are limited to systems owned by airlines; it has no regulatory authority over the independent provider.'' 766 F.2d at 1110. Whether the Board could regulate a non-airline system was not an issue in that case. The Board rules did not cover any non-airline system, the parties in the judicial review proceeding were not arguing that the Board should have covered such systems (or urging the Court to hold that the Board could not regulate them), and the definition of ''ticket agent'' and the Board's authority to regulate such systems were not issues in the proceeding. The Court's statement thus is dictum and not binding on us.

In arguing that past judicial and administrative precedent otherwise shows that systems cannot be ticket agents, commenters cite other decisions which are not controlling. United, for example, cites *Official Airline Guides, Inc.* v. *FTC,* 630 F.2d 920, as allegedly setting limits to the scope of section 411. United Comments at 7, n.12. The decision actually addressed questions about the extent of the FTC's jurisdiction under section 5 of the FTC Act, not ours. Sabre cites *Foremost Int'l Tours* v. *Qantas Airways Enforcement Proceeding,* 79 CAB 86, 102 (1978), for the administrative law judge's statement that the ''Board has no jurisdiction over wholesale tour operators.'' Sabre Reply Comments at 22. The judge did not explain his conclusion but noted elsewhere that wholesale tour operators do not issue airline ticket stock (or deal with the public), and that a travel agent selling a tour sends the payment for the air transportation directly to the airline, not through the tour operator. 79 CAB at 100. The district court, moreover, had thought that wholesale tour operators were ticket agents. *Foremost Int'l Tours* v. *Qantas Airways,* 379 F. Supp. 88, 95 (D. Hawaii 1974), *aff'd,* 525 F.2d 281 (9th Cir. 1975). Because the systems, unlike wholesale tour operators, do issue tickets, the *Foremost* case is not dispositive.

Expedia also argues that Congress amended section 411 to cover ticket agents in order to prevent the fraudulent conduct by individuals ostensibly selling tickets, especially on behalf on nonscheduled airlines. Expedia Comments at 17, citing S. Rep. No. 82–1508 and H.R. Rep. No. 82–2420 (1952).

While it is true that Congress understood the need to prevent such conduct, the authority granted by the legislation enacted by Congress is broader than that. Our authority under section 411 is not limited by Congress' primary intent at the time of enactment, when the statutory language is not so narrow. *Consumer Electronics Ass'n* v. *FCC,* D.C. Cir. No. 02–1312 (decided October 28, 2003). *Cf. Independent Insurance Agents* v. *Ludwig,* 997 F.2d 958, 961 (DC Cir. 1993).

Thus section 411 authorizes us to regulate the systems as ticket agents when necessary to prevent unfair and deceptive practices and unfair methods of competition, despite the divestiture of their ownership interests by the U.S airlines that formerly controlled the systems. Determining whether a system's conduct would be unfair or deceptive would not be affected by a system's ownership. The lack of U.S. airline ownership, however, could be very relevant to the question of whether the practices barred by our rules would constitute unfair methods of competition. We discuss that question next.

2. Antitrust Principles Relevant to System Practices

A system or airline practice will be an unfair method of competition if it violates antitrust laws or antitrust principles. In our past rulemakings, we determined that the system practices barred or restricted by our rules would be unfair methods of competition, either because the practices unreasonably limited competition in the CRS business or because they represented an effort to reduce competition in the airline business. We relied on the systems' ownership and control by airlines and airline affiliates. Because the systems are no longer controlled by U.S. airlines, we must reexamine whether the practices barred by our rules would be unfair methods of competition.

Our notice of proposed rulemaking tentatively concluded that section 411 authorized us to readopt most of the existing rules, because we found that the practices prohibited by them could be unfair methods of competition, even though two of the four systems then had no airline owners. 67 FR 69385–69387.

Several of the commenters, especially Sabre and United, argue that the practices at issue could not be unfair methods of competition. They primarily argue that, even if the systems had market power in the CRS business over airlines, system practices that affected airline competition could not violate antitrust principles because the systems did not compete in the airline industry. United Reply Comments at 16–20; Sabre Comments at 41–45.

We are readopting only the rules prohibiting display bias and adopting certain rules prohibiting parity and most-favored-nations clauses in contracts between systems and participating airlines, if those clauses are a condition to participation in the system. The record does not provide a factual basis for finding that the other system practices at issue would be unfair methods of competition.

We may prohibit display bias under section 411 on the grounds that it would constitute an unfair and deceptive practice and an unfair method of competition. We have found that display bias is likely to mislead a significant number of consumers by causing their travel agents to book relatively inferior flights when other flights would better meet the travelers' needs. The Seventh Circuit upheld the Board's rules barring display bias on the basis of findings that display bias would tend to deceive a significant number of consumers. We have made the same finding here. We may therefore readopt rules barring display bias under our authority to prohibit unfair and deceptive practices.

Display bias could also constitute an unfair method of competition to the extent that the system biases displays in order to benefit one airline at the expense of competing airlines. Presumably a system would not bias its displays in favor of one airline at the expense of rival airlines unless the favored airline had given the system inducements to engage in display bias. In that event, the system and the favored airline would be engaged in a joint effort to distort competition in the airline industry, an effort that could succeed only because of the system's market power over the disfavored airlines.

Display bias does not promote competition on the merits. Instead, it is designed to suppress competition by causing consumers and their travel agents to select inferior airline services over other available services that would better suit their needs. As the Justice Department points out, display bias ''would divert passengers without regard to airlines'' prices or quality.'' Justice Department Reply Comments at 19. Display bias could deter entry or expansion by more efficient competitors and possibly cause competitors to exit some markets. *Id.* at 19–20.

Contracts that unreasonably restrict one party's ability to buy products or services from competitors of the other party (or unreasonably restrict competitors of one party from buying products or services offered by the other party to the contract) can be unlawful, if they significantly restrict competition without promoting efficiency. For example, the FTC held that a series of contracts between a major retailer and its suppliers that restricted each supplier's ability to sell their products to the retailer's competitors violated section 1 of the Sherman Act. *In the Matter of Toys ''R'' Us* (October 13, 1998), opinion at 86–87, *aff'd on other grounds, Toys ''R'' Us, Inc.* v. *FTC,* 221 F.3d 928 (7th Cir. 2000).

In some cases, the courts have suggested that contracts giving one party a competitive advantage by causing consumers to be misled may violate the Sherman Act. As one court stated, ''Competition would be harmed if consumers were routed to particular glass repair companies based on factors other than competitive pricing or quality in the marketplace.'' *Stewart Glass & Mirror, Inc.* v. *U.S.A. Glas, Inc.,* 940 F. Supp. 1026, 1035 (E.D. Tex. 1996). In *United States* v. *Microsoft Corp.,* the Court held that Microsoft had violated section 2 of the Sherman Act by providing software development tools to software companies writing Java programs without telling them that Java applications written with the Microsoft tools would work on the Windows operating system sold by Microsoft. Microsoft's intentional deception was unlawful, because it supported the maintenance of Windows' existing monopoly. 253 F.3d at 76–77.

While these cases involve different factual circumstances and were in part decided under section 2 of the Sherman Act, they support a conclusion that arrangements between a system and an airline to bias displays would constitute an unfair method of competition that violates section 411. Display bias would be designed to undermine the competitive position of the targeted airlines by misleading consumers and their travel agents about which airline services would best satisfy a consumer's preferences. Any such arrangements would be intended to handicap the ability of competing airlines to compete on the basis of price and service quality. As such, they would be comparable to the agreements condemned in *Toys ''R'' Us.* While the FTC based its decision on the existence of a series of agreements between the retailer and the supplier, we think that a bias agreement between one airline and one system would unreasonably restrict competition, because the system has market power over airlines in terms of access to the travel agencies subscribing to its services. In *Toys ''R'' Us,* on the other hand, the retailer, unlike the airline buying display bias, could not

undermine the competitive position of competing stores without obtaining agreements from a number of toy manufacturers.

Given the nature of airline markets, many of which are served by only a few airlines, display bias in some cases could facilitate an airline's acquisition of monopoly power in some such markets.

The other practices being prohibited by our rules are airline parity clauses and clauses requiring airlines as a condition to participation in a system to provide the system with all fares, including fares such as webfares that an airline would otherwise choose not to sell through the system. We are not prohibiting parity and most-favored-nation clauses that result from bargaining between a system and participating airlines, such as the clauses accepted by the airlines participating in the Sabre DCA and Galileo Momentum programs.

When we initially prohibited the enforcement of airline parity clauses, we found that such clauses constituted unfair methods of competition, because they unreasonably restricted airline choices on participation levels in different systems and were analogous to unlawful tying. 62 FR 59793–59797. As we said then, and as is still true, parity clauses imposed by a system may violate antitrust principles, because such parity clauses will maintain a system's market power. By denying an airline any opportunity to choose different levels of participation in competing systems, a system's parity clause makes it more difficult for other firms to enter the CRS business and undermines the airline's ability to offer higher-level information and booking capabilities to travel agencies through direct connections. 62 FR 59796. Parity clauses may also constitute an anti-competitive tying of services. A parity clause imposed on participating airlines represents a system's use of its market power to compel airlines to purchase services they may not want as a condition to obtaining any service. We therefore reaffirm our past finding that parity clauses may represent unlawful tying. 62 FR 59795–59796. Our conclusion is supported by the recent decision in the Visa/MasterMoney case, where the court's ruling largely denying various cross motions for summary judgment held that contract clauses imposed by the two credit card companies requiring stores to accept debit cards as a condition to obtaining authorization to make credit card sales could be an unlawful tie. *In Re Visa Check/MasterMoney Antitrust Litigation,* E.D.N.Y. No. 96–CV–5238, April 1, 2003, Memorandum and Order.

System clauses requiring participating airlines to provide all fares as a condition to participation may similarly constitute unfair methods of competition, because they unreasonably limit each airline's ability to choose how to market its services. That would buttress the systems' market power, by eliminating the potential development and use of alternative information sources and booking channels by travel agents who want to book webfares. The Justice Department thus states that such clauses ''may reinforce CRS market power over airlines, particularly if they discourage the development of alternative distribution channels.'' Justice Department Reply Comments at 26. Such clauses, moreover, would eliminate the airlines' ability to use their control over access to webfares as bargaining leverage to obtain better prices and terms for participation from the systems. The airlines' control over access to webfares has caused Sabre and Galileo to offer lower booking fees to airlines that agree to provide them with all such fares. A system's contract clause requiring an airline to provide access to all fares as a condition to any participation would also be analogous to an unlawful tying arrangement. The system would be denying access unless the airline agreed to make all fares available, even though airlines have typically chosen to make some types of fares, like webfares, available only through selected distribution channels.

Our decision not to readopt the remaining rules largely reflects our policy and economic judgment that those rules are unnecessary or unnecessarily restrictive. That decision also reflects the limits on our authority under section 411. We may adopt rules regulating system practices only if necessary to prevent practices that would violate the antitrust laws or antitrust principles or cause consumers to be misled.

While we are finding that each system has some market power over most airlines, that finding by itself does not authorize us to regulate system practices under section 411, even if a system's practices impose unduly high costs on participating airlines, as seems to be true with respect to booking fees. As the Justice Department points out, ''Supracompetitive fees, even when not used to target specific airlines, are inefficient and harm consumers by artificially raising the cost of air travel.'' Justice Department Reply Comments at 3. Nonetheless, a firm's possession of monopoly power in itself is not an antitrust law violation, even though the firm necessarily has the power to charge prices substantially above competitive levels. *United States* v. *Microsoft Corp.,* 253 F.3d at 51. *See also United States* v. *Colgate & Co.,* 250 U.S. 300, 307 (1919). If Congress finds that firms in an industry have market power and should be restrained from exercising that power, for example, by barring supracompetitive prices, Congress typically will establish a public utility-type regulatory structure. Congress has not done so with respect to the airline distribution business, and it determined 25 years ago that the comparable regulatory regime for the airline industry should be abolished. A monopolist will violate the antitrust laws only if it acquires or maintains, or attempts to acquire or maintain, monopoly power by engaging in exclusionary conduct that does not represent legitimate competition, such as the development of superior products or services. *United States* v. *Microsoft Corp.,* 253 F.3d at 58. Our authority to prohibit practices that violate antitrust principles, not just the antitrust laws, would not give us the power to generally regulate the conduct of a non-airline firm that is a monopolist, even if the firm's actions can significantly injure airline business operations, although we may prohibit practices by firms with market power that are designed to maintain that power if they do not provide efficiency benefits or represent legitimate competition.

America West nonetheless contends that section 411 authorizes us to regulate system practices even if we have no evidence that relationships between one or more airlines and a system will likely cause the system to take action to prejudice airline competition. According to America West, ''charging a supracompetitive booking fee is . . . an unfair method of competition in the sale of air transportation.'' America West Reply Comments at 16. America West provides no analysis showing how a system would be violating antitrust principles by charging supracompetitive prices. As shown above, the antitrust laws do not bar a firm from charging supracompetitive prices. America West's contention is inconsistent with the Federal Trade Commission's position that it would not consider practices by a monopolist to be unfair methods of competition if they affected a market in which the monopolist did not operate. FTC Reply Comments at 4.

On the ground that the primary purpose of section 411 is allegedly the prevention of consumer deception, Expedia argues that we cannot regulate the systems' practices in order to

prevent unfair methods of competition. Expedia Comments at 17–18. This claim runs counter to the language of section 411, which prohibits unfair methods of competition as well as unfair and deceptive practices. Furthermore, when Congress transferred the section 411 authority to us upon the Board's sunset, Congress specifically stated that it did so in order to maintain the authority to prevent anti-competitive conduct. Congress cited the Board's then pending CRS rulemaking as an example of regulatory action that should be maintained. H.R. Rep. No. 98–793, 98th Cong., 2d Sess. (1984) at 5.

When airlines controlled the systems, the systems were likely to engage in conduct that would violate section 411, and seemingly had done so before the Board adopted the initial CRS rules. Without airline control of the systems or other evidence of anti-competitive arrangements between systems and airlines, system practices that affect airline competition are not likely to violate antitrust laws or principles, except for display bias. The record does not indicate that the existing relationships between systems and their former owners, whether based on marketing agreements or otherwise, are likely to cause the systems to take actions that would distort airline competition. The commenters who urged us to readopt most of the rules, including the rule barring the systems from charging discriminatory booking fees, have failed to show that such rules must be adopted to prevent conduct likely to violate section 411.

Our notice of proposed rulemaking proposed an analysis that could enable us to make our rules applicable to the non-airline systems. Including the non-airline systems within the reach of the rules could be justified if the record indicated that systems would take actions intended to benefit the competitive position of some airlines at the expense of disfavored airlines. 67 FR 69387, citing, *inter alia, Official Airline Guides* v. *FTC;* 68 FR 12622 (March 17, 2003). The record, as noted, does not show that such conduct is likely to occur, except for bias. As a result, we need not decide now whether that tentative analysis is valid. We recognize that the FTC submitted comments stating that it no longer follows the cases cited by us. The FTC additionally recommended that we reexamine our analysis in light of the brief jointly filed by the FTC and the Justice Department in *Verizon Communications* v. *Law Offices of Curtis* v. *Trinko, LLP,* U.S. Sup. Ct. No. 02–682, which argued that neither the monopoly leveraging principle nor the essential facilities doctrine provided an independent basis for liability under section 2 of the Sherman Act. FTC Reply Comments at 4. In view of our decision that the record does not provide a basis for readopting most of the current rules, further discussion of these questions is unnecessary.

We find that the practices regulated by the rules that we are adopting here may violate section 411, because they may unreasonably reduce competition in the airline and airline distribution industries and are analogous to antitrust law violations.

3. First Amendment and International Law Issues

Our decision to readopt the rules against display bias and only a few of the other rules presents two other important legal issues, whether our regulations are consistent with the First Amendment, and whether our decision is consistent with the United States' obligations under its air services agreements with foreign countries that require the United States to prevent certain types of system conduct that would deny foreign airlines fair and nondiscriminatory treatment. We address the First Amendment issues in connection with our discussion of the display bias rules, and we discuss the United States' obligations under the air services agreements in our discussion of the international issues.

G. The Specific Rule Proposals

Our reexamination of the need for CRS rules in light of the changes in the systems' ownership and the on-going developments in airline distribution has convinced us that most of the rules are no longer necessary. This section states our conclusions on the need for the individual rules on which the notice of proposed rulemaking requested comments. As discussed above, we are willing to adopt rules regulating system practices only if they are reasonably necessary to prevent anti-competitive or deceptive practices that are likely to occur and that market forces are unlikely to remedy, if the rules will also be effective and enforceable.

We will begin our discussion of the major rulemaking issues by discussing the scope of the rules and certain definitional issues, which will be followed by our discussion of the rules that we have decided to readopt, the rules prohibiting display bias and certain contract clauses in the systems' contracts with participating airlines that appear to be anti-competitive. After that we will discuss (i) mandatory participation, (ii) booking fees, (iii) booking and marketing information, (iv) the use of third-party hardware and software by travel agencies and their ability to use one terminal to access several systems and databases, (v) travel agency contracts, (vi) Internet regulation, and (vii) international issues.

1. The Scope of the Rules

In our notice of proposed rulemaking, we proposed to modify the scope of the rules by making them applicable to all systems without regard to any airline ownership or marketing relationships. 67 FR 69382–69383. The existing rules cover systems owned or marketed by airlines that are used by travel agencies to obtain information, make bookings, and issue tickets for passenger air transportation. They do not cover computer systems that do not provide all of these functions, systems that are not owned or marketed by an airline or airline affiliate, and system services that are not used by travel agencies (for example, they do not cover CRSs when used by corporate travel departments). The rules also do not govern the operations of traditional travel agencies or on-line travel agencies. The description of the current rules' applicability is set forth in § 255.2, and the definition of ''system'' is in § 255.3.

We proposed to make the rules applicable to all systems, whether or not owned or marketed by airlines, but to maintain the systems' exclusion when providing services to users other than travel agencies. 67 FR 69389. The non-airline systems generally argue that there is no reason to regulate their practices due to their lack of airline ownership (and, as discussed above, they argue that section 411 does not authorize us to regulate systems not owned by airlines). Other commenters, notably Amadeus, argue that the rules should cover all systems equally. While no commenters advocate extending the coverage of all rules to the systems when providing services to corporate travel departments and other non-agency users, a few commenters essentially contend that the rules should cover selected CRS practices when corporate travel departments are using a system, because they urge us to regulate access to marketing and booking data and access to corporate discount fares. *See, e.g.,* NBTA Comments at 18–24; American Express Comments.

We have determined, as discussed above, that the rules should cover non-airline systems. Systems are likely to engage in bias whether or not they are owned or controlled by airlines. We are prohibiting a few specific airline contract practices—mandatory parity clauses and demanding most-favored-nation clauses—because they would

tend to maintain each system's market power and reduce the ability of airlines to obtain better terms for participation. Such clauses would have harmful effects no matter whether the system is owned by airlines or by non-airline firms. We accordingly are revising the language of the definition of ''system'' by eliminating the current limitation that a system be owned or marketed by an airline.

While including non-airline systems within the definition of ''system'' represents an extension of the current rules, as a practical matter this change will have no immediate impact, because all four of the systems are either owned or marketed by airlines. Applying the rules to all systems will also be equitable, because all competing firms providing essentially the same kind of services will be subject to the same rules. *Cf.* Amadeus Comments at 31–36; Orbitz Comments at 43–45.

We recognize that this change in the definition of a system departs from our earlier reasoning on whether the practices of non-airline systems required regulation. In our last rulemaking, however, we were focusing on system practices that were designed to prejudice airline competition, such as the use of architectural bias, and on practices that unreasonably restricted the travel agencies' ability to switch systems or use multiple sources of information and booking channels when competition between the systems represented a form of competition between the airlines owning the systems. At that time, of course, every system was owned and controlled by one or more airlines. In this proceeding we are adopting only rules prohibiting display bias and certain contract clauses that would unreasonably deny airlines the ability to choose how to distribute their services and fares. This change in focus, and the possibility that both non-airline and airline systems will engage in display bias and seek to restrict airline choices on distribution channels, explain our decision to expand the scope of the rules.

As noted, some commenters suggest that the rules should cover some system operations when being used by corporate travel departments. We have decided not to extend the rules to cover the use of the systems by persons other than travel agents. In the past, even when we found that the systems' practices required strict regulation insofar as the systems were providing services to travel agents, we concluded that we did not need to regulate CRS practices when the system was being used by a corporate travel department or someone else besides a travel agent. 57 FR 43794–43795. The record in this proceeding does not show a need to expand the regulation of the systems' practices. Doing so would be inconsistent with our decision that virtually all CRS regulation should be ended.

Furthermore, the proposals for expanding CRS regulation involve areas such as directing certain airlines to make all of their services and fares, such as corporate discount fares, available through all systems and barring airlines from obtaining unrestricted access to the booking and marketing data generated by the systems from bookings made by travel agencies and corporate travel departments. *See, e.g.*, NBTA Comments at 18–24; American Express Comments. As explained elsewhere in this document, we have decided not to adopt rules on these issues.

2. Exclusion of Internet-Based Systems

We proposed to revise the scope of our rules in a second respect, by excluding firms that do not provide airline information and booking capabilities to travel agencies under formal contracts. We expected that Internet-based firms such as Orbitz could enter the CRS business by providing CRS services on a transaction-by-transaction basis. We tentatively found that such Internet-based firms would be likely to offer new competition in the CRS business but not likely to obtain the kind of market power that made CRS rules necessary. We doubted that such firms would present a potential for anti-competitive conduct and deceptive conduct. We expected that travel agencies would use such a service as an alternative to one of the existing systems, either on a transaction-by-transaction basis or under short-term contracts. 67 FR 69389–69390.

Several commenters oppose this proposal on the ground that all systems should be treated the same and that Orbitz in particular should be covered by the rules because, unlike the four existing systems, it is owned and controlled by major U.S. airlines. Some commenters argue that using the existence of a formal contract to distinguish between systems covered by the rules and those not covered by the rules would be irrational. *See, e.g.*, Amadeus Comments at 42–43, 98–100; Southwest Comments at 7–10.

Orbitz supports the proposal. If a travel agency used a system on a transaction-by-transaction basis, the system would assertedly have no assurance that the travel agency would continue using its services, and thus the system would have no market power. According to Orbitz, that would eliminate any basis for regulation. Orbitz Comments at 41–43.

We have decided not to modify the definition of ''system'' to exclude firms that do not offer services under a formal contract, as was proposed, or to create a different exception for Internet-based firms that offer services that are comparable to those being offered by the existing systems. Normally all competitors in an industry subject to general regulations should be treated alike, unless there are substantial reasons for a different result.

Moreover, we see a likelihood that any firm providing system services, even on a transaction-by-transaction basis, may engage in the kind of practices prohibited by our rules. Our proposal essentially assumed that travel agents would use an Internet-based system in addition to one of the existing systems, not as a substitute for such a system. The commenters generally agree, however, that the great majority of travel agencies will use a single system, not multiple systems. *See, e.g.*, ASTA Comments at 3–4; Large Agency Coalition Comments at 20. As a result, travel agencies using an Internet-based system would probably use it as their only system. If such a system built a subscriber base consisting of travel agencies using its services for almost all CRS functions, that system in time would acquire the kind of market power that the existing systems have—airlines would have to participate in that system if they wanted their services to be readily saleable by its travel agency subscribers. In addition, travel agencies will be reluctant to switch systems, whatever the form of contractual arrangement, so subscribers using a system without having a long-term contractual arrangement will likely continue using that system for a substantial period of time. Furthermore, the firm most likely to benefit from the proposed redefinition of ''system'' would be Orbitz. Given Orbitz' affiliation with five major airlines, and its access to the webfares offered by most airlines, Orbitz may in time obtain a significant number of subscribers.

The proposed distinction between systems providing services to subscribers under formal contracts and those that do so without formal contracts would likely be difficult to administer. Even a short-term commitment by a travel agency to use a system would arguably constitute a formal commitment. Amadeus Comments at 42. Galileo contends that such a distinction would encourage firms to game the system by developing business relationships that in form

would not appear to involve formal contracts. Galileo Comments at 44. *See also* Amadeus Comments at 42–43.

We also do not believe that our decision will deter Orbitz or other firms from entering the CRS industry, assuming that doing so is otherwise an attractive business proposition. The remaining rules will prohibit display bias and certain types of restrictive clauses in airline contracts. Orbitz' business plan has included commitments to offer unbiased displays, which Orbitz has honored. Office of the Inspector General, U.S. Department of Transportation, ''OIG Comments on DOT Study of Air Travel Services'' (December 13, 2002), at 7–8. We assume that our individual rules against display bias would not force Orbitz to restructure its displays. We see no evidence that Orbitz has planned to impose parity clauses and similar restrictions on airlines using its services. Orbitz' most-favored-nation clause is consistent with the limited rule barring systems from demanding access to all publicly-available fares as a condition to any participation in a system, because Orbitz gives airlines a rebate on their booking fees if they agree to the most-favored-nation clause and will sell their services through Orbitz if they do not agree.

One firm, AgentWare, urges us to revise the definition to make sure that it does not inadvertently cover Internet-based software applications such as AgentWare's Travel Console. AgentWare Reply Comments. AgentWare does not explain why our definitions would create a problem, describe in detail how AgentWare provides information and booking services to travel agencies, or propose a change to the rules' definition that would avoid the stated problem. Our review of the description of AgentWare's products set forth on its website suggests that the rules should not apply to AgentWare, which appears to provide a link to other sites where bookings can be made, does not provide a booking function itself, and presumably is not charging airlines any fees. *See also* Galileo Comments at 66–67. If AgentWare believes that the rules would interfere with its operations and can show that the application of the rules to its services would be unnecessary to protect the public interest, we could exempt it from the rules under 49 U.S.C. 40109. We do not wish to discourage firms like AgentWare from offering new technology and new information services to travel agencies and travelers.

American Express asks that we be sure to exclude direct connections between travel agencies and airlines and proprietary software used internally by a travel agency. American Express Comments. Our revised definition of ''system'' expressly does not cover direct connections and would not cover software used by a travel agency.

3. Definitions

The rules currently govern the operation of each ''system,'' defined as a computerized reservations system that, among other things, is offered to subscribers, charges any airline other than its affiliated airlines fees for system services, and provides travel agents with the ability to make reservations and to issue tickets. The rules define ''subscriber'' as a ticket agent ''that holds itself out as a neutral source of information about, or tickets for, the air transportation industry and that uses a system.'' Section 255.3.

We proposed to change the definition of ''system'' and ''subscriber'' to reflect current industry conditions. Because the airlines are trying to phase out paper tickets, we stated that we planned to eliminate the requirement that a system be able to issue tickets. When we adopted the current rules, we assumed that travel agencies would not choose a system that did not offer a ticketing capability. Since then airlines have developed E-ticketing, and they often discourage passengers from demanding paper tickets (an E-ticket, unlike a paper ticket, is just a printed confirmation of the purchase of air transportation). The ability to issue tickets therefore may no longer be a crucial function needed by travel agencies. 67 FR 69390

Similarly, because many travel agencies have incentive commission arrangements with some airlines that are designed to encourage the travel agency to shift bookings to those airlines, we proposed to eliminate the requirement that a subscriber be impartial. While travel agencies generally offer impartial advice, the existence of preferred supplier relationships between many travel agencies and individual airlines might lead some to question whether the agencies were entirely impartial. We therefore proposed to amend the definition in order to eliminate any possible uncertainty over the rules' applicability. 67 FR 69390.

No one commented on our proposal to change the definition of ''system'' by deleting the ticket issuance function, and some support the proposed change in the definition of ''subscriber.'' ASTA Comments at 50; Amadeus Comments at 44.

We will therefore adopt these changes for the reasons stated in our notice of proposed rulemaking. In addition, our decision that most of the rules should not be readopted has made other definitions unnecessary, such as ''system owner.'' We are not readopting these definitions.

4. Rules Barring Display Bias

(a) Background. We have found, as explained above, that we should continue to prohibit display bias for a six-month period. Display bias may both harm airline competition and cause consumers to be misled, especially if it is not clearly disclosed, and accordingly we believe it necessary to allow additional time for an orderly transition to a deregulated marketplace.

Our rules prohibit systems from biasing their displays in favor of individual airlines but do not prescribe how a system must display airline services. Each system may develop its own criteria for editing and ranking displays of airline services. Section 255.4. The rules define display bias as using carrier identity in selecting flights from the database and ordering the listing of flights in the display. Galileo, for example, may not give United's flights a preference just because they are operated by United. Other provisions additionally limit the potential for bias. One such provision requires each system to apply its editing and ranking criteria consistently to all markets. The system must select connecting points (and double connect points) for constructing connecting flights for each city pair on the basis of criteria that are applied consistently to all airlines and all markets. Participating airlines can designate five points to be used as connecting points in a market. Section 255.4(b)(1), (c).

Each participating airline must ensure that it provides complete and accurate information to each system in a form that will enable the systems to display flights in accordance with our rules on display bias. Section 255.4(f).

The rules do not prohibit systems from selling advertising on their displays.

The current detailed rules on display bias stemmed from findings by us and the Board that rules prohibiting or restricting specific display algorithms were necessary, due to the systems' creation of editing and ranking criteria that, while often ostensibly neutral, in fact gave the services of favored airlines an unwarranted advantage in the system's displays over the services offered by competing airlines. *See, e.g.*, 62 FR 63837.

The rules do not regulate the displays created by travel agencies and thus do not prohibit a travel agency from biasing the displays used by its travel agents. We determined in our last overall

rulemaking that such a rule was unnecessary because competition between travel agencies appeared likely to deter them from offering customers misleading or incomplete advice on airline service options. 57 FR 43809.

In our notice of proposed rulemaking, we proposed to maintain the existing rules against display bias. We also proposed to bar airlines from inducing, or attempting to induce, a system to create a display that would violate the rules on display bias. 67 FR 69385, 69397, 69428.

We further proposed to modify the rules to address two other display issues. First, we proposed to limit the number of times an airline service could be displayed under different airline codes. 69 FR 69396–69397. Secondly, American had once offered travel agencies software that would enable an agency to create displays that gave American a strong preference. We tentatively determined that the rules should prohibit any airline from offering programs to travel agencies enabling agencies to bias their displays. 67 FR 69397. We did not propose to regulate the displays created by travel agencies. 67 FR 69397–69398.

The commenters disagree over our proposal to readopt the existing rules. Sabre, Delta, and Travelocity argue that no rules on display bias are necessary, and the Competitive Enterprise Institute (''CEI'') argues that any restrictions on system displays would violate the First Amendment. Other commenters assert that rules prohibiting display bias remain necessary. *See, e.g.*, America West Comments at 39; American Comments at 35; Continental Comments at 24; Northwest Comments at 12; ASTA Comments at 41. Commenters similarly disagree over our proposals on limiting the display of code-share services and barring airlines from providing software that could be used by a travel agency to bias its displays.

After considering the comments, we have determined to maintain the existing rules prohibiting the systems from biasing displays for an additional period of six months. We will not adopt our proposals to bar airlines from distributing software that can bias displays and to limit the number of times a single service is displayed under different airline codes.

(b) *Maintaining the Rules Prohibiting Display Bias.* We explained above why we have decided to readopt rules prohibiting display bias, for the next six months, in our discussion of why we find that limited CRS regulation remains necessary. As discussed there, the record demonstrates that systems are likely to have the wherewithal to bias their displays of airline services if we allow our prohibition against such bias to terminate immediately. Undisclosed display bias could prejudice airline competition and cause consumers to receive misleading information on airline services. Display bias makes it more difficult for travel agents to find the airline services that best meet a customer's needs. ASTA accordingly states, ''Travel agencies should not be required to waste time in an effort to defeat biased displays so they can serve their clients. Airlines should win clients with better fares and service, not by burying their competitors' information in computer displays.'' ASTA Comments at 41.

No commenter has argued that we must revise the existing rules, should we decide to keep regulations against display bias. The commenters who argue that rules on display bias are unnecessary have not suggested rule revisions that would minimize the regulation of the systems' editing and ranking of airline service options, nor have they shown that the rules impose any significant burden on the systems. We will therefore readopt the existing rules for a period of six months with a sunset date of July 31, 2004. We will actively continue to monitor market conditions. We, of course, retain the ability to propose readoption of rules against display bias if conditions indicate, contrary to our present expectation, that continuation of such rules is warranted.

(c) *Barring Airlines from Encouraging Display Bias.* We proposed to adopt a rule, section 255.11(a), that would prohibit airlines from inducing or attempting to induce a system to bias its displays. If section 411 were not read as enabling us to directly regulate system practices, we could prohibit some potentially prejudicial practices, like display bias, by barring airlines from entering into contracts with systems that would encourage or facilitate such practices, as explained in our notice of proposed rulemaking. 67 FR 69385.

No one has objected to this proposal, assuming that we have a basis for regulating display bias at all, so we will adopt it. While we believe that systems are ticket agents and thus subject to section 411, this rule provides an additional basis for enforcing the prohibitions against display bias during the six-month transitional period.

(d) *First Amendment Issues.* While section 411 authorizes us to regulate the systems' displays, in exercising that authority we must comply with the First Amendment, which restricts the ability of government agencies to regulate commercial speech. Two commenters—CEI and Sabre—raise questions about whether our proposed rules would violate the First Amendment (several other commenters argued that our proposed policy on the disclosure of travel agency service fees would violate the First Amendment, an argument that we will address in a separate rulemaking on that issue). CEI contends that our proposed rules on display bias are contrary to the First Amendment's protection for commercial speech. CEI Reply Comments at 2–3. Sabre does not argue that the proposed rules are unlawful and instead only suggests that they may present First Amendment issues. Sabre Reply Comments at 73.

We believe that our rules against display bias will not violate the First Amendment, as was true when we adopted the existing rules. 57 FR 43792. The Supreme Court has held that government agencies may regulate commercial speech. As the Court has explained, ''Commercial speech * * * is 'linked inextricably' with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.'' *Edenfield* v. *Fane,* 507 U.S. 761, 767 (1993) (citations omitted). As a result, courts and agencies may enforce competition laws against firms despite First Amendment claims. The Supreme Court has refused to block suits and administrative actions taken to enforce the antitrust laws despite assertions that the targeted conduct represents an exercise of First Amendment rights. *See, e.g., FTC* v. *Superior Court Trial Lawyers Ass'n,* 493 U.S. 411 (1990); *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.,* 486 U.S. 492 (1988). The same principle should apply to our implementation of our statutory authority to prohibit unfair methods of competition.

Furthermore, the First Amendment protects commercial speech that is not misleading. As the Court stated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U.S. 557, 563 (1980), ''The government may ban forms of communication more likely to deceive the public than to inform it,'' for ''there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.'' The Court has declared, ''But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions.'' *In re R.M.J.,* 455 U.S. 191, 203 (1982). We are adopting the rules on

display bias because we seek to protect the public against misleading communications, and experience has shown that systems are likely to bias their displays if not barred from doing so. The courts have sustained restrictions on speech where necessary to prevent possibly misleading messages. *Nutritional Health Alliance* v. *Shalala,* 144 F.3d 220 (2d Cir. 1998); *Bristol Myers Co.* v. *FTC,* 738 F.2d 554, 562 (2d Cir. 1984).

However, if displays of airline services of the kind proscribed by our rules were considered protected by the First Amendment, our rules would satisfy the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n,* 447 U.S. 557 (1980); *Lorillard Tobacco Co.* v. *Reilly,* 533 U.S. 525 (2001); and *Board of Trustees* v. *Fox,* 492 U.S. 469 (1989). A government may restrict commercial speech that concerns lawful activity and is not misleading, if the government has a substantial interest and if the restrictions directly advance that interest and are no more extensive than necessary to serve that interest. *Central Hudson, supra,* 447 U.S. at 566; *United States* v. *Edge Communications,* 509 U.S. 418 (1993).

In considering whether our rules on display bias are consistent with the First Amendment, the limited nature of the restrictions imposed by our rules is important. Unlike the typical commercial speech case, our rules do not prohibit the listing of any airline service or fare, nor do they prohibit airlines from advertising their services on CRS screens or elsewhere. Our notice of proposed rulemaking thus stated in the context of proposals to regulate on-line travel agencies that we do not consider banner advertisements to constitute bias. 67 FR 69412. Our rules, moreover, are in large part designed to keep systems from hiding or omitting information, for example, by constructing displays of connecting services that arbitrarily exclude the hubs of disfavored airlines as connecting points. The rules merely require systems to follow certain requirements in listing flights in their displays of airline services rather than prohibit the inclusion of information.

Our rules satisfy the first element of the commercial speech test, because we have a substantial interest in preventing system practices that would mislead consumers and harm airline competition. Congress has given us the responsibility to prevent unfair and deceptive practices and unfair methods of competition in the airline industry. Our readoption of the rules against display is, as shown, consistent with the Justice Department's position that display bias will injure consumers by causing a reduction in airline competition.

Our rules meet the second element of the test, because they directly advance our interest in preventing display bias that would harm competition and mislead consumers. Our rules impose display requirements that experience has shown are necessary to prevent systems from presenting displays that would mislead travel agents and their customers and that would harm airline competition.

Finally, our rules meet the third part of the *Central Hudson* test. Under that part of the test, there must be a reasonable fit (but not necessarily a perfect fit) between the advertising limitation and the government's asserted interest, and the restriction need not be the least restrictive means for defending that interest. The rules are tailored to prevent display bias. They do not, for example, prohibit systems from advertising airline services on their displays, nor from providing a display of only one airline's services. The rules also do not generally prescribe how airline services must be edited and ranked. The Court upheld the advertising prohibition in *Edge Broadcasting* because it was ''reasonable'' without examining whether the prohibition was better than available alternatives, 509 U.S. at 429–431. CEI, the commenter arguing that the display bias rules violate the First Amendment, has not suggested any alternative regulations that would be less burdensome and still prevent consumers from being misled and prevent the harm to airline competition that would result from display bias. *Cf. Trans Union* v. *FTC,* 295 F.3d 42, 53 (D.C. Cir. 2002).

(e) *Display of Code-Share Services.* The display of services operated under a code-share arrangement can lead to the multiple listing of single flights, because the service may be listed under the code of each airline that has a code-share agreement with the airline operating the flight. We asked for comments on whether we should adopt one of the following limits on the number of times a single flight was displayed under different codes: (i) an American proposal for a rule requiring that all airline codes displayed for a flight be displayed in one listing, as is the case for flights operated under one airline code, (ii) the European rule allowing a service to be displayed under no more than two codes, and (iii) a Continental proposal allowing one listing of an international nonstop flight or set of connections for each code-share partner. Because we have found that code-sharing usually benefits consumers by creating more integrated services, we did not propose to prohibit code-sharing altogether. 57 FR 43805. We further noted that airlines engaged in code-sharing understandably expect their services to be listed under each partner's code. Code-sharing is a significant feature of the international alliances that we have found provide significant consumer benefits. International agreements also provide bilateral rights to offer code-share services. 67 FR 69396–69397.

Several commenters urge us to adopt the European rule, which bars a single service from being displayed under more than two codes. Amadeus Comments at 55–56; American Comments at 35; Midwest Comments at 24–25; Air Carrier Ass'n of America Comments at 13. Southwest contends that no service should be listed more than once. Southwest Comments at 10–12. U.S. Airways prefers limiting the display of a domestic service to two codes and an international service to three codes. U.S. Airways Comments at 9–12. Continental argues that each service should be displayed once under each airline code. Continental Comments at 24–25. *See also* ASTA Comments at 41. Northwest opposes any limits on the display of code-share services. Northwest Comments at 22.

During the comment period, we reviewed under 49 U.S.C. 47120 the domestic alliance planned by Delta, Continental, and Northwest. We concluded that the alliance presented significant competitive concerns but that we would not begin a formal investigation of whether the alliance's operations would constitute unfair methods of competition in violation of section 411 if the three airlines agreed to conditions alleviating our concerns. One of the conditions required the three airlines to ask the systems to display their services under no more than two of their three codes while we completed this rulemaking. We developed that condition because we believed that the use of all of the partners' codes on their services could create an unreasonable competitive advantage for the three airlines. 68 FR 10770 (March 6, 2003).

We have decided not to limit the display of code-share flights. While we remain concerned about the potential competitive effects of the multiple display of code-share services, we do not see a compelling reason to regulate the display of code-share services at this time. However, nothing in our rules, or in this discussion, should be read as prohibiting or discouraging systems from limiting the display of code-share

services if they wish to do so, and two of them—Sabre and Amadeus—have done so by listing a flight under the codes of no more than two airlines, the operating airline and one of its code-share partners. They are thereby following the European Union rules, which allow each airline service to be displayed under no more than two airline codes. We assume that the other systems will adopt similar limits if the display of code-share services under multiple airline codes is disadvantageous for travel agencies, who can choose between systems and should prefer a system that has the most useful displays. That no system is now owned or controlled by U.S. airlines should make it more likely that systems will respond to travel agent and consumer preferences in this area.

Orbitz suggests that the adoption of the European Union rule by Sabre and Amadeus violates our rule barring systems from discriminating against airlines that sell services under another airline's code, 14 CFR 256.4. Orbitz Reply Comments at 16, n.8. We disagree. The Board adopted that rule because United's system, Apollo, planned to stop displaying flights of airlines that operated entirely under another airline's code, such as the Allegheny Commuter airlines, which had no codes of their own and instead used US Airways' code. Under Apollo's plan, the system would list connecting services only under the code of the airline that operated the flight. 49 FR 9430 (March 13, 1984). In contrast, the practice followed by Sabre and Amadeus does not prevent an airline's code from being used on flights operated by a second airline. Instead, the two systems limit the number of times the code is displayed. We do not think that violates the rule, which prohibits a system from denying access to its system to airlines that share a single code or from discriminating against an airline on the basis of its use of another airline's code.

(f) *Biasing Software Provided by Airlines.* While we did not propose to bar travel agencies from creating biased displays, we did propose to bar all airlines from providing software to travel agencies that could be used to create biased displays. This proposal grew out of an enforcement proceeding prosecuted by our Enforcement Office. That Office had filed a complaint against American and Sabre based on American's distribution to some travel agencies using Sabre, then controlled by American, of a program that enabled them to bias their displays in favor of American. American Airlines and Sabre Travel Information Network Enforcement Proceeding, Docket OST–95–430. The software enabled travel agencies to create several different displays, including one that would show only American flights.

We thought that an airline's distribution of software to be used for biasing displays was essentially the same as a system's offering of a biased display. We recognized that travel agencies would decide whether to accept such software, but we anticipated that a travel agency would be under some pressure to accept such software from an airline that was the major airline in the agency's market. We saw no reason for allowing any airline to distribute such software. 67 FR 69397.

We have decided not to adopt a new rule that would prohibit airlines from distributing software that could be used to create biased displays, although we are prohibiting airlines from attempting to induce any system to create biased displays. Travel agencies have to compete against other travel agencies, and their need to satisfy their customers should check their willingness to create biased displays. The airlines' divestiture of their system ownership interests should alleviate any problem that might otherwise exist, because the airline affiliated with the system used by the travel agency would be the airline most able to cause the travel agency to accept biasing software. American, for example, distributed its software to travel agencies using Sabre. Furthermore, a travel agency that is intent on creating a biased display could probably obtain the necessary software from other sources. Delta Reply Comments at 60. Banning airlines from providing biasing software therefore seems unlikely to stop such conduct.

ASTA, moreover, alleges that the proposed rule is unnecessary. ''A travel agency would only want to bias a display when it was working with a corporate client that had made an independent preferred fare arrangement with the favored airline. In such cases the agency's efficient servicing of that client will be enhanced if the agency has available to it a display that shows the favored carrier's flight first.'' ASTA Comments at 41.

The lack of a rule may lead to some harm. Some travel agencies, despite their need to obtain repeat customers, may bias displays in ways that would cause customers to book flights that do not best meet their needs, and a rule prohibiting airlines from distributing biasing software would help prevent such conduct. The competitive pressures on travel agencies nonetheless should make the adoption of a general prohibition unnecessary. We do not wish to adopt rules that would prevent all potential problems, because doing so would impose a large body of regulation on industry participants and stifle innovation.

As is true on other issues, however, we will monitor the conduct of airlines and travel agencies to see whether the lack of general rules is leading to deceptive or anti-competitive practices that are not being corrected by market forces.

Amadeus argues that a system should also be able to sell software to travel agencies that would allow agencies to create biased displays if they wish. Amadeus Reply Comments at 12. Our proposed rule would have prohibited such conduct. We have decided not to bar systems from selling such software. A travel agency always has the option to decline to use such software and a system, unlike an airline that dominates a region, should have little ability to compel a travel agency into accepting software that the agency prefers not to use. In contrast, we are prohibiting systems from biasing their displays, because then an unbiased display is not available as an option.

5. Contract Clauses Restricting Airline Choices on System Usage

(a) *Background and Our Proposals.* We have found that the systems continue to have some market power over most airlines, as explained above, although we expect that power to be diminished by the on-going developments in airline ticket distribution. Airlines should have some bargaining power against systems if each airline can choose which services and fares will be saleable through each system and the level at which it will participate in each system.

There remains a significant risk that systems may use their market power to compel conduct that would limit the potential for competitive discipline in the CRS business. First, until we prohibited them from doing so, three of the four systems enforced parity clauses against participating airlines. A system's parity clause required each participating airline to buy at least as high a level of service from the system as it did from any other system. To ensure that each airline can choose its participation level in each system, we adopted a rule prohibiting systems from enforcing parity clauses against airlines that do not own or market a competing system, because we found that parity clauses denied airlines the ability to select their participation level (and therefore prevented competition that might otherwise exist). Section 255.6(e), adopted at 62 FR 59784 (November 5,

1997). Parity clauses made it unnecessary for systems to compete for airline participation at higher levels of service (while almost all airlines must participate in each system, as discussed, many airlines do not need to participate at the higher levels, which are more expensive). As we additionally explained, ''[P]arity clauses cause airlines either to buy more CRS services than they wish to buy from some systems or to stop buying services from other systems that they would like to buy, which creates economic inefficiencies and injures airline competition.'' 62 FR 59784. We proposed to readopt that rule in this proceeding. 67 FR 69392.

Secondly, we saw a risk that systems could try to take away the airlines' control over access to their fares, especially webfares, which airlines could otherwise use as leverage to obtain better terms from the systems. Travel agencies wish to be able to find and book webfares through their systems, because doing so is more efficient than using an alternative booking channel. 67 FR 69373, 69381. As discussed above, after we completed our notice of proposed rulemaking, two of the systems—Sabre and Galileo—began offering lower fees to airlines that agreed to make all their webfares available through the system. Sabre's comments on our advance notices of proposed rulemaking, however, indicated that a system might by contract attempt to compel participating airlines to make all fares saleable through the system. Sabre stated that its contracts required participating airlines to make all publicly-available fares saleable through Sabre, although Sabre had not yet required any airline to comply with that provision. *See* 67 FR 69392–69393. Since then, Sabre has been giving reduced fees to airlines that provide their webfares, although Sabre had earlier sued American to compel that airline to provide its webfares, albeit under a contractual provision applicable to airlines that owned or marketed another system. American Comments at 24–26; Orbitz Comments at 36.

We also proposed to prohibit each system from enforcing clauses that bar airlines from discriminating against travel agencies because they used that system. Sabre had such a clause in its participating airline agreements. We thought that clauses barring discrimination could block airline efforts to persuade travel agencies to use systems that were less expensive for a participating airline. 67 FR 69393.

We believed that these proposals would be consistent with our rule prohibiting parity clauses, § 255.6(e). We did not propose to ban such clauses if they resulted from negotiations between the system and participating airlines. 67 FR 69392–69393.

The Justice Department states that most-favored-nation clauses like those that we proposed to prohibit can be anti-competitive, that the Justice Department supported our proposal to prohibit parity clauses in 1996, and that the Justice Department has filed antitrust enforcement actions against the use of similar clauses in other industries. Justice Department Reply Comments at 25. The clauses ''may reinforce CRS market power over airlines, particularly if they discourage the development of alternative distribution channels.'' Justice Department Reply Comments at 26. Such clauses can be beneficial, however, and any broad prohibition of most-favored-nation clauses by us would be harmful if it prevented airlines and systems ''from freely negotiating mutually acceptable contracts,'' especially when systems are willing to offer discounted fees to airlines willing to accept such a clause. Justice Department Reply Comments at 25–26. The Justice Department concludes that we could reasonably decide to prohibit parity clauses and clauses requiring an airline to make all publicly-available fares saleable through a system but that the opposite decision could also be reasonable (the Justice Department seemingly assumed, however, that our proposed rules would prohibit airlines from agreeing to accept parity clauses and clauses requiring them to make all fares available, which was not our intent). The Justice Department recommends against adopting the proposal to prohibit systems from barring airlines from discriminating against their subscribers. Justice Department Reply Comments at 27.

Orbitz and several airlines argue that we should prohibit most-favored-nation clauses like parity clauses and should not allow systems to enforce them against airlines that own or market a competing system. Orbitz Comments at 35–39; Alaska Comments at 8; American Comments at 24–29; Continental Comments at 14–17; Delta Comments at 33–39. Galileo supports the readoption of the existing rule barring parity clauses with the exception allowing a system to enforce such a clause against an airline affiliated with a competing system.

United contends that parity clauses clearly violate the antitrust laws but that enforcement action, not the adoption of a general rule, is the proper way to prevent such anti-competitive conduct. United Reply Comments at 46–54, 75–77.

Several commenters argue that systems should be able to negotiate for parity clauses or most-favored-nation clauses from participating airlines. Amadeus Comments at 46–48; Galileo Comments at 24; Sabre Comments at 133–135; Amadeus Reply Comments at 16; Mercatus Comments at 8.

(b) *Summary of Final Rule.* We have determined to readopt for a transitional period of six months the rule prohibiting parity clauses as a condition to any participation in that system, but without the existing exception that allows a system to enforce such a clause against an airline that owns or markets another system. We are also adopting for six months a rule barring systems from requiring airlines to provide all publicly-available fares to a system as a condition to any participation in that system. We have decided not to adopt the rule barring a system from prohibiting participating airlines from discriminating against its subscribers.

These rules will sunset on July 31, 2004. The six-month period, we believe, will furnish the parties with notice of the forthcoming changes and an opportunity to prepare for the absence of these rules. The six-month period will, we believe, allow affected parties to arrange for an orderly transition to complete deregulation of computer reservations systems. We, of course, retain the authority to reexamine these issues at any time if warranted.

We agree with the commenters who contend that a system should be able to negotiate for most-favored-nation clauses from participating airlines. Amadeus thus states, ''CRSs and airlines should be free to bargain for [parity clauses] as part of their overall negotiation of fees and terms of participation,'' and ''CRSs should have the right to bargain with airlines concerning whether an airline must provide to the system fares provided to any other system, or to any online travel site, or to any other distribution channel.'' Amadeus Comments at 47. Our rules will not bar systems and airlines from doing so, and will not affect the ability of Sabre and Galileo to continue their existing programs to trade lower fees for access to webfares. Orbitz, of course, has a similar program, which enables airlines to obtain a partial rebate of their booking fees if they agree to make all of their publicly-available fares, including webfares, saleable through Orbitz.

We disagree with United's contention that we should rely on enforcement action rather than rules to prevent

systems from demanding most-favored-nation clauses that are anti-competitive. United Reply Comments at 23. United itself agrees that parity clauses are anti-competitive. United Reply Coments at 76. We would be using our authority more efficiently if we establish rules barring specified anti-competitive clauses rather than seek to block the imposition of such clauses through enforcement proceedings.

Nonetheless, while we are not barring systems from creating and enforcing bargained-for parity clauses and clauses requiring an airline to provide all publicly-available fares to the system that are saleable through other distribution channels, most-favored-nation clauses can be anti-competitive in some situations, as pointed out by the Justice Department. America West complains that the Galileo and Sabre Momentum and DCA programs will insulate the two systems from competition from alternative distribution channels: ''These programs essentially require America West to relinquish control over how and to whom it will distribute its inventory for a minimal discount off of Galileo's and Sabre's booking fees'' and would require America West to ''forego any opportunity to encourage the development of alternative distribution channels by providing special fares exclusively through such alternate channels.'' America West Reply to Supp. Reply at 3. The systems' market power possibly may enable the CRSs to obtain access to webfares without significant reductions in booking fees. At this time, however, we believe, as does the Justice Department, that systems should be able to negotiate for most-favored-nation clauses, which do offer participating airlines some reductions in booking fees and enable travel agents to obtain more comprehensive information on airline services from their systems.

(c) *Airline Parity Clauses.* We have determined to maintain the prohibition against the enforcement of parity clauses that are demanded as a condition of participation for an additional six months, and to eliminate the exception allowing systems to use such a clause against an airline that owns or markets another system. Each airline should be able to choose its level of participation in each system. Prohibiting parity clauses for this additional period should give airlines additional bargaining leverage against individual systems, and furnish time to make adjustments in anticipation of the termination of the prohibition.

The existing rule, as noted, has an exception allowing a system to enforce a parity clause against an airline that owns or markets a competing system. We created that exception because an airline affiliated with one CRS as an owner or marketer might participate in competing systems at a level lower than its level of participation in its own system in order to induce travel agencies in regions where it is the dominant airline to choose its affiliated system rather than a competing system. We therefore allowed a system to enforce parity clauses against airlines that owned or marketed a competing system. A system could not enforce a parity clause, however, until it had given us and the airline 14 days advance notice of its intent to do so. 62 FR 59797–59799.

Keeping such an exception would be inconsistent with our decision that the mandatory participation should not be readopted. An airline that owns or markets a system should have the ability to determine at what level it will participate in any system. In theory, such an airline may choose a lower participation level in some systems in order to give an advantage to the system that it owns or markets, but substantial changes in participation levels do not seem likely. The major network airlines need to be in every significant distribution channel, and most of them have chosen to provide their webfares to Sabre and Galileo rather than reserve them for Orbitz, even though they own Orbitz.

We note that Sabre argues that a rule barring parity clauses (or clauses requiring an airline to make all publicly-available fares saleable through a system), if such clauses are imposed as a condition to any participation in the system, would not violate antitrust principles. Sabre Reply Comments at 58–61. We disagree for the reasons set forth when we adopted the existing rule prohibiting the enforcement of parity clauses. Sabre, however, does not seem to oppose the actual rules we proposed. Sabre states that it seeks ''the right to bargain for nondiscrimination.'' Sabre Reply Comments at 57–58. We wish to give the systems that opportunity, for the record suggests that the result should be pro-competitive. The existing Sabre and Galileo programs whereby systems agree to charge lower fees in exchange for guaranteed access to all publicly-available fares should benefit all parties to the arrangements and consumers as well.

(d) *Clauses Mandating Access to All Fares.* We also proposed a rule barring systems from requiring an airline, as a condition to participation, to provide the system with fares that the airline had chosen not to sell through any system. Any such condition could unreasonably restrict a participating airline's ability to bargain with the system for better pricing and terms. Airlines should be free to choose to offer their webfares, or other types of fares, only through their own websites, without being obligated by system contracts to make them available through other distribution channels. Airlines can use their control over webfares to win better terms for CRS participation. As Amadeus states, ''Airlines have attained, and are increasingly using, the leverage of access to webfares to wrest better deals from the CRSs.'' Amadeus Comments at 10.

Contract clauses that required access to all publicly-available fares as a condition to any participation in a system could frustrate our efforts to allow airlines to create ways of bypassing the systems when doing so is more cost-effective and likely to establish competitive discipline for the systems' prices and terms for participation. As American contends, if we allow systems to demand that an airline provide all of its publicly-available fares as a condition to any participation, ''Airlines would lose their most effective tool for creating and encouraging the growth of lower cost distribution channels.'' American Comments at 27.

We originally proposed to bar contractual requirements that an airline provide fares that it had chosen not to distribute through travel agencies or any system. 67 FR 69393. On further consideration, we have determined that the proposal was too narrow. As shown, several airlines have agreed with Galileo and Sabre that they will provide all webfares to those systems in exchange for reduced booking fees. The original proposal would allow the other two systems to require those airlines to provide the same fares to them, even if they have offered nothing in exchange for the ability to sell the fares. Our rules should not be used to aid Amadeus and Worldspan in insisting that they be given access to the same fares when they have not offered better terms to participating airlines in exchange for the fares. *Cf.* Orbitz Comments at 39. We are therefore barring systems from requiring an airline, as a condition to participation, to provide access to fares that the airline does not wish to sell through that system.

We are adopting this rule for six months even though our proposal stemmed from a Sabre contract clause that that system is not now enforcing. We think there is some likelihood that another system would seek to take such

action. While this rulemaking was pending, Worldspan threatened to expel U.S. Airways unless that airline made all of its webfares saleable through Worldspan. U.S. Airways refused to agree, and Worldspan did not follow through on its threat. Sabre Comments at 75; Sabre Reply Comments, Salop & Woodbury Declaration at 17. While Worldspan did not carry out its threat, its decision may have been influenced by the pendency of this proceeding. *Cf.* 57 FR 43817. Because we believe that a system's demand that an airline provide all publicly-available fares as a condition to any participation would be anti-competitive, adopting our proposed rule is the best course of action.

This rule, like the rule barring parity clauses, will not have an exception allowing systems to demand access to all publicly-available fares from airlines that own or market a competing system. All airlines should be able to withhold access to attractive fares from a system unless the system offers acceptable terms for the right to sell the fares.

We recognize that travel agents could operate more efficiently and provide their customers more complete advice if every airline's publicly-available fares were saleable through each of the systems. Nevertheless, allowing systems to compel airlines to provide all such fares without providing any benefits in return would maintain the systems' market power and deny airlines an opportunity to use their control of webfares as a way to obtain lower fees. In addition, as explained below in our discussion of proposals that we require airlines to make all fares available for sale through all distribution channels, such a requirement would be contrary to long-established operating practices. Airlines have long chosen to offer some special fares only through selected distribution channels.

Two airlines—Delta and Northwest—urge us to adopt a broader rule that would prohibit systems from also demanding access to information and benefits such as frequent flyer awards if an airline has chosen not to provide those to the system. Delta Reply Comments at 34–35; Northwest Reply Comments at 11–12. We have no evidence that systems have attempted to compel airlines to provide such information and benefits. A broader rule, therefore, seems unnecessary at this time.

America West seeks a rule prohibiting each system from providing access to any airline's webfares for their subscribers, if the airline has not chosen to distribute the fares through that system. America West Comments at 31, 34–35. This proposal stems from the systems' use of firms like FareChase to search airline websites for better fares not available through the system and to tell the travel agent using the system when such fares are being offered. The travel agent who wishes to book such a fare, however, cannot do so through the system and must instead make the booking through the airline's website (or another site that has obtained access to the fares from the airline). Sabre Reply Comments at 48.

We are unwilling at this point to adopt such a rule. When FareChase searches airline websites for fares, it does not cause airlines to pay additional booking fees to a system. Sabre Reply Comments at 48. It may, however, increase the airline's costs for operating its website and internal reservations system. The record does not provide a basis for a careful analysis of the possible competitive effects of the systems' use of such services. We would need more information and comments from more interested persons before adopting a rule like that requested by America West. Barring systems from obtaining fare information from other sources for their subscribers could also present difficult questions of intellectual property law.

(e) *Non-Discrimination Clauses.* We are not adopting the proposal that would bar systems from enforcing any prohibition against an airline's discrimination against its subscribers. The proposal would effectively allow airlines to treat a system's subscribers differently from subscribers to other systems if the difference in treatment was based on the system's providing lower quality service, or charging higher fees, than other systems.

Several commenters complain that the language was ambiguous and would lead to problems of interpretation. *See, e.g.*, Amadeus Comments at 40–41; Amadeus Reply Comments at 53. Delta argues that the rule would be unnecessary if airlines could deny a disfavored system access to webfares. Delta Comments at 41–42. The Justice Department recommends against the adoption of the proposal, in part on the grounds that the contract clause that led to the proposal had not been used. Justice Department Reply Comments at 27. Continental, on the other hand, supports the proposal. Continental Comments at 14–16. ASTA objects to our proposal on the ground that travel agencies should not be used as weapons in disputes between an airline and a system. ASTA Comments at 42–43.

We continue to believe that an airline should be able to offer better service to the subscribers of one or a few systems without having to offer the same service to the subscribers of every system. An airline's ability to take such action could be used to encourage travel agencies to use the system that offers the airline better terms and lower prices for participation. However, commenters did not express strong support for the rule proposal, and the proposal's qualification that the difference in treatment should be based on lower fees and poorer service could create disputes about whether those conditions were met. Moreover, we think the rules barring systems from demanding access to all fares as a condition to participation will be a more effective and practicable means of providing airlines some additional bargaining power. In addition, no system thus far has enforced such a clause. If a system does so in circumstances suggesting that the system seeks to maintain its market power and deny an airline some bargaining leverage, we will consider taking enforcement action under section 411.

6. Equal Functionality

In our last reexamination of the rules, a number of commenters had complained that the systems engaged in architectural bias in an effort to obtain more bookings for their owner airlines. Architectural bias means the creation of system design features and functions in a way that enables travel agents to obtain information and make bookings on the owner airline more reliably and quickly than on other airlines. These features caused travel agents to book the favored airline in cases where another airline provided service that satisfied the customer's needs better. 57 FR 43810–43811. As a result, we adopted several rules designed to equalize the functionality for owner and non-owner airlines. We required systems to give all participating airlines equal access to enhancements and to provide equal treatment on the loading of information, and we prohibited systems from using default features that favored the owner airline. 57 FR 43814–43816. Because these rules had been effective, and because no one complained that they were unduly burdensome or unnecessary, we had proposed to readopt the equal functionality requirements without change. 67 FR 69398. On the other hand, we also proposed to eliminate the rule that essentially requires equal booking fees.

The Justice Department contends that we should eliminate the equal functionality rules, except for a rule requiring equal treatment on the loading of information. The Justice Department reasons that airlines should be able to bargain for special functionality as well

as lower fees. Justice Department Reply Comments at 31–32. Amadeus alleges that allowing systems to sell special functionality to individual airlines will encourage innovation and efficiencies. Amadeus Reply Comments at 13–14.

We agree with the position taken by the Justice Department. Maintaining the rules requiring equal functionality would be inconsistent with our decision to end the rule barring discriminatory booking fees. Airlines and systems should be able to bargain over functionality along with fees. Eliminating the rule, moreover, could encourage a system to share in the cost and risk of developing new functions, as the Justice Department points out, Justice Department Reply Comments at 32:

> Such freedom might also allow CRSs greater leeway to share with airlines the development cost and risk of new functions. For example, an airline might be made the ''launch partner'' for a new CRS function and be granted a certain period of exclusivity in exchange for sharing in the development and testing cost for that function.

See also Amadeus Reply Comments at 13.

At the same time, the systems' interest in increasing revenues should encourage them to make new functionality available to all airlines, because doing so would increase their fee revenue. As Delta contends, systems have an interest in selling as much functionality as airlines will buy. Delta Comments at 19.

We will, however, maintain a requirement that each system provide participating airlines equal treatment in the care and timeliness with which information is loaded in the system, as suggested by the Justice Department. We agree with the Justice Department's position that ''it is difficult to imagine a legitimate business reason for differential treatment'' in the loading of information. Justice Department Reply Comments at 32. This requirement is essentially equivalent to the requirement that displays be unbiased. Any significant disparity in the loading of information would result in displays that did not equally list each airline's most up-to-date services and fares. *See* Justice Department Reply Comments at 8, n.9. We are not persuaded by Amadeus' argument that systems should be able to bargain with airlines over the timing of information loading. Amadeus Reply Comments at 14. A system's willingness to give some airlines preferential treatment on the loading of information would be akin to display bias. For example, if a disfavored airline instituted new discount fares, there could be a significant delay before the fares became available in a system, which would deny important information to travel agents and their customers and harm the airline's ability to compete with other airlines.

Under the current rule, systems must load information from participating airlines with the same care and timeliness as they do for an airline with a system ownership interest. However, because only Amadeus currently has airline owners, the rule does not cover the three systems with the largest market shares in the United States. To make the rule effective, we will revise it to require that systems load information for all airlines with the same care and timeliness. This change should not impose any significant burden on the systems.

7. The Mandatory Participation Rule

Under our mandatory participation rule, section 255.7, an airline that has an ownership interest of five percent or more in a system (a ''system owner'') must participate in competing systems at the same level at which it participates in its own system, if the other systems' terms for participation at that level are commercially reasonable, and must provide all systems with the fares that are commonly available to subscribers in its own system. We imposed this requirement because some U.S. airlines with an ownership interest in one system limited their participation in competing systems in order to encourage travel agencies in their hub cities to use their own system. Some airlines also withheld complete information on their fares and services from competing systems. U.S. systems have encountered similar conduct internationally by foreign travel suppliers that own or market a competing system. 56 FR 12608.

As a result of the U.S. airlines' divestitures of their system ownership interests, the only airlines currently subject to the rule are the three foreign airlines that own Amadeus: Lufthansa, Air France, and Iberia.

The commenters on our advance notices of proposed rulemaking disagreed over whether the rule should be kept, strengthened, or eliminated. Several major airlines and Orbitz argued that the rule was counterproductive, because it allegedly enabled systems to dictate terms for airline participation. Some other airlines and systems asserted that the rule should be maintained and extended to airlines that market a system, not just airlines with a significant ownership interest. Several commenters, including some travel agencies, argued that the rule should prohibit each system owner from denying access to its corporate discount fares to travel agencies that do not use its system. They argued that a system's airline owner could effectively compel travel agencies to use its system by denying them access to its corporate discount fares if they used a different system, even though the airline fully complied with the mandatory participation rule. *See, e.g.*, Amadeus Comments at 88–89.

We proposed to end the mandatory participation requirement because some airlines might then be able to bargain for better terms for participation in return for participating at higher levels. However, we also invited comment on whether the rule should be kept and, if so, whether it should cover airlines that market a system and require owner airlines to make their corporate discount fares saleable through competing systems. 67 FR 69395.

Orbitz, Alaska, American, Delta, and Northwest support the proposed termination of the mandatory participation rule, but Amadeus, Galileo, Southwest, U.S. Airways, and ASTA contend that we should readopt the rule.

We have determined to end the mandatory participation rule as proposed. The rule was adopted, as noted above, when airlines owned each of the systems. The rule was intended to keep airlines that owned a system from using their dominance of regional airline markets to distort competition in the CRS business. Because no system is now owned by U.S. airlines, the rule currently has no practical effect on competition. The rule would have an impact if Orbitz goes ahead with its plans to enter the CRS business, since Orbitz'' five airline owners would then become subject to the rule, but Orbitz has said that it will not begin operating as a system if doing so would trigger an obligation to comply with the mandatory participation rule. Transcript at 78–79.

More importantly, the rule limits the ability of owner airlines to bargain for better terms with the systems. If such an airline could credibly threaten to reduce its participation level in a system, it would have some leverage for obtaining lower fees or better service. The rule eliminates that option. As the Justice Department states, if the rule is eliminated, ''the airline would therefore be in a better position to negotiate lower booking fees or to drive bookings toward lower-cost outlets.'' Justice Department Reply Comments at 23.

We do not expect the rule's termination to cause significant harm to airline competition or consumers. As noted, the rule currently covers only the

three European airlines that own Amadeus. If airlines with CRS ownership interests take advantage of the rule's termination to lower their participation level in one or more systems, the travel agents using those systems may be unable to perform the full range of booking functions for those airlines. In the unlikely event that such an airline withdrew entirely from a system, the system's subscribers would then be unable to use the system to obtain complete schedule, fare, and availability information for that airline and make a booking. The travel agency's operations would be less efficient. However, airlines generally have no obligation to participate in every distribution channel, and Southwest and JetBlue, for example, only participate in Sabre.

We think it unlikely that airlines will make radical changes in their participation levels as a result of the termination of the mandatory participation rule, despite efforts by owner airlines in the past to put competing systems at a disadvantage by lowering their participation level. The revenue needs of the major network airlines, as discussed above, require them to participate in every distribution channel used by a substantial number of potential customers. Transcript at 140. Galileo thus states that the behavior of airlines that are not subject to the rule is generally the same as the behavior of those that are. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 64. The marketing needs of the larger network airlines, moreover, require them to participate at a high level in every system. Amadeus alleges that every major network airline currently participates in each system at the highest level. Amadeus Reply Comments at 24. Several of Orbitz' owner airlines have agreed to make their webfares saleable through Sabre and Galileo, even though doing so reduced one of Orbitz' principal competitive advantages, the superior access that it has had to those fares.

Furthermore, our fundamental goal is the promotion of competition between airlines, which will help consumers, not the promotion of competition between CRSs for travel agency subscribers. 67 FR 69394–69395. Due to the ownership changes and technological changes in the CRS business, competition between the systems is no longer a direct form of airline competition. 67 FR 69406. The mandatory participation rule, designed to promote competition in the CRS business, has thus lost its importance for strengthening airline competition.

In that regard, the record does not show that ending the mandatory participation rule will reduce airline competition. Galileo and US Airways predict that an airline affiliated with one system that dominates a regional airline market (Delta in Atlanta, for example) will lower its participation level in other systems so that its affiliated system will dominate the CRS business in that area. Other airlines serving that area will then be subject to the additional market power thereby obtained by that system. Galileo Comments at 16–18; US Airways Comments at 18–19. This theory assumes that Delta could actually lower its participation level substantially in other systems. Delta contends that it could not take such action. Delta Reply Comments at 39. Delta is probably correct. The competing systems will be the major systems in other areas served by Delta flights. Because lowering its participation level in those systems would cost the airline bookings in those areas, the airline is unlikely to drastically reduce its participation levels in competing systems.

We recognize that maintaining the mandatory participation rule could make fare information more widely available, if some U.S. airlines again became system owners. *See, e.g.*, Large Agency Coalition Comments at 38–39; ASTA Comments at 45; AAA Comments at 2. Imposing such a requirement on airlines, however, would unreasonably restrict their ability to bargain for better terms for participation.

Finally, making the mandatory participation rule effective would require expanding it to require each owner airline to provide every system with access to its corporate discount fares. Galileo Comments at 21–22. The current rules arguably do not require airlines to make those fares available to rival systems, yet experience has shown that an airline can effectively compel a travel agency operating in geographic areas dominated by that airline to choose the airline's affiliated system by allowing the agency to sell the airline's corporate discount fares only if it uses that system. *See, e.g.*, Amadeus Comments at 88–90. Similarly, if the rule were readopted, it should arguably cover airlines that market a system, because they may have incentives to limit participation in competing systems. 67 FR 69395; Amadeus Comments at 50–52; Galileo Comments at 19–20 and Guerin-Calvert, Jernigan, & Hurdle Declaration at 69–70.

We are unwilling to engage in such additional regulation. The mandatory participation rule, if maintained, would unreasonably limit airline opportunities to bargain for better terms for system participation, and the rule, as shown, no longer appears to be necessary to promote airline competition.

8. Booking Fees

(a) *Background.* The rules have always prohibited each system from charging unreasonably discriminatory booking fees, § 255.6(a). The Board adopted that prohibition because some systems charged discriminatorily high fees to airlines competing with the system's owner. On the other hand, the Board did not regulate the level of booking fees. The Board anticipated that some major airlines would have bargaining leverage which could be used to keep systems from charging unreasonably high booking fees. 49 FR 32543, 32551–32554.

When we last reexamined the rules, we maintained the prohibition against discriminatory booking fees and declined to adopt any rule that would directly limit fee levels, for example, by requiring fees to be reasonable or cost-based. 57 FR 43816–43818. At that time, of course, one or more airlines controlled each system and would have an incentive to charge competing airlines unreasonably high fees.

In their comments on the advance notices of proposed rulemaking, a number of airlines complained that booking fees are too high and that the systems also charge fees for transactions that are allegedly illegitimate and of no value to airlines. *See* 67 FR 69398. We declined to make proposals that would further regulate booking fees. We again concluded that regulating fee levels would be impracticable. We decided against regulating the systems' arrangement of participation levels, even though some airlines had complained that the systems unreasonably declined to provide some service features (E-ticketing, for example) unless the airline agreed to buy other services which unduly raised its fees. 67 FR 69399–69400. We tentatively agreed with the complaining airlines that the systems' past practice of charging booking fees for one category of transactions, passive bookings, appeared to be unreasonable, but the record indicated that the systems had reformed their practices in a way that made the reasonableness of those charges moot. 67 FR 69400–69401.

Rather than continue to regulate fees, we proposed to eliminate the rule prohibiting unjustly discriminatory fees (and the mandatory participation rule) on the basis that doing so could give some airlines bargaining leverage against the systems. As we noted, in most unregulated industries a firm is free to demand better terms from its suppliers, even if its competitors cannot

obtain the same terms. The rule barring discriminatory fees may limit the ability of individual airlines to negotiate for better terms and thus limit the operation of market forces in the CRS business. 67 FR 69399.

We also invited commenters to address a zero fee rule, which would bar systems from charging airlines fees for participation. As shown, the systems compete for travel agency subscribers but not airline participants. Because travel agencies can choose between systems, the systems compete on price. A zero fee rule thus would cause the entire price for CRS services to be set by competitive market forces, although a major beneficiary of the CRS services would not be charged. We pointed out that such a rule could be disruptive, because the systems were obtaining the great majority of their revenues from airlines, not from travel agencies, and that it would enable airlines to obtain CRS services without payment. 67 FR 69399.

Amadeus, Galileo, America West, Midwest, and U.S. Airways oppose the proposal to eliminate the bar against discriminatory booking fees. Orbitz and its owner airlines support the proposal, as do several foreign airlines. Ass'n of Asia Pacific Airlines Comments at 6; British Airways Comments at 8; Lufthansa Comments at 3; Qantas Comments at 1. The Justice Department supports the proposed elimination of the rule. The Justice Department additionally suggests that the zero fee could be beneficial but is not recommending the adoption of any booking fee rule now. Justice Department Reply Comments at 3, 32–34. American, America West, and U.S. Airways urge us to adopt a zero fee rule.

(b) *Final Decision.* We are eliminating the prohibition against discriminatory booking fees, as we proposed, and not adopting a zero fee rule.

Because no system is now controlled by U.S. airlines, a system's decision to charge one airline lower fees than another airline cannot fairly be characterized as discrimination. The differences between the fees charged one airline and those charged other airlines should not be viewed as discriminatory. A more accurate term would be differential pricing, for firms in other industries commonly charge different customers different prices. Any difference in prices will reflect market forces, not a seller's decision to arbitrarily discriminate against some buyers in favor of others.

Eliminating the rule barring differential booking fees should enable some airlines to bargain for lower fees. Though most airlines must participate in each system in order to make their services readily saleable by the travel agents using that system, each system has an incentive to obtain the participation of all important airlines, because travel agencies will be less inclined to use that system if those airlines participate only in the system's competitors. Furthermore, an airline's level of participation is important to travel agencies, because a travel agency can make bookings more reliably and quickly on airlines that participate at a higher level, and can use other service features that are important to agency customers. 62 FR 59793. We recognize, in view of our findings that each system has market power, that even the largest airlines may have little leverage to obtain lower fees despite the elimination of the rule. Nonetheless, eliminating the rule may provide some benefits.

On the other hand, the systems' ability to charge different airlines different fees should not significantly harm competition or consumers. We understand that airlines will not have an equal ability to bargain for lower fees. The Justice Department thus states, ''[R]emoving the prohibition against discriminatory booking fees would inevitably result in carriers with less bargaining power having higher CRS costs than others.'' Justice Department Reply Comments at 33. As we stated in our notice, ''In most unregulated industries a firm is free to demand better terms from its suppliers, even if its competitors cannot successfully obtain the same terms.'' 67 FR 69399. Differential pricing is widespread in other industries, including industries supplying other products and services to the airline industry, such as aircraft manufacturers. United Reply Comments at 40–41.

We disagree, moreover, with the commenters who argue that only the large airlines will benefit from the elimination of the prohibition against differential fees. *See, e.g.*, America West Comments at 24. An airline's ability to obtain lower fees will depend in part on its own need to participate in a system. An airline like Southwest that does not rely heavily on the travel agency distribution channel—and thus on the systems used by the travel agencies—should have substantial bargaining leverage. Smaller airlines that are large players in a region (Alaska in the Far West, for example) should also have some leverage, because a system will be less able to win subscribers in that region if such an airline does not participate. American Comments at 18–19 and Dorman Declaration at 9–10; Sabre Reply Comments at 76. Because the systems charge fees based on the volume of transactions, not on ticket prices, they should value participation by low-fare airlines, whose low fares generate more passengers and thus a higher volume of bookings. Sabre Comments, McAfee and Hendricks Declaration at 58. Even if only the larger airlines benefit from this rule change, as assumed by many commenters, the result would be consistent with practices in other industries.

We doubt that the resulting differences in fees paid by different airlines will be substantial. Galileo states that the fees charged other travel suppliers do not vary by much. Transcript at 60. Although airlines are more dependent on the systems than are other travel suppliers, and although travel agents rely on the systems more for airline bookings than they do for other travel bookings, any differences in fee levels between airlines seem unlikely to be very large. We do not expect the systems' fee practices to duplicate those followed before the Board adopted the original rules. At that time there were substantial differences between the fees charged favored airlines and those charged disfavored airlines. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 60. Each system then was owned by one U.S. airline and had incentives to charge its owner's competitors unusually high fees in order to prejudice their ability to compete. Systems without U.S. airline owners should not have similar incentives. Sabre Comments, Salop & Woodbury Declaration at 26–30 and McAfee & Hendricks Declaration at 53–59.

We have determined not to readopt the rule barring differential booking fees on economic policy grounds. However, our authority to prohibit unfair methods of competition would not authorize us to readopt the rule, given the factual information and policy arguments in the record. Firms in other industries are not required to charge all customers the same price, and, as the Justice Department points out, a firm's offering of preferential terms to selected customers is not necessarily anti-competitive. Justice Department Reply Comments at 33, 34, n.39. The systems neither are owned by U.S. airlines nor compete in the airline business. The record does not show a likelihood that systems would charge some airlines discriminatorily high fees in order to prejudice airline competition. These circumstances would not support a finding that a system's willingness to give some airlines, but not others, lower fees is an unfair method of competition in violation of section 411.

While a number of foreign airlines supported the proposed elimination of the rule barring differential booking fees, a few opposed it, in part on the ground that the rule is required by the United States' commitment in bilateral air services agreements to prevent systems from treating foreign airlines discriminatorily. Air France Comments at 6. This issue is discussed below in the section on international issues.

Because we are ending the rule prohibiting differential pricing, we are not readopting the requirement that a system treat all non-paying airlines the same, § 255.11(a). When the rules do not require equal treatment for airlines paying booking fees, there is no reason to require equal treatment for airlines that do not pay booking fees.

We will not adopt a zero fee rule. As discussed in our notice of proposed rulemaking, adopting a zero fee rule would present serious practical difficulties. The only commenters now supporting a zero fee rule—American, America West, and U.S. Airways—have not convinced us that these difficulties are negligible. A zero fee rule would enable airlines to get system services for free, which would encourage all airlines to choose the highest level of participation. That would discourage systems from improving the services offered participating airlines. Sabre Reply Comments, Salop & Woodbury Declaration at 28; Worldspan Reply Comments at 22–23. A zero fee rule would also worsen the travel agency industry's financial position, because the systems would be forced to obtain all of their revenues from travel agencies. ASTA Reply Comments at 15–16. American and America West suggest that the impact on travel agencies can be adequately mitigated by phasing in the zero fee rule. America West Comments at 21; American Comments at 23–24. We disagree. A zero fee rule, even if phased in, would still shift a substantial cost burden unto travel agencies.

In addition, American, America West, and U.S. Airways essentially argue that a zero fee rule would create a more rational result in terms of economic efficiency: the systems' fees would be disciplined by market forces if the systems could impose fees only on the users who can choose between systems. America West Comments at 16–21; American Comments at 20–24; U.S. Airways Reply Comments at 7–8. Even if this economic efficiency argument is valid, we have no authority under section 411 to regulate business practices to create a more competitive or efficient industry, if the practices at issue do not violate the antitrust laws or antitrust principles. *Cf. E.I. Du Pont de Nemours & Co.* v. *FTC*, 729 F.2d 128 (2d Cir. 1984). That statute authorizes us only to prohibit practices that violate the antitrust laws or antitrust principles, and the systems' exercise of their ability to charge monopoly-level prices to one set of users—airlines—does not violate antitrust principles or the antitrust laws.

A few commenters ask us to take action on one other issue, the systems' charging of booking fees for passive bookings. *See*, *e.g.*, America West Comments at 9–10. Our notice tentatively concluded that the systems' past practice of charging participating airlines for passive bookings appeared to be unreasonable, because passive bookings did not normally benefit airlines and because the incentive payment programs included in the systems' subscriber contracts seemed to encourage travel agents to make unnecessary passive bookings in order to meet the programs' minimum booking quotas. We decided not to propose any rules on this issue, because the record indicated that the systems had stopped charging booking fees for passive transactions. 67 FR 69400–69401. We additionally noted that a rule barring systems from charging fees for passive bookings would likely cause the systems to increase other fees to offset the revenue loss. 67 FR 69401.

The comments suggest that the systems have either stopped charging fees for passive bookings or taken other steps that have substantially cut the number of passive bookings. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 77–78; Sabre Comments at 111, 149; ASTA Comments at 33. Sabre represents that only seven percent of its total bookings consist of passive bookings. Sabre Comments at 149. Although America West contends that the rules should bar the imposition of fees for passive bookings, America West also states that passive bookings constituted 1.4 percent of its booking fee liability in 2002. America West Comments at 10. The airlines supporting restrictions on fees for passive bookings have not shown that the fees charged for passive bookings are so serious a problem that a rule is necessary. ASTA alleges that airlines take disciplinary action against travel agents who make abusive bookings through the passive booking function or otherwise. ASTA Comments at 33. Furthermore, as we noted in the notice of proposed rulemaking, limiting the systems' fees for passive bookings is unlikely to reduce a participating airline's total CRS costs. America West has conceded as much. America West Comments at 10.

9. Booking Fee Bills

Our rules require the systems to provide booking fee bills in sufficient detail so that participating airlines can audit the accuracy of the systems' charges. We adopted this rule largely to keep systems from evading the prohibition against discriminatory booking fees by imposing false charges on disfavored airlines. We stated, ''The rule requiring [systems] to provide enough information to allow the auditing of bills for fees is accordingly essential to maintain the rule banning discriminatory booking fees.'' 57 FR 43819.

We initially proposed to readopt this rule. 67 FR 69401. However, our decision to eliminate the predicate for the rule—the prohibition against discriminatory booking fees—removes the rationale for continuing to prescribe requirements for booking fee bills.

We assume that the systems may stop providing airlines with information that would enable them to audit the accuracy of their booking fee bills. However, as discussed above in connection with other rule proposals, section 411 does not allow us to regulate system practices in order to improve efficiency or prevent unattractive behavior. We cannot readopt this rule under section 411 unless we find that it is necessary to prevent unfair methods of competition. A firm's refusal to provide adequate billing data would not normally be an unfair method of competition. We adopted the billing data requirement when airlines controlled the systems and would engage in practices that would prejudice competing airlines. Because the systems no longer are owned by U.S. airlines, we see no basis at this time for a finding that a system's refusal to provide enough information backing up its bills would be an unfair method of competition.

10. Other Participating Carrier Contract Rules

The current rules have two other provisions governing contracts between systems and participating airlines that we are not readopting. Section 255.6(b) prohibits systems from conditioning participation on the purchase or sale of other goods and services, a provision adopted by the Board due to efforts by some systems to impose additional costs on airlines competing with a system's owner airline. 49 FR 32554–32555. Section 255.6(c) states that a system may condition participation in its system in the United States on the airline's agreement to participate in that system or affiliated systems in other

countries, if those systems do not use any factor related to carrier identity in their displays and if the fees will be non-discriminatory.

In keeping with our overall decision against readopting most of the existing rules, we will not readopt these rules. The rule barring the tying of system participation with the purchase of other goods and services should be unnecessary if no system is owned or controlled by a U.S. airline. In addition, readopting the rule would be inconsistent with our decision that we should end the prohibition against differential booking fees. When we are not requiring systems to charge equal fees, we should not tell them what other conditions may be required for participation unless, as is true of parity clauses and clauses requiring access to all publicly-available fares, the condition would entrench the systems' existing market power over airlines.

For similar reasons, we are not maintaining the rule limiting the systems' ability to require worldwide participation. It is not clear to us on the basis of this record that this practice would be comparable to unlawful tying under the antitrust laws.

However, if demands by a system that participating airlines purchase unrelated goods and services as a condition to participation or that they participate on a worldwide basis are likely to reduce competition in the airline or airline distribution businesses, we can take appropriate action under section 411 to block the system from enforcing such demands.

11. Marketing and Booking Data

(a) *Background.* Systems generate valuable data from the bookings made by their subscribers. The data show how many bookings are being made by individual travel agencies on individual flights operated by each airline in each market. The information can enable anyone using it to analyze the traffic in individual airline markets and the booking patterns of individual travel agencies. 67 FR 69401–69402.

Section 255.10 of our rules requires each system to make available to all participating airlines the marketing and booking data that it chooses to generate from bookings made by system users. The rule does not restrict the systems' prices for the data. 57 FR 43820–43821.

While the rule does not require a system to generate any data, the systems have found it profitable to sell data to airlines (the usual term for the data is MIDT data) (for a description of the data sold by one system, see Amadeus Comments at 62–64). Initially almost all of the airlines purchasing the data were large airlines. In recent years, the systems have created smaller sets of data that would be attractive to smaller airlines. 67 FR 69402; Transcript at 176; United Reply Comments at 87. The information sold by the systems does not include fare amounts or information identifying individual passengers. Justice Department Reply Comments at 35, n.40; Transcript at 175–176; Amadeus Reply Comments at 47.

The rule also does not bar systems from providing data to anyone outside the airline industry. The rule blocks systems from providing data to any foreign airline that owns or controls a system in a foreign country, if that system does not provide comparable data to U.S. airlines. The rule further prohibits airlines receiving data derived from international bookings from giving anyone access to the data, except to the extent that an airline uses an outside firm to process the data, unless the system provides access to other persons.

(b) *Proposals and Comments.* The systems' sale of the data has been controversial. In their comments on our advance notices of proposed rulemaking, the systems selling the data and the airlines buying the data alleged that airlines use the data for legitimate pro-competitive purposes. These airlines stated that they rely on the data for marketing research and route development purposes, to make decisions on pricing and revenue management, and to implement their override commission and corporate discount fare programs, which typically require travel agencies and corporate customers to give an airline a certain share of their total business in order to receive the additional commissions or discount fares. Some smaller airlines and travel agencies, however, complained that the airlines purchasing the data (typically large airlines) use the information to determine which travel agencies have been selling tickets on a competitor and then pressure agencies into cutting back their bookings on rival airlines. Travel agencies contended that they should have control over access to the data created by their use of a system. 67 FR 69402.

Although we recognized the data's legitimate pro-competitive uses, our concern that the data could be used in anti-competitive ways led us to propose restrictions on airline access to the data in our notice of proposed rulemaking. The possible restrictions included the denial of access to the data on any airline's bookings if that airline objected to the disclosure of that information to any other airline or the denial of access to data showing the bookings made by any individual travel agency. Because airlines had legitimate uses for the data, we stated that any restrictions on access should be as few as possible to avoid interference with the data's legitimate uses. We noted, moreover, that any restrictions on access arguably should be limited to data on domestic travel. The complaints about the alleged misuse of the data all involved domestic markets. In addition, while airlines could obtain comparable data on domestic markets from other sources, comparable data appeared to be unavailable for bookings for international travel. 67 FR 69401–69404.

Our proposed rule would govern only the data derived from bookings made by travel agencies. We did not propose to regulate the availability of data derived from bookings made by corporate travel departments (or anyone else using a system to book airline travel).

America West, Southwest, the Air Carrier Association of America (a low-fare airline trade association), and some travel agencies support the proposed restrictions. The larger U.S. network airlines, the systems, firms processing the data for airlines that buy the data (DOB Systems and Shepherd Systems), and a number of foreign airlines (Lufthansa, Qantas, and Virgin Atlantic, for example) oppose the proposals. Several travel agency commenters favor restrictions on access to the data. ASTA Comments at 40–41 (each travel agency should be able to block access to data on its bookings); Carlson Wagonlit Comments at 12–15; Large Agency Coalition Comments at 36. NBTA alleges that the airlines' access to the data makes it harder for corporations to negotiate more favorable air transportation contracts. NBTA Comments at 21. The Justice Department opposes the proposals, because the record does not show that access to the data is causing significant competitive harm and because the proposed restrictions would interfere with the data's pro-competitive uses. Justice Department Reply Comments at 34–36.

The commenters disagree over whether comparable data are now available from other sources, or soon would be. Some commenters claim that equivalent data will become available. Amadeus Comments at 66, 73; Shepherd Systems Comments at 10–11. Other commenters argue that the type of data provided by the systems is not available from other sources. Delta Comments at 24; United Comments at 35–36.

(c) *Final Rule.* We have decided not to adopt a rule restricting access to the data. Given our decision that only rules that are necessary to prevent anti-

competitive practices should be readopted, we will also eliminate the existing rule requiring systems to make data available to all participating airlines.

We remain concerned over the possible misuse of the data. However, the record does not adequately demonstrate that the data's availability causes competitive harm that would justify the adoption of the proposed restrictions. The airlines obtaining the data have legitimate uses for the information. *See, e.g.*, Justice Department Reply Comments at 34–35. If necessary, and supported by concrete evidence, individual enforcement actions would be the better means for addressing any airline's anti-competitive usage of the data.

Adopting a rule restricting access to information that is currently available would require substantial evidence in the record that airlines have used the data in ways that have significantly harmed airline competition. The record does not contain such evidence, although several commenters have stated that large airlines do use the data to compel travel agencies to stop buying tickets for their customers on competing airlines, or that the data could be used for that purpose. Transcript at 216–217; America West Comments at 29; Carlson Wagonlit Comments at 14. The use of the data to compel travel agencies to stop selling tickets on rival airlines may constitute an unfair method of competition. However, no airline has submitted evidence showing that it has lost a significant amount of bookings from travel agencies who had been subjected to pressure from large airlines, nor has any commenter estimated how widespread or frequent are the alleged anti-competitive practices. We could not adopt a rule that effectively reduced the data's benefits without detailed evidence showing significant harm to competition.

We recognize that such evidence may be hard to obtain, because travel agencies will be reluctant to complain about alleged mistreatment by an airline due to the airline's ability to retaliate. Transcript at 216–217; ASTA Reply Comments at 20–21. However, none of the low-fare airlines provided an estimate on the basis of its own experience how many travel agencies were coerced into ending their bookings with that airline, and that the data purchased from the systems were the source of the airline's information on the travel agency bookings. We note as well that American has flatly denied that it used the data to deter travel agencies in the Dallas area from booking Legend, a new entrant airline operating from Dallas' Love Field. American Comments at 46. That denial contradicts the statements made by Legend to Department staff members that were summarized in the notice of proposed rulemaking. *See* 67 FR 69403. Delta denies that it has ever misused the data. Transcript at 130. Virgin Atlantic, the target of British Airways' efforts to keep travel agencies from booking British Airways competitors, efforts not based on access to CRS data, argues that access to the data should not be restricted. Virgin Atlantic Comments at 4–6. The Justice Department contends that the lack of fare information means that the data cannot be used to coordinate fares. Justice Department Reply Comments at 35, n.40. A number of foreign airlines, which should have less leverage with U.S. travel agencies than the large U.S. network airlines, oppose the proposed restrictions and allege that the data tapes are valuable to them. Asociación Internacional de Transporte Aeéreo Latinoamericano Comments at 4; Ass'n of Asia Pacific Airlines Comments at 7; British Airways Comments at 12; LAN Chile Comments at 7; TACA Comments; Virgin Atlantic Comments.

In addition, any harm resulting from the continued sale of the data should diminish. The airlines most interested in limiting access to the data, the low-fare airlines, are shifting their bookings away from the travel agency distribution channel. The low-fare airlines have operated much more profitably in recent years than the network airlines, who wish to continue buying the data. The low-fare airlines arguably would be more successful if the availability of the data has caused them substantial competitive harm, but their relative success despite the network airlines' access to the data is a further reason why the record does not convincingly show that the proposed rules are necessary.

On the other hand, the commenters opposing restrictions on the data allege that the data provide invaluable information used for a variety of pro-competitive purposes. A number of smaller airlines buy the data, as do foreign airlines serving the United States. *See, e.g.*, Amadeus Comments at 64; Shepherd Systems Reply Comments at 11–12. Airlines use the data to learn when competitive responses are necessary to increase their market share (responses such as fare reductions or service increases), to check the relative attractiveness of their schedules, and to see developing demand trends. Delta Comments at 22; United Comments at 32; US Airways Comments at 13; Shepherd Systems Comments at 4. As Delta puts it, ''We also use [the data] to identify market trends to determine where we should be offering lower fares, sales, more aggressive competition.'' Transcript at 130. American, moreover, represents that it relied on the data in its recent broad-scale restructuring of its route schedules. American Comments at 40. The proposed rules would interfere with these uses of the data. If individual airlines were allowed to opt out of the data, the resulting data including only bookings on the airlines that agreed to the release of data on their bookings would give an incomplete picture of many markets. Amadeus Comments at 64; United Comments at 34; United Reply Comments at 95–98; DOB Systems Comments at 1–2. This restriction, moreover, would not directly address the problem identified in the notice of proposed rulemaking, the large airlines' alleged use of the data to pressure travel agencies to stop selling tickets on competing airlines. 67 FR 69402–69403.

A restriction barring the release of data on bookings by individual travel agencies could undermine the value of the data for overall market planning and research. While airlines could still obtain aggregate data from each system for local and regional markets, the systems do not use the same geographic areas in their sorting of the data. The data from the four systems could not practicably be combined for any local market due to the lack of common market definitions. Shepherd Systems Comments at 11–12. Some airlines allege that they would no longer buy the data tapes if we adopted our proposed restrictions. Lufthansa Comments at 6, 8; Qantas Comments at 2.

Denying access to data on bookings by individual travel agencies would make the data useless for monitoring the performance of individual travel agencies under the airlines' incentive commission agreements, which enable travel agencies to obtain larger commission payments from an airline as it obtains a larger share of the agency's business. The major airlines' use of override commissions has raised competitive concerns, but we have not previously found that such incentive commissions are unlawful. 67 FR 69404. Without such a finding, we could not easily block airlines from obtaining the data needed to measure the performance of those travel agencies that have incentive commission agreements. ASTA Comments at 40.

Restricting access to the data would impose other costs as well. Obviously the firms that process the data for airlines would lose a substantial amount of business. Shepherd Systems Comments at 12; DOB Systems

Comments at 2. Much of the investments made by systems and airlines in developing the ability to process and use the data would be lost. American estimates that it has invested $15 million in the last five to six years building systems that use the data. American Comments at 38. And the systems would lose the revenues now obtained from selling the data.

Some commenters argue that the data tapes are unnecessary, because any airline can assertedly see market trends and the effectiveness of its sales efforts from data on its own bookings. Air Carrier Ass'n Reply Comments at 9–10. Although we tentatively believed that airlines did not need to see data on the success of their competitors' marketing efforts, 67 FR 69403, the comments have persuaded us that an airline reasonably needs to see data on the entire market in order to assess the effectiveness of its own marketing efforts. Data on an airline's own sales will not show overall market trends or enable an airline to compare the effectiveness of its marketing efforts with those of other airlines.

Some commenters charge that airlines use the data at times to ''poach'' customers from other airlines. Transcript at 237–238; ASTA Reply Comments at 20–21. The data, however, contain no information identifying individual passengers. An airline can often identify a corporate customer from the data, because corporations frequently have an on-site travel agency location. Transcript at 238. In any event, while poaching may be unethical, it may benefit travelers, because the poacher presumably has to offer more attractive terms to the travelers or their travel agencies in order to get them to switch. Transcript at 237.

We have also decided to eliminate the existing rule, which requires systems to make any data generated from subscriber bookings available to all participating airlines. The systems appear to be eager sellers of data. Because no system is currently owned or controlled by U.S. airlines, the systems should have no incentive to refuse to sell the data to any airline willing to buy the data. The systems should have incentives to sell as much data as airlines will buy. Delta Comments at 20. The rule thus is no longer necessary.

Eliminating the existing rule will also eliminate the restrictions on providing any data to a foreign airline that owns or controls a system in a foreign country that does not make comparable data available to U.S. airlines, section 255.10(b). We are not readopting these restrictions. The U.S. airlines that provide the most international service have not specifically asked us to maintain this restriction, and one of them, United, has argued that we should eliminate all of the CRS rules. The statutes administered by us, however, give us the authority to take countermeasures when a foreign airline engages in discriminatory conduct that injures U.S. airlines. 49 U.S.C. 41310. The termination of the rule will not affect our authority and willingness to take steps necessary to end discriminatory conduct by foreign firms.

12. Third-Party Hardware and Software

In an effort to give travel agencies a greater ability to access multiple sources of airline information and booking channels, in our last overall reexamination of the CRS rules, we adopted rules allowing travel agencies to use their own hardware and software in conjunction with a system and to access any database with airline information or booking facility for airline services from that equipment. If the travel agency instead obtains its equipment from the system, the rule allows the system to determine whether the subscriber may access other databases or booking channels from that equipment. 57 FR 43796–43800.

We adopted these rules because the systems then barred their subscribers in the United States from using their own equipment and from accessing any other database or system from the equipment provided by the system. While travel agencies could obtain additional equipment from another source if they wished to access alternative electronic sources of information and booking capabilities, doing that would be inefficient. In adopting the rules, we reasoned that the travel agents' ability to access different systems and databases efficiently could enable airlines to obtain bookings from travel agents that would bypass the systems, which would place some market pressure on the systems' terms and prices for airline participation. *See* 67 FR 69390–69391.

Experience has shown that these rules in recent years have been effective in important respects. 67 FR 69391. Many travel agencies have been acquiring their own equipment, and subscribers are using their equipment, whether or not owned by a system, to access the Internet and other booking channels, as discussed above in our review of current industry conditions. However, travel agents are not making a significant share of their airline bookings through the Internet or other channels outside the travel agency's primary system. As discussed above, the commenters in this proceeding generally agree that travel agencies will rarely be willing to make airline bookings outside their primary system due to the inefficiency of doing so, even when travel agents can access the Internet from the same equipment used to access their primary system.

In our notice of proposed rulemaking, we proposed to readopt the rule and to strengthen it by eliminating a system's ability to keep subscribers from using system-owned equipment to access other systems and databases. 67 FR 69391. We also invited comment on whether we should adopt a rule preventing systems from discriminating against subscribers who used a back-office system in conjunction with bookings made outside a system and from charging discriminatorily high fees to subscribers who bought their own equipment. 67 FR 69392.

We have decided, in line with our overall approach in this proceeding, not to readopt the rule. We recognize that the rule has had pro-competitive effects and that any restrictions on a subscriber's acquisition of third-party hardware and software or on a subscriber's use of any equipment to access other systems or databases or booking channels would likely present competitive concerns. However, market developments have made the rule unnecessary.

ASTA states that it knows of no evidence that systems now discourage travel agencies from getting their own equipment. ASTA Comments at 14–15. Sabre represents that it is withdrawing from the equipment-leasing business and that most Sabre subscribers have their own equipment. Sabre Comments at 19–20, 131. Amadeus similarly states that most of its subscribers own their own equipment, and it alleges that it does not restrict its subscribers from accessing other databases and booking channels when they use equipment provided by Amadeus. Amadeus Comments at 45. Notwithstanding these statements from Sabre and Amadeus, most travel agencies continue to use equipment provided by a system. Orbitz Comments at 56. However, the record does not indicate that systems in recent years have been placing roadblocks in the way of subscriber efforts to use alternative booking channels. Even if Galileo and Worldspan subscribers have had less success in using third-party equipment (or in accessing other databases and booking channels), a travel agency that wants more flexibility in these areas should be able to obtain it by switching to Sabre or Amadeus.

Furthermore, as discussed above, the systems' subscriber contracts are giving travel agencies increasingly more flexibility. Recent experience indicates

that systems will be unable to impose contractual restrictions on their subscribers that would significantly restrict a travel agency's ability to use alternative sources of airline information and booking capabilities, due in large part to the travel agencies' increasing need to access the Internet. ASTA Comments at 14–15.

We are basing our decision to sunset the rules on third-party hardware and software on our expectation that doing so will not lead to anti-competitive behavior. Any unreasonable efforts by a system to restrict a subscriber's use of other systems or databases would presumably constitute an unfair method of competition. In any such cases we will consider taking appropriate enforcement action. We have full authority to prohibit systems (and airlines and travel agencies) from engaging in conduct that would violate section 411 even if we have no rule prohibiting that conduct.

13. Travel Agency Contracts

(a) *Background.* Since the first CRS rulemaking, the rules have regulated the systems' contracts with travel agency subscribers in an effort to give travel agencies a greater opportunity to switch systems or use multiple systems (or booking channels). The rules therefore prohibit certain types of travel agency contract clauses that would unreasonably restrict a travel agency's ability to use alternative systems, such as clauses requiring an agency to use an airline's affiliated system for all of its bookings on that airline or denying a travel agency commissions for bookings on an airline if not made through the airline's own system. The rules allow systems to offer travel agencies a contract with a five-year term as long as they also offer contracts with a term of no more than three years. The rules bar systems from imposing minimum use clauses (clauses stating that an agency's failure to make a certain number of bookings per month per terminal will constitute a breach of contract). On the other hand, the rules do not prohibit productivity pricing or the tying of access to an airline's marketing benefits to the travel agency's use of the system affiliated with that airline, nor do they bar systems from obtaining damages if a travel agency breaches its subscriber agreement by canceling it before the end of its term. 57 FR 43825–43828.

We regulated the systems' subscriber contracts, because practices that limit competition between the systems were likely to impair airline competition. An airline would be handicapped in entering new markets if its affiliated system could not obtain travel agency customers in the region. Furthermore, system contracts that restrict competition between systems (or keep travel agents from using alternative systems and booking channels) would entrench the systems' existing market power and keep airlines from finding alternative ways of conducting the functions provided by the systems. 57 FR 43823–43824. In addition, an airline that used its dominance of a region to obtain more subscribers to its system thereby would increase its dominance of the regional airline market. Justice Department Reply Comments at 9.

We have stated, however, that effective regulation would be difficult, and some restrictions on the relationships between a travel agency and a system or its airline owners might well be unenforceable or be evaded by the system. *See, e.g.*, 57 FR 43827 (restrictions on liquidated damages for breach of contract); 57 FR 43828 (prohibition against tying of marketing benefits with use of a system).

Our notice of proposed rulemaking proposed to readopt the existing rules on subscriber contracts and to make them stricter, although we recognized that the systems competed vigorously for travel agency subscribers. We requested comments on whether we should shorten the maximum permissible length of subscriber contracts, for example, by adopting the European Union rule which allows a subscriber to cancel its CRS contract on three months notice after the contract has been in force for one year. We asked whether we should restrict the types of damages obtainable by a system from a subscriber who cancels a contract before the end of the contract term and whether we should prohibit airlines from tying access to an airline's marketing benefits with the agency's use of the airline's affiliated system. We additionally invited comment on whether we should bar systems from demanding a new contract if they provided additional equipment to a subscriber during the term of an existing contract. And we proposed to restrict productivity pricing, a form of incentive pricing that appeared to encourage subscribers to use the system for all or almost all of their bookings. 67 FR 69406–69410.

We made these proposals because the record in this proceeding then suggested that the systems were effectively using these kinds of contract provisions to keep subscribers from using alternative booking channels. 67 FR 69405. However, our notice specifically requested more detailed information on the current relationships between travel agencies and the systems and on the systems' business practices. 67 FR 69406. We further noted that the U.S. airlines' divestiture of most of their system ownership interests was eliminating one of the bases for the regulation of subscriber contracts, the interest of an owner airline in obtaining subscribers for its system in cities that it planned to enter. 67 FR 69406. As we pointed out, ''[T]he systems compete vigorously for travel agency subscribers'' and ''the systems' competition for travel agency customers usually disciplines the price and quality of services offered travel agencies.'' 67 FR 69405.

The Justice Department recommends that we eliminate the rules on subscriber contracts. It contends that the travel agencies' unwillingness to use multiple systems means that any rules designed to encourage them to do so will be ineffective. The systems compete for travel agency subscribers, and ''behavioral rules that regulate the terms of CRS-subscriber contracts may be unnecessary because competition among CRSs for subscribers is apparently eliminating contracts that limit subscriber options.'' The existing rules also present significant enforcement problems. Justice Department Reply Comments at 28–29.

The travel agency commenters strongly oppose restrictions on the systems' incentive payments, which assertedly are essential for the survival of many agencies, although some support restrictions on the systems' ability to enforce the penalty provisions in their productivity pricing arrangements. *See, e.g.*, ASTA Comments at 35. The travel agency commenters represent that an individual travel agency will rarely be willing to use more than one system and that any rules intended to achieve that result will be ineffective and should not be adopted. Travel agencies generally favor some stricter subscriber contract rules. ASTA Comments at 30–35; Large Agency Coalition Comments at 36. Some argue in contrast that the rules should not limit travel agencies from obtaining whatever contract they wish. *See, e.g.*, AAA Comments at 2; Transcript at 241–242. ASTA, moreover, suggests that non-airline systems are not ticket agents subject to section 411, and the Large Agency Coalition asserts that it would prefer to have the rules terminate rather than have restrictions on the systems' incentive payments. ASTA Comments at 45–47; Large Agency Coalition Comments at 38. The travel agency commenters do not argue that subscriber contract rules are necessary to protect travel agencies against system demands for

unreasonable contract lengths or undue restrictions on the ability of travel agents to access other databases and booking channels.

Orbitz and several airlines argue that tougher rules are necessary, because the systems' existing contracts unreasonably keep travel agencies from switching systems. *See, e.g.*, Orbitz Comments at 46–49; Continental Comments at 17–20; Delta Comments at 41–42; America West Comments at 26–29.

Galileo supports the continuation of the existing rules, while Amadeus suggests that additional rules should be adopted.

(b) *Final Decision.* The updated information on industry practices provided by the comments has persuaded us that we should not adopt our proposed changes to the rules and that we should not readopt the existing rules. Rules generally governing subscriber contract practices no longer appear to be necessary, because the market is working. Moreover, the systems' subscriber contracts do not appear to substantially restrict travel agents from using alternative booking channels.

The comments show that the nature of subscriber contracts has changed substantially in the last few years, as discussed above in our description of the travel agency business. As stated there, the systems no longer obtain contracts that will keep travel agencies from using other electronic channels for obtaining information and making bookings. Large Agency Coalition Comments at 7. A declining portion of subscriber contracts contain productivity pricing provisions, current productivity pricing provisions allow travel agencies to obtain bonuses (or avoid penalties) despite booking airline tickets outside the system, and the length of the term of the typical subscriber contract has shrunk dramatically. The agencies' ability to obtain more flexible contracts is consistent with our finding that the systems compete aggressively for travel agency subscribers. A system that does not satisfy travel agency demands for greater flexibility will lose subscribers. Given industry trends, we assume that future subscriber contracts will provide travel agencies with even greater flexibility. Transcript at 232.

While the systems have always competed for subscribers, in earlier years that competition did not keep them from obtaining contract clauses that effectively deterred travel agencies from using multiple systems or booking channels and from switching systems. For example, 12 years ago Worldspan alleged that it abandoned its efforts to obtain more subscribers by offering less restrictive contracts, because doing so was not increasing its subscriber base. 57 FR 43824. Moreover, while our 1992 rules required systems to offer travel agencies a three-year contract in addition to a five-year contract, for some years the systems were able to obtain five-year contracts from most of their subscribers. 67 FR 69405. In contrast, the record shows that the average contract term now is three years. Sabre Comments at 17–18. Similarly, while the great majority of subscriber contracts once contained productivity pricing provisions that effectively discouraged travel agents from using alternative booking channels for any significant share of their sales, the record does not indicate that this is the case now. *See, e.g.*, ASTA Comments at 15.

The record does not show that we should adopt a rule requiring systems to provide new equipment to a subscriber during the term of a contract without requiring a new long-term contract for the added equipment. ASTA states that it considers it unlikely that a system ''will refuse equipment additions late in a contract term or gouge the agency on price,'' because doing so ''could persuade the agency to buy its own equipment or even to switch vendors altogether.'' ASTA Comments at 32. While ASTA nonetheless suggests that we should bar systems from requiring a new contract for the added equipment, we think that the systems and subscribers should negotiate their own arrangements. As ASTA alleges, travel agencies have some leverage with systems on this issue. If we restricted the systems' contractual flexibility by regulation, moreover, that might discourage them from agreeing to provide any new equipment. 57 FR 43825–43826.

We see no reason to adopt stronger rules, or keep the existing rules, when market forces are enabling travel agencies to obtain less restrictive contracts and when the systems' contracts do not appear to impose unreasonable restraints on the subscribers' ability to switch systems or use several electronic information sources and booking channels in addition to their primary system.

The systems' current contract practices, moreover, are not necessarily unreasonable. Long-term contracts, for example, offer significant efficiency advantages, as we pointed out in our notice of proposed rulemaking. Long-term contracts reduce the parties' negotiating expenses. Sabre Comments at 153–154. Although Amadeus favors the European rule, which allows travel agencies to cancel contracts on short notice after the first year of a subscriber contract, Amadeus admits that the European rule could lead to somewhat higher transaction costs. Amadeus Reply Comments at 64. One travel agency argues that a five-year term is the best term for a subscriber contract. Travel Management Alliance Comments. Some travel agencies, moreover, would like the opportunity to obtain contracts with terms longer than allowed by our current rules. Transcript at 241–242; AAA Comments at 2.

Similarly, contracts offering customers incentives to rely on a supplier for a greater share of its goods or services are also not unreasonable. Many airlines, after all, offer travel agencies override commission programs that enable travel agencies to obtain larger commissions from an airline if they book a larger share of their business with the airline. Amadeus Comments at 86. Also, virtually every airline has a frequent flyer program that rewards passengers for traveling more with that airline. *Cf.* Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 81. Exclusive contracts are not inherently unlawful. *United States* v. *Microsoft Corp.*, 253 F.3d at 70.

In addition, we have recognized that systems should be able to obtain damages for breach when a subscriber cancels its contract before the end of the term without cause. 57 FR 43827.

We do not view the systems' use of productivity pricing as a strategy created to maintain their market power over airlines, but as a response to their competitive struggle for subscribers and each travel agency's knowledge that its choice of one system rather than the others will enable the winning system to obtain a stream of booking fees from airlines.

Subscriber contract terms that give a system some assurance that its subscribers will continue using its services also give the systems ''incentives to make investments that enhance their value to travel agencies, including increased automation, customized features and other functionality enhancements, and the provision or upgrade of equipment.'' Justice Department Reply Comments at 28. Sabre concedes that it has contracts with small travel agency subscribers that deny those subscribers incentive payments if they make bookings through another system, but these provisions are allegedly reasonable because Sabre provides substantial support for such an agency, the cost of which is offset by the booking fees obtained by Sabre if they continue using Sabre for their bookings. These subscribers account for a small part of Sabre's total subscriber base.

Sabre Comments, Salop & Woodbury Declaration at 18–20.

In any event, insofar as the rules are intended to allow travel agencies to use multiple systems, the rules will not work. Travel agencies will rarely use more than one system because doing so is inefficient, as discussed above. If the systems' productivity pricing programs provide a disincentive to use alternative booking channels, airlines can offer incentive payments of their own that could encourage travel agents to make bookings directly with an airline. Galileo Comments, Guerin-Calvert, Jernigan & Hurdle Declaration at 81.

Efforts to regulate travel agency contracts also present a practical problem, the difficulty of obtaining effective compliance (in contrast, the rules on display bias, equal functionality, and non-discriminatory booking fees have been effective and complied with). Experience with our past attempts to prevent certain contract practices has shown that systems can evade restrictions by devising alternative contract terms that achieve the same result as the prohibited terms but comply with the letter of our rules. 57 FR 43827. If we adopted rules prohibiting productivity pricing arrangements, travel agencies and systems would have incentives to maintain them, and enforcing those rules would be impracticable. Justice Department Reply Comments at 29; Delta Reply Comments at 52–53.

The record shows that the profitability of many travel agencies depends on the incentive payments provided by productivity pricing contracts. *See, e.g.*, Large Agency Coalition Comments at 33. We would be reluctant to disallow such pricing contracts when doing so seems likely to impose severe financial strains on many travel agencies, as is claimed by many of the travel agency commenters. The surviving travel agencies, moreover, would need to obtain additional revenues to offset the loss of the systems' incentive payments, which would either increase the costs for consumers to use travel agencies or the airlines' costs for distributing their tickets through travel agencies. Sabre Reply Comments, Salop & Woodbury Declaration at 22–24.

In any event, on balance, the systems' current productivity pricing clauses seem to allow travel agencies to make a significant number of bookings through different booking channels. Large Agency Coalition Reply Comments at 13–16. The systems do not discourage subscribers from accessing the Internet, and the growing use of programs like AgentWare's service, which provides travel agents links to other booking sites, suggests that travel agents are able to make bookings outside their primary system. We recognize that several commenters contend that the systems' productivity pricing clauses contain provisions that deter travel agents from using alternative booking channels. For example, while ASTA opposes restrictions on incentive payments, it suggests that we should eliminate penalty clauses in the systems' productivity pricing agreements because penalty clauses do deter travel agents from using the Internet for bookings. ASTA Comments at 26, n. 44, and 34–35. *See also* Southwest Comments at 16–20; Travel Management Alliance Comments. The Large Agency Coalition's comments address in detail the effects of the penalty provisions but not the incentive payment provisions. The ASTA survey suggests that the systems' productivity pricing programs are one of the three reasons why travel agents do not make more bookings on the Internet. Orbitz Comments at 23, n. 10. Orbitz asserts that the systems compel travel agencies to accept exclusive deals. Orbitz Comments at 46–47. These complaints that productivity pricing does block travel agencies from using alternative booking channels are not substantiated enough to override the other factors in favor of eliminating the restrictions on subscriber contracts—the travel agencies' inherent unwillingness to use multiple systems, the difficulty of enforcing rules on issues like incentive payments, and the dependence of many travel agencies on incentive payments for survival. Equally important, the market seems to be moving in a more competitive direction. The minimum booking quotas in subscriber contracts are declining, and the systems' incentive payments to travel agencies are now declining and will continue to do so. Transcript at 232, 234, 235.

Other considerations make us reluctant to regulate many of the subscriber contract issues. The U.S. airlines' divestiture of their system ownership interests has ended the direct link between system competition and airline competition that was a principal basis for the adoption of subscriber contract rules. Travel agency decisions to use one system rather than another, and to accept longterm contracts for CRS services, should not affect airline competition. In exercising our authority to prohibit unfair methods of competition under section 411, our primary goal has been the protection of airline competition. Regulating subscriber contracts for the most part would not further that goal.

Given the record evidence on current market conditions, it is doubtful whether section 411 would enable us to maintain rules governing travel agency contracts. Practices like longterm contracts and incentive payment programs are not inherently anti-competitive, as discussed above. If the systems' current subscriber contracts effectively deterred travel agents from using alternative booking channels (direct links with an airline's internal reservations system, for example), the contracts could constitute an unfair method of competition, because they would help preserve the systems' existing power over airlines, unless the contracts were justified by legitimate business reasons that outweighed any adverse impact on competition. Because the systems are ticket agents subject to our jurisdiction under section 411, we may regulate their contract practices if they are engaged in unfair methods of competition that affects airline distribution. The record in past proceedings indicated that the systems' contract practices could violate section 411, because the systems imposed contract terms on travel agencies that appeared designed to preserve the systems' market power by deterring travel agents from using alternative booking channels. 57 FR 43823–43825. *Cf. United States* v. *Microsoft Corp.*, 253 F.3d at 71–74. The record here, in contrast, does not show that the systems' contracts effectively keep travel agents from making bookings that bypass the systems.

We recognize that prospective entry into the CRS business, by Orbitz, for example, would be more successful if the systems' existing subscriber contracts were nullified, thereby enabling all travel agencies to make a new choice of which system to use. Orbitz otherwise may be able to obtain subscribers only from those travel agencies whose contracts are expiring. Orbitz in fact seeks to give subscribers an option to void all existing contracts that do not comply with new subscriber contract rules. Orbitz Comments at 50, 53. Northwest, one of Orbitz' owners, similarly argues that we should enable any travel agency to terminate its existing contract with a system, if any of the airlines serving the agency's city withdraws from participation in that system. Northwest Comments at 3–4.

Ending any substantial number of existing subscriber contracts would be disruptive and impose substantial negotiating costs on the systems and travel agencies. *See, e.g.*, Galileo Reply Comments at 59. Imposing such burdens on the industry would be at odds with our overall decision to end CRS

regulation. Furthermore, we doubt that section 411 would authorize us to grant Orbitz' request. As stated elsewhere, section 411 does not empower us to impose our views of the best possible competitive structure and practices on an industry. It authorizes us instead to prohibit unfair methods of competition. Because the record does not show that the systems' current subscriber practices violate the antitrust laws or antitrust principles, we do not have the power to undo the existing contracts, even if they may hinder Orbitz' entry into the business.

Orbitz and other commenters are legitimately concerned about the impact of potential system contract practices that would unreasonably restrict travel agency usage of alternative booking channels. We will monitor the systems' practices to ensure that the end of our rules on contract practices does not lead to new efforts to obtain contracts from subscribers that will unreasonably limit airline competition.

14. The Tying of Commissions and Marketing Benefits With a Subscriber's Choice of a System

Our concern that an owner airline would use its dominance of airline markets in some cities to obtain dominance in the CRS markets in those cities led the Board to adopt a rule prohibiting an airline that owned a system from tying a travel agency's commissions to the agency's use of the airline's system. Dominance in the local CRS market would reinforce the airline's power in the local airline markets. Justice Department Reply Comments at 9. For the same reasons, we have considered proposals to prohibit the tying of a travel agency's access to an airline's marketing benefits, such as the ability to waive advance-purchase restrictions on discount fares, with the agency's choice of the system affiliated with the airline. We did not adopt such a rule because we expected that any such requirement would be unenforceable. 57 FR 43828.

A few commenters complain that airlines affiliated with a system have distorted competition in the CRS business by refusing to provide marketing benefits (or the ability to sell the airline's corporate discount fares) to travel agencies that do not use the system owned or marketed by the airline. Some commenters believe that such airlines have also tied access to override commissions with the travel agency's use of the airline's affiliated CRS, even though doing so would violate our rule. *See, e.g.*, Amadeus Comments at 90–92.

Our notice of proposed rulemaking stated that we were willing to revisit the issue of the tying of marketing benefits to the use of the airline's affiliated system, although we again expressed our concern about the potential unenforceability of any such rule. 67 FR 69409–69410.

ASTA and Amadeus support the proposed prohibition against the tying of a travel agency's access to marketing benefits with the agency's choice of a system. ASTA Comments at 39–40; Amadeus Comments at 86–92. Other commenters oppose the proposal. Delta Reply Comments at 53–58; Northwest Reply Comments at 24–25; United Reply Comments at 54–65.

After considering the comments, we have decided to terminate the current rule rather than broaden it. First, no U.S. airline currently owns a system, so the existing bar against tying now covers only the three European airlines that own Amadeus. Secondly, the existing and proposed restrictions on tying, even if effective, seem unlikely to significantly affect airline competition, because no system has U.S. airline ownership. Thirdly, an airline that is affiliated with a system may have legitimate reasons for wanting to encourage travel agencies to use that system. Bookings made through that system, for example, may be less costly for that airline. United Reply Comments at 64–65. Also, some commenters (but not Amadeus) allege that the airlines marketing a system do not aggressively sell the system and that tying is a vanishing practice. Large Agency Coalition Reply Comments at 16–17. Fourthly, a prohibition against the tying of marketing benefits would not keep airlines that wished to use their dominance of local airline markets from using their position in the airline market to compel travel agencies to use their affiliated system. Airlines can achieve that result by tying a travel agency's choice of their favored system to the agency's access to corporate discount fares. Finally, we continue to believe that prohibitions against tying are likely to be unenforceable, a view that the Justice Department shares. Justice Department Reply Comments at 24. Although the current rules thus prohibit the tying of a travel agency's ability to obtain commissions with the agency's choice of a system, Amadeus alleges that it has lost subscribers (or failed to win new subscribers) because an airline that owned or marketed a competing system threatened to terminate the agency's commissions if it chose Amadeus. Amadeus Comments at 90–92; *see also* Large Agency Coalition Reply Comments at 17.

Nonetheless, we will watch for any anti-competitive behavior in this area and take enforcement action if appropriate.

15. Regulation of the Internet's Use in Airline Distribution

When we last reexamined the need for the CRS rules and their effectiveness, the Internet did not play a role in airline ticket distribution. The systems were used by travel agencies, corporate travel departments, and by some consumers through on-line services. At that time, ''brick-and-mortar'' travel agencies sold about 80 percent of all airline tickets, and consumers bought most of the remainder directly from the airlines. Few travelers bought tickets on-line. 57 FR 43794–43795. Our rules regulate the systems insofar as they are used by travel agencies but do not otherwise regulate the systems, and they do not cover the operations of travel agencies.

In recent years, the Internet has become a major avenue for the sale of airline tickets. Both airlines and travel agencies have established websites where consumers can research airline service options and make bookings. The number of tickets sold through the Internet has been growing steadily, from 18 percent of all tickets in 2001 to an estimated 25 percent of all tickets in 2003. Airline websites account for about half of all tickets sold through the Internet. Galileo Comments, Guerin-Calvert, Jernigan, & Hurdle Declaration at 24. Some firms have established themselves as on-line travel agencies, like Travelocity, Expedia, and Orbitz, but many ''brick-and-mortar'' travel agencies have also established websites. 67 FR 69374.

Our supplemental advance notice of proposed rulemaking asked for comments on whether we should regulate the on-line distribution of airline tickets. 65 FR 45557. While a number of commenters argued that no Internet activities should be regulated, others contended that some rules were necessary. *See* 67 FR 69410.

After considering the comments, we tentatively concluded that we should not now adopt rules that would generally govern the Internet's use in airline distribution. Rather than propose rules on the basis of a relatively short experience, we wished to see how the Internet's use in airline distribution develops and whether its evolving use threatens airline competition and consumer access to accurate and complete information on airline services. We found that our experience with the Internet thus far does not confirm that broad regulations are necessary. We invited commenters who

disagreed with our tentative position on these issues to present their proposals with information and analysis showing that they would provide public benefits without harming competition or the development of new on-line marketing approaches. 67 FR 69410.

We did propose a change to our policy statement on fare advertising concerning one Internet-related issue, the requirements for disclosure of travel agency service fees. We plan to address that question in a separate final rule.

We still believe that we should not adopt rules governing airline distribution over the Internet, whether through airline websites or on-line travel agencies. As we stated in the notice, we intend to continue watching the Internet distribution practices of airlines and on-line travel agencies and will take action if that becomes necessary. The absence of rules specifically governing Internet distribution practices will not excuse airlines and travel agencies from complying with section 411, which prohibits unfair and deceptive practices and unfair methods of competition in the distribution of airline tickets. In addition, existing rules requiring travel agencies to provide accurate information on airline services, 14 CFR 399.80, are applicable to on-line ticket sales by travel agencies. We are ready to take enforcement action against any travel agency (or airline) that provides deceptive information on airline services through the Internet, and we have done so in several cases. *See, e.g.*, Orders 2001–5–32 (May 30, 2001) and 2001–6–3 (June 7, 2001).

The issues presented by the comments concern (i) regulation of on-line travel agencies, (ii) regulation of airline choices on which distribution channels should be given access to all publicly-available fares, and (iii) Orbitz.

We affirm our tentative decision that rules are not needed to regulate airline websites. The commenters have not challenged that tentative decision. Consumers assume that an airline website will favor the airline's own services and not present an impartial display of all airline services. Any airline offering a website will seek to promote its own services and those of any allied airlines. 67 FR 69411.

(a) *Regulation of On-Line Travel Agencies.* On-line travel agencies such as Expedia, Travelocity, and Orbitz have become major sellers of airline travel. We tentatively concluded that we should not adopt rules regulating their conduct, despite the concern expressed by some commenters that on-line travel agencies may bias their displays in favor of preferred airlines if not prohibited from doing so. We noted that we were not proposing to regulate the CRS displays created by travel agencies for their travel agents. The existing CRS rules do not regulate the practices of ''brick-and-mortar'' travel agencies. However, every on-line travel agency, like every ''brick-and-mortar'' travel agency, is subject to section 411 and may not engage in unfair and deceptive practices.

We thought that on-line travel agencies, like ''brick-and-mortar'' travel agencies, want to keep their customers satisfied. That should deter them from providing inaccurate or misleading advice to customers and so would keep them from biasing their displays. Newspapers and magazines occasionally compare the quality of service offered by different on-line travel agencies, which should discourage the agencies from offering biased displays. And because consumers usually search several sites before making a booking, they should not be harmed if one on-line travel agency biases its displays. The record, moreover, did not show that bias is a serious problem at on-line travel agency websites. Finally, a rule requiring on-line travel agencies to follow prescribed display rules could discourage new methods of offering airline tickets on-line, such as those developed by Priceline and Hotwire. 67 FR 69411–69412.

A few commenters contend that we should adopt rules governing on-line travel agency displays. America West Comments at 37; US Airways Comments at 5–9. Amadeus contends that the systems should not be regulated if on-line travel agencies are not regulated. Amadeus Comments at 93; Amadeus Reply Comments at 54–59. Midwest alleges that some on-line travel agencies offer displays that are biased and inaccurate and do not show that its service is superior to the coach service typically provided by other airlines. Midwest Comments at 10–16.

These commenters have not convinced us that on-line display bias is a widespread problem that harms consumers and requires the adoption of rules. The examples cited by Midwest, if accurate, are troubling, but we believe that individual enforcement action would be the better approach if an agency is offering displays that mislead consumers.

In finding that the record does not show a need for rules barring display bias by on-line travel agencies, we are not determining that consumers have a greater ability than travel agents to work around bias. We are instead finding that the on-line travel agencies do not appear to be biasing their displays and that they are unlikely to do so, because most consumers check more than one website and because newspapers and other publications rate the relative accuracy and value of the different on-line travel agencies. These factors should effectively discourage on-line travel agencies from engaging in display bias, even though many consumers investigate airline services on only one website and not all consumers read published reports comparing the different on-line travel agencies. 67 FR 69411. If an on-line travel agency does create displays that mislead consumers, we can and will take appropriate enforcement action.

We also see no reason to exempt the systems from regulation if we do not adopt rules regulating the on-line travel agencies. The systems are not direct competitors of the on-line travel agencies, and the systems' possession of market power over airlines mandates the adoption for a transitional period of some rules designed to prevent practices intended to maintain that market power or to use it in ways that could cause consumer deception. The on-line travel agencies do not have that kind of market power. Justice Department Reply Comments at 15.

(b) *The Airlines' Differing Treatment of Different Travel Agencies.* A number of the comments on our advance notices of proposed rulemaking had argued that we should require airlines to make all of their publicly-available fares, especially their webfares, saleable through every system. These commenters complained that the airlines' decision to make webfares available only through individual airline websites, or through such websites and Orbitz, was unfair to other travel agencies and the traveling public. The airlines, on the other hand, asserted that their decision to sell their webfares only through the least costly distribution channels was a rational decision. *See* 67 FR 69412–69413.

We declined to propose any rule requiring airlines to make all fares available through all distribution channels, as was sought by a number of commenters. Telling airlines how they must distribute their services and fares would likely deter them from offering some fares that they wish to sell only through selected distribution channels. Moreover, individual airlines have always given some travel agencies access to fares and other benefits not given other travel agencies. A rule requiring airlines to treat all distribution channels the same, in terms of access to fares, would be contrary to the industry's established practices (and contrary to practices followed by the

systems and individual travel agencies as well). In addition, as we explained, the basis for this rulemaking was our authority under section 411 to prohibit unfair methods of competition, unfair methods of competition are practices that violate the antitrust laws or antitrust principles, and the antitrust laws generally allow individual firms to choose how to distribute their products and services. An airline's decision to provide certain types of fares or better treatment to one type of distribution channel (or to some but not all firms within the same channel) would not ordinarily violate antitrust principles. 67 FR 69413.

After we prepared our notice of proposed rulemaking, the National Commission to Ensure Consumer Information and Choice in the Airline Industry, which had been charged by Congress to study this and related issues, issued its report. That report concluded that airlines should not be required to make all fares available through all distribution channels. The Commission reasoned that such a requirement would substantially harm consumers, because airlines would stop offering some low webfares, would be contrary to the industry's use of different distribution channels to dispose of specific types of inventory, and would not solve the travel agency industry's basic problems, particularly the growing use of the Internet. ''Upheaval in Travel Distribution: Impact on Consumers and Travel Agents,'' ''National Commission to Ensure Consumer Information and Choice in the Airline Industry'' (November 13, 2002), at 56–58.

Several commenters continue to assert that airlines should be required to make all publicly-available fares saleable through all distribution channels. Large Agency Coalition Comments at 38–39; AAA Comments at 3; Carlson Wagonlit Comments at 3.

Airlines object to any such requirement. *See, e.g.,* America West Comments at 32–34; Continental Comments at 10.

We remain unwilling to require airlines to make their webfares (or other publicly-available fares) available to each system so that travel agencies can easily book them. For the reasons stated in our notice of proposed rulemaking, any such requirement would be outside our authority under section 411 and lack an economic or policy justification. Such a requirement would deny airlines the ability to choose which distribution channel best meets their needs. As shown, Southwest and JetBlue, two successful and growing airlines, have chosen to distribute their services through only one system, Sabre, and to encourage travelers to make bookings directly with the airline, either through the airline's website or a reservations agent. The requirement would be contrary to the airlines' established practice of selling some fares only through a few selected channels. America West points out that it makes special fares available only through some channels, like one or two of the on-line travel agencies, rather than through all channels. America West Comments at 33. As noted, our decision is consistent with the National Commission's conclusions, and we agree with the Commission's analysis. As the Commission stated, requiring airlines to make all fares available through all distribution channels will encourage airlines to eliminate those fares that they wish to make available only through selected distribution outlets.

Requiring airlines to make all publicly-available fares saleable through all channels would be more efficient for travel agents and their customers, because they would no longer need to search multiple places to check all the fares, and would be able to make bookings through their primary system, which has been the most efficient booking process for travel agencies. Our authority to prevent unfair methods of competition would not allow us to override individual airline decisions on how to distribute tickets unless we can show that doing so is necessary to prevent conduct that would violate the antitrust laws or antitrust principles. The record in this proceeding would not support such a finding. In addition, a requirement that airlines must make all fares available through all channels would deter airlines from offering many discounts, including presumably their webfares. Airlines would have less incentive to offer discounted fares if they were required to sell those fares through all channels, including the most expensive. America West Comments at 32; United Reply Comments at 51–52.

Furthermore, the market is addressing this issue. Sabre and Galileo, as shown, have created programs whereby airlines that make their webfares saleable through the system will obtain lower booking fees in exchange. A number of major airlines have agreed to provide their webfares to the two systems on these conditions. As a result, Galileo and Sabre subscribers now have access through their systems to the webfares offered by most major airlines. Amadeus and Worldspan can similarly offer airlines terms attractive enough to obtain the right to sell webfares. In any event, systems should obtain access to webfares by making their sale through a CRS attractive for airlines, not by Government edict.

(c) *Regulation of Joint Airline Web sites.* Orbitz, the on-line travel agency, and Hotwire, an on-line firm that allows consumers to obtain low fares but without providing a choice between airlines or schedules, are owned and controlled by several major airlines. Orbitz has obtained the ability to sell many discount fares that are not available for sale through other travel agencies. Orbitz gives airlines a rebate on their booking fees if they agree to make all of their publicly-available fares saleable through Orbitz. Office of the Inspector General, U.S. Department of Transportation, ''OIG Comments on DOT Study of Air Travel Services'' (December 13, 2002), at 2–3.

A number of parties had complained that any website owned by two or more airlines, such as Orbitz and Hotwire, may well be operated in a manner which will reduce competition and lead to consumers receiving biased or inaccurate information. 67 FR 69413. Galileo contends, for example, that the most-favored-nation clause used by Orbitz has led to fewer and smaller fare discounts. Galileo Comments, Hausman Declaration. Travel agencies contend that Orbitz' most-favored-nation clause is intended to eliminate them from the distribution business. *See, e.g.*, Hewins Travel Consultants Reply Comments. Expedia urges us to take enforcement action against Orbitz, but does not ask that we adopt regulations governing joint airline websites. Expedia Comments at 10–13.

We decided not to propose rules regulating the operation of joint airline websites in this proceeding. The only two significant jointly-managed airline websites were Orbitz and Hotwire. Adopting general rules governing the operation of joint airline websites would be premature. The enforcement process would be the best means for addressing any problems with deceptive practices and unfair methods of competition created by such a site. An enforcement proceeding could effectively take into account the characteristics of an individual website while a rule might be unable to do so. 67 FR 69413.

We further noted that we had been informally examining Orbitz' business plan and strategy to see whether it might have been engaged in deceptive practices or unfair methods of competition. Our progress report to Congress on that investigation, ''Report to Congress: Efforts to Monitor Orbitz,'' did not reach any definitive conclusions on whether Orbitz' operations may violate antitrust principles, in part

because of the continuing changes in the on-line distribution business, and in part because the Justice Department had not concluded its own antitrust investigation into Orbitz. The Justice Department recently announced that it had completed its extensive investigation and concluded that Orbitz had not reduced competition or harmed consumers. Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Orbitz Investigation (July 31, 2003). The Justice Department's announcement confirmed our preliminary findings, set forth in our June 27, 2002, report to Congress, that the formation of Orbitz and the Orbitz most-favored-nation clause have neither reduced airfare discounting nor reduced competition in the on-line distribution of airline services. This Department's Inspector General reviewed our report to Congress to evaluate the reasonableness and accuracy of the report's findings. The Inspector General concurred with those findings. He concluded, ''The Department has an ongoing responsibility to monitor the behavior of all of the airlines to ensure that they are not engaging in unfair methods of competition and as part of this general responsibility, should continue to observe how the airlines use all distribution outlets, including Orbitz, to distribute their services.'' Office of the Inspector General, U.S. Department of Transportation, ''OIG Comments on DOT Study of Air Travel Services'' (December 13, 2002), at 28–29.

If Orbitz or its owner airlines engage in unlawful conduct, we can and will use our authority to end any unlawful practices. *See, e.g.*, April 13, 2001, Letter from Susan McDermott and Samuel Podberesky to Jeffrey Katz, at 6.

For the reasons stated in our notice of proposed rulemaking, we are not adopting rules specifically governing joint airline websites like Orbitz at this time. We also see no basis now for instituting any formal investigation into Orbitz' operations. Our own informal review has not shown that such a proceeding would be justified, and the Justice Department has concluded after an extensive investigation that it has no evidence indicating that Orbitz has violated the antitrust laws. Moreover, as we stated in the notice of proposed rulemaking, Orbitz and any other website operated jointly by two or more airlines are subject to the antitrust laws and section 411. The antitrust laws prohibit competing firms from operating a joint venture in ways that unreasonably restrict competition. *See* 67 FR 69414.

Insofar as Expedia's concerns reflect the greater availability of webfares on Orbitz than on competing on-line travel agencies, the market appears to be addressing that issue. As discussed above, two of the systems have obtained access to the webfares of several airlines by providing booking fee reductions in return, and we see no reason why the other two systems could not create similar arrangements. Expedia itself could seek to obtain access to webfares by bargaining with the airlines that offer them.

16. Tying of Internet Participation

Each system generally follows a practice of requiring every participating airline to agree that its services can be booked by every user of the system, including all ''brick-and-mortar'' and on-line travel agencies. A non-accredited travel agency, a corporate travel department, an on-line computer service, or a consumer accessing the system through a travel agency website thus can book the services of each participating airline through the system. Several airlines had asserted that airlines should be able to determine which website could sell their services and that the systems should be barred from tying access to a system's on-line users with access to its ''brick-and-mortar'' travel agency subscribers. 67 FR 69414–69415.

We asked for comments on whether such a rule should be adopted. Such a rule could be beneficial by giving airlines a greater ability to determine which distribution channels could sell their services. A rule barring tying could enable market forces to discipline the systems' terms for participation in the services they offer to on-line travel agencies and other Internet users, because airlines might be able to decline participation if the terms were unreasonable. 67 FR 69414–69415.

We noted, however, that such a rule might be unnecessary. Southwest had been able to keep on-line travel agencies from selling its tickets, and Northwest successfully threatened to stop one on-line travel agency from selling its tickets if the agency did not change its business practices. We asked the parties to comment on whether a prohibition against tying would be technologically feasible, and whether an individual airline could effectively block any Internet site (or a ''brick-and-mortar'' travel agency) from selling its tickets. 67 FR 69415.

Continental and Northwest support the proposal, while Amadeus and Sabre oppose it.

We have decided not to adopt a rule barring the tying of access to ''brick-and-mortar'' travel agencies with access to on-line travel agencies using a system. The comments have not persuaded us that such a rule is necessary, because airlines seemingly already have some ability to stop individual travel agencies from selling their tickets. None of the commenters supporting the proposal has explained why such a rule is necessary when an airline already has the authority to stop an individual travel agency from selling its tickets. Sabre and Amadeus assert that each airline can bar an agency from selling its services by denying it an appointment as its sales agent. Sabre Reply Comments at 68; Amadeus Comments at 101–102. Northwest, moreover, was able to obtain better terms from Travelocity and Expedia by denying them commissions on their bookings. Orbitz Comments at 17–18. Our notice pointed out that Southwest had been able to keep on-line travel agencies from selling its tickets. Sabre also asserts that implementing such a rule would be costly, for its programming expenses would exceed $1.5 million. Sabre Reply Comments at 69.

America West contends without explanation that the systems' market power would currently preclude an airline from ending an on-line agency's authority to sell its tickets. America West Comments at 36. Because other commenters disagree with America West's position, we could not adopt the rule proposal without additional evidence and analysis from America West and other commenters.

In addition, the systems' worldwide participation agreements do not appear to violate the antitrust laws or antitrust principles. Sabre has argued that the antitrust laws' prohibition against tying rule does not apply to the systems' practice of requiring worldwide participation, since the offering of system services to ''brick-and-mortar'' travel agencies and the offering of the same services to on-line travel agencies do not constitute separate products. Sabre Reply Comments at 67. *See also* Amadeus Reply Comments at 48.

United, which argues that all of the rules should be terminated, asserts that we should adopt the proposal on tying if we maintain CRS rules. United further argues that the systems' worldwide participation agreements violate the antitrust laws. United Reply Comments at 78–80. United essentially contends that access to each subscriber is a separate product under tying principles. We disagree that a system is necessarily engaged in the tying of two separate services when it demands that a participating airline agree to allow all of the system's subscribers to sell its

services (subject to the airline's right to deny any individual subscriber the authority to sell any of its services). Each system has tens of thousands of subscribers worldwide, and Sabre and Amadeus each has over 60,000 travel agency users. Sabre Comments, McAfee & Hendricks Declaration at 11. United's tying theory assumes that a system and airline should be able to decide whether each individual subscriber should be able to sell the airline's tickets through the system. That would not be efficient. The record in this proceeding does not contain evidence demonstrating that airlines would normally demand that a system treat access to each individual subscriber as a separate service. As a result, a system does not appear to be offering separate products when it requires a participating airline to agree that any system user can sell the airline's services, subject to the airline's right to terminate entirely a travel agency's authority to sell the airline's services. *Cf. United States* v. *Microsoft Corp.*, 253 F.3d at 85–89.

17. International Issues

Our rules govern the systems' operations within the United States. Section 255.2. This rulemaking nonetheless presents international issues, because the systems operating in the United States operate throughout the world, because foreign airlines serving U.S. points obtain ticket sales from bookings made through the systems in the United States, and because the United States' bilateral air services agreements (and one multilateral agreement) with a number of foreign countries obligate each party to ensure that airlines domiciled in the other country are not subject to discriminatory treatment from any system. 67 FR 69372. In addition, the European Union, Canada, Australia, and other foreign countries have adopted their own CRS rules. The basic principles for all of the rules are similar, but the actual rules are different, as in some respects are the underlying regulatory philosophies. 67 FR 69372, 69415.

The major international consideration is the United States' obligation under the air services agreements to keep systems operating in the United States from engaging in conduct that discriminates against foreign airlines, such as charging discriminatory booking fees to foreign airlines and biasing displays against foreign airlines. Congress has directed us to exercise our authority consistently with the United States' obligations under international agreements. 49 U.S.C. 40105(b)(1)(A).

Several of the commenters, notably Amadeus, contend that we must readopt the existing rules and impose them on all systems in order to comply with the obligations imposed by these agreements. Amadeus Comments at 36–41; Amadeus Reply Comments at 20–22. *See also* Air France Comments at 6. Amadeus states that it would not object to the rules' termination if the only issue were whether rules were required on economic policy grounds. Amadeus Comments at 4. Other commenters, like United and Sabre, argue that satisfying those obligations does not necessarily require us to maintain CRS rules and that we have no authority to adopt rules in order to comply with the United States' international agreements if section 411 does not otherwise authorize us to regulate the systems. United Reply Comments at 19–20; Sabre Reply Comments at 22–24. United and Continental urge us to eliminate the rules even though they recognize that foreign CRS rules typically contain reciprocity requirements. Transcript at 118, 140. A number of foreign airlines have supported proposals to eliminate some of the rules, such as the rule prohibiting discriminatory booking fees. Ass'n of Asia Pacific Airlines Comments at 6; British Airways Comments at 8; Lufthansa Comments at 3; Qantas Comments at 1.

The final rules adopted in this proceeding no longer include the prohibitions against discriminatory treatment contained in the existing rules. We recognize that different airlines may obtain different treatment from the systems as a result, especially on booking fees. However, because no U.S. airline now controls any system operating in the United States, the systems should have no incentive to discriminate against foreign airlines. Sabre Comments at 147. As noted, our proposal to eliminate the rule barring discriminatory booking fees was supported by several, though not all, foreign airline commenters. We have also found that the elimination of those rules will benefit consumers and not harm airline competition.

In addition, the statutory authority for our rules has always been section 411, which authorizes us to prohibit unfair and deceptive practices and unfair methods of competition. We may adopt rules that will prevent practices that violate the antitrust laws or antitrust principles, but we do not have general authority to regulate the business practices of the systems (or airlines). To adopt any rule regulating CRS practices, we must find that the rule is necessary to prohibit conduct that would violate section 411. Our decisions that several of the rules should not be readopted at all, such as the rule prohibiting discriminatory booking fees, flow from our decisions that the practices regulated by those rules no longer appear to be violations of section 411 or that the rules have become unnecessary for other reasons. As a result, section 411 does not authorize us to maintain those rules indefinitely.

We recognize the United States has signed bilateral air services agreements obligating each party to ensure that airlines domiciled in the country of the other party are not subjected to discriminatory treatment from systems operating in its own territory. While we will no longer have rules carrying out all of the obligations imposed by the bilateral air services agreements, we and the other agencies of the United States government intend to take such action as is necessary and appropriate to ensure that foreign airlines have a fair opportunity to compete for travelers in the United States.

Amadeus has suggested that we attempt to harmonize our rules with those of the European Union. As we stated in our notice of proposed rulemaking, we understand that a greater similarity between our rules and the European rules (and the rules of other countries) would provide benefits, especially by avoiding the need for the systems to follow potentially different business practices in different jurisdictions. However, our ability to regulate CRS practices is subject to the limits of our authority under section 411 to prohibit unfair and deceptive practices and unfair methods of competition by airlines and ticket agents and our obligation to adopt only those rules whose benefits will outweigh their costs. We cannot make our rules conform to those of the European Union unless doing so will meet the requirements established by Congress.

18. Retaliation Against Discrimination by Foreign Airlines and Systems

In some cases in the past, as discussed in our notice of proposed rulemaking, a foreign airline limited its participation in a U.S. system (or imposed restrictions on travel agencies using a U.S. system in its homeland) to deter travel agencies in its homeland from choosing a U.S. system instead of the system owned or marketed by the foreign airline. In a few such cases, we proposed countermeasures to encourage the foreign airline to end its discriminatory conduct. We acted under the International Air Transportation Fair Competitive Practices Act, recodified as 49 U.S.C. 41310, which has authorized us to impose countermeasures when a

foreign airline or other firm engages in discriminatory conduct against a U.S. airline. 67 FR 69372. Congress has since amended 49 U.S.C. 41310 to give us broader authority to take countermeasures against a foreign system or a foreign airline that controls such a system, if the system engages in an unjustifiably discriminatory or anticompetitive practice against a U.S. CRS or imposes unjustifiable restrictions on access by a U.S. system to a foreign market. This broadens the statute by authorizing us to take action when a U.S. system is subject to discriminatory conduct by a foreign firm. Section 741 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106–181 (April 5, 2000).

To further deter discriminatory treatment, our current rules authorize a system to engage in discriminatory conduct against a foreign airline that operates a foreign system, if that system subjects a U.S. airline to discriminatory treatment and the system has given us and the foreign airline 14 days advance notice of its plan to take countermeasures. Section 255.11(b).

We did not propose to strengthen this rule, although Sabre asked us to do so. We explained that we would in any event continue to take appropriate action when a U.S. airline or system is subject to discriminatory treatment by a foreign firm designed to prejudice the U.S. firm's ability to compete. 67 FR 69415–69416.

Although Sabre has argued that we have no authority to regulate its operations under section 411 and that there is no longer any economic justification for the rules, Sabre has urged us to strengthen our existing rule, but only if we maintain CRS regulations. Sabre Comments at 168–169. Delta, on the other hand, argues that the existing rule should be eliminated. Delta Reply Comments at 58.

We intend to carry out Congress' mandate that action be taken when foreign airlines and systems engage in discriminatory conduct against U.S. firms. We can take such action without maintaining the existing rule. We have determined, however, not to readopt the rule authorizing a system to take countermeasures against a foreign system that discriminates against U.S. airlines. If we were to readopt the rule, we would presumably have to modify it, because we are eliminating the major rules barring each system from engaging in discriminatory treatment of participating airlines. The rule should authorize self-help only when a foreign system biases its displays against U.S. airlines.

Furthermore, the rule as written is outdated. The Board originally adopted the rule at a time when each significant system operating in the United States was owned by a major U.S. airline with international operations. As written, the rule made sense because it allowed the system to take countermeasures if its airline owner (but not the system itself) was subject to discriminatory treatment from a foreign system that was owned or controlled by a foreign airline. 49 FR 11668–11669. Sabre no longer has any airline owners and so should have little incentive to take countermeasures if a U.S. airline is subjected to discriminatory treatment overseas from a foreign system. The rule, moreover, would allow Sabre to subject the offending foreign airline to discriminatory treatment, not to take direct action against the foreign system. We think that we can more rationally protect Sabre's interests by reaffirming our willingness to take appropriate action authorized by statute.

19. Sunset Date for the Rules

Our rules have had a sunset date to ensure that we would reexamine the need for the rules and their effectiveness. Section 255.12. In our notice, we tentatively decided not to propose a new sunset date for the rules in our notice of proposed rulemaking. Instead, we stated that we would review the rules when necessary and would consider comments on when that should be done. 67 FR 69416.

Some commenters asked us to establish a new sunset date that would establish a time when the rules would be reexamined, while other commenters argued that a new sunset date should establish the time when the rules would end without further reexamination.

See, e.g., Alaska Comments at 1–3 and Delta Comments at 2–3 (transitional rules should terminate in three years); American Comments at 49 (three-year sunset period with presumption that rules would then terminate); Midwest Comments at 29 (at least five years).

Whether the rules should have a sunset date, and when that date should be, are essentially moot issues as a result of our final decision in this proceeding. We are readopting very few of the existing rules. The other rules will therefore automatically expire on January 31, 2004. The rules adopted here will be terminated as of July 31, 2004. We will, however, actively monitor conditions in the market in order to verify our assumption that rules against display bias will not be necessary beyond that time. We retain the authority to propose a continuation of rules against display bias if, contrary to our expectation, continued regulation is warranted.

20. Effective Date of the Rules

The Administrative Procedure Act states that new rules normally should take effect no less than thirty days after their publication. Our notice of proposed rulemaking invited comments on whether we should give firms additional time to comply with any new requirements mandated by our final rule in this proceeding. 67 FR 69416–69417. In response to our notice of proposed rulemaking, which proposed to readopt most of the rules and adding additional requirements for some of them, like the rules on subscriber contracts, a number of commenters asserted that one or more provisions of our proposed CRS rules should take effect on a delayed schedule due to the expense or difficulty of compliance within thirty days of the rules' publication date. See, *e.g.*, Amadeus Comments at 104–106; Galileo Reply Comments at 59. Galileo further contends that we should provide for a two-year transition if we determine not to readopt the mandatory participation rule and the rule barring differential booking fees. Galileo Reply Comments at 59.

We have decided to make January 31, 2004, the effective date of this rule. That date is the sunset date for the existing rules. We have determined for good cause to make the rule effective on that date, rather than thirty days after publication as required by the Administrative Procedure Act except for good cause shown. 5 U.S.C. 553(d). We are maintaining for a six-month transition period the current rules prohibiting display bias and, with some changes, the current rule prohibiting parity clauses in the systems' contracts with participating airlines. Our transitional rule barring airlines from inducing systems to bias displays is new in form but merely bars airlines from encouraging systems to violate their existing obligation to provide neutral displays. We are adopting a transitional rule prohibiting each system from demanding that an airline provide all public fares as a condition to any participation in the system, but this rule is analogous to the existing rule prohibiting parity clauses. These rules will not require any changes, as far as we know, in the systems' existing operations. Making them effective on less than thirty days notice accordingly will not impose an undue burden on anyone. If the rules did not become effective on January 31, 2004, there would be a short gap between the expiration of the current rules and the effectiveness of the new rules, which

could cause systems for a brief period to engage in practices that could harm competition and consumers. The January 31, 2004, effective date will not prevent firms from taking immediate advantage of the substantial deregulation resulting from our decision that most of the current rules should not be readopted.

The elimination of other rules on participating airline contracts (the prohibition against discriminatory booking fees, for example), and the rules on subscriber contracts will not require any immediate change in the operations of airlines, systems, and travel agencies. The parties are free to maintain their existing contracts while they develop new agreements that take advantage of the flexibility on these matters offered by our final decision. We cannot create a transitional period by readopting the existing rules for a short period, because the record in this proceeding would not justify doing so.

Amadeus has filed a petition asking us to eliminate the rules' existing sunset date, January 31, 2004. Docket OST–2003–16469. Amadeus notes that we have submitted a final rule to OMB review but that the review process may not be completed before the sunset date. In addition, Amadeus claims that industry participants will need several months to adjust to any substantial change in the current regulatory structure, such as partial deregulation. Galileo supports Amadeus' petition, but Delta, Northwest, Sabre, United, and Worldspan oppose it.

We see no need to eliminate the sunset date. As noted, we have decided that most of the existing rules should be terminated. Maintaining the existing rules beyond January 31 would prevent airlines, systems, and travel agencies from taking immediate advantage of the industry's deregulation. Moreover, we are not directing any firms to change their current methods of operation. They may continue to follow their existing business practices until they determine how best to modify them in response to deregulation, if not compelled to change them sooner due to market forces.

21. Divestiture

The American Antitrust Institute and US Airways have suggested that we should require the divestiture of all airline ownership of any system. They argue that airline ownership of a system creates the incentive (and ability) to operate the system in ways that will reduce airline competition. US Airways Comments at 23; American Antitrust Institute Comments at 6–7. *See also* Sabre Comments, Woodbury & Salop Declaration at 3–5; Travelers First Reply Comments.

Amadeus opposes any such requirement. It contends that such a requirement would be unfair and unlawful, because it would require the European airlines that own the majority of Amadeus' stock to divest it, even though the company is located in Europe. Amadeus Reply Comments at 41–42.

We will not require divestiture. We did not propose such a rule, and we did not require divestiture when the systems operating in the United States were controlled by U.S. airlines. 57 FR 43830.

However, our decision that most of the current rules should not be readopted in large part reflects the complete divestiture by U.S. airlines of their CRS ownership interests. A system's ownership by U.S. airlines would raise competitive concerns. The Justice Department thus states, ''Finally, DOJ's recommendation assumes that the recent divestitures represent a permanent change in the ownership structure of the industry.

DOT should therefore make clear that any attempt at reintegration into CRS by airlines will be closely scrutinized by the appropriate enforcement agencies.'' Justice Department Reply Comments at 4. As we stated above, we already intend to monitor airline distribution developments during the next six months and beyond. We will pay particularly close attention to any airline efforts to establish control over a system. We retain the authority to bring enforcement cases against firms that violate the statutory prohibition against unfair methods of competition, and we will take appropriate action if we have evidence of unlawful conduct.

We recognize that Orbitz, owned by five major airlines, may enter the CRS business, a prospect not specifically addressed by the Justice Department. The Justice Department has been investigating Orbitz' operation as an on-line travel agency and concluded that it had no evidence that Orbitz' current operations are harming consumers or reducing competition. Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Orbitz Investigation (July 31, 2003). As we noted in our notice of proposed rulemaking, the antitrust laws significantly restrict the operations of a joint venture among competitors. 67 FR 69414. The Justice Department will enforce those laws if necessary. Furthermore, our examination of the CRS industry's developments after the effective date of our new rules will include a review of Orbitz' operations as a system, if it chooses to enter the business.

Regulatory Process Matters

Regulatory Assessment and Unfunded Mandates Reform Act Assessment

1. Unfunded Mandates Reform Act Assessment

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually.

The legal authority for the rule is provided by 49 U.S.C. 41712, which authorizes the Department to prohibit unfair or deceptive practices and unfair methods of competition in air transportation or the sale of air transportation. The Department is authorized by 49 U.S.C. 40113(a) to implement that authority by adopting rules defining and prohibiting unfair or deceptive practices and unfair methods of competition.

The rule would not result in expenditures by State, local, or tribal governments because no such government operates a system or airline subject to the proposed regulation. The Regulatory Assessment below provides detailed discussion of the costs and benefits for the rule. The Regulatory Assessment also presents alternatives to the rule.

2. The Department's Regulatory Assessment

Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), defines a significant regulatory action as one that is likely to result in a rule that may have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Regulatory actions are also considered significant if they are likely to create a serious inconsistency or interfere with the actions taken or planned by another agency or if they materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of the recipients of such programs.

The Department's Regulatory Policies and Procedures (44 FR 11034, February 26, 1979) outline similar definitions and requirements with the goal of

simplifying and improving the quality of the Department's regulatory process. They state that a rule will be significant if it is likely to generate much public interest.

The Department has determined that these regulations are not an economically significant regulatory action under the Executive Order, because the record does not show that the rules would likely have an annual impact on the economy of $100 million or more. The rules will not impose significant costs on the systems or other firms. The cost of complying with the prohibitions against display bias should be small, because the systems have been complying with those requirements and must continue to comply with similar requirements imposed by other countries. The rules will reduce the systems' revenues by barring them from selling display bias, but nothing in the record indicates that the revenue loss would exceed $100 million, and the systems have not claimed that the continuation of the rules barring display bias will reduce their revenues by $100 million or more.

The rules are significant under the Department's Regulatory Policies and Procedures because of the amount of public interest they are likely to generate. The Department has prepared a regulatory assessment for this final rule, which has been placed in the docket for this proceeding. These rules have been reviewed by the Office of Management and Budget under the Executive Order.

The notice of proposed rulemaking contained a preliminary regulatory impact analysis of the proposed rules. That analysis tentatively concluded that the benefits of the proposed rules would exceed the costs of those rules. The analysis relied on a qualitative assessment of the costs and benefits of the proposed rules, because we did not have information of the kind and detail necessary for a quantification of those benefits and costs. We requested interested persons to provide detailed information on the potential consequences of the proposed rules. 67 FR 69419.

Our final regulatory assessment concludes that the benefits of the final rule will outweigh its costs. The final rule will benefit airline competition by preventing systems from agreeing with some airlines to bias displays in their favor and against other airlines. If the final rule did not prohibit display bias, the systems would be likely to bias their displays. That could harm consumers by causing system users to obtain misleading information and by reducing airline competition. A system has some ability to bias its displays, because participating airlines have little ability to cause systems to stop biasing displays, travel agencies can live with some bias, a system that sells display bias can offer better terms to travel agency customers, and a travel agency would incur switching costs if it changed systems in order to avoid one system's bias. Display bias has the potential to undermine airline competition and distorts consumer choices. We believe that a rule prohibiting display bias will impose relatively small costs on the systems.

The rules prohibiting systems from demanding that airlines agree to parity clauses or clauses requiring an airline to make all of its publicly-available fares saleable through a system as a condition to any participation will give airlines some leverage in negotiating for better terms for participation. During the transition period, this will offset to some extent the systems' existing market power and furnish airlines an opportunity to prepare more effectively for the termination of the prohibition. The transition will give airlines some ability to promote alternative distribution and booking channels and thereby promote innovation.

Terminating the rest of the existing rules over time will promote efficiency and reduce costs for firms involved in airline distribution and the airlines themselves.

The final regulatory assessment concludes that the costs of readopting the other rules would exceed their benefits.

Regulatory Flexibility Statement

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The act requires agencies to publish a final regulatory flexibility analysis for regulations that may have a significant economic impact on a substantial number of small entities. Our notice of proposed rulemaking, which assumed that the relevant small entities included smaller U.S. airlines and travel agencies, included an initial regulatory flexibility analysis. That notice also set forth the reasons for our rule proposals and their objectives and legal basis. This is the regulatory flexibility analysis for our final rule.

Our existing CRS rules primarily regulate the systems' operations, although they do impose some obligations on airlines participating in the systems and indirectly regulate travel agencies by prohibiting certain types of conduct in the travel agencies' relationships with systems and their airline owners. Our notice of proposed rulemaking proposed to maintain most of the existing rules and to strengthen certain parts of those rules, primarily the rules governing the systems' contractual relationships with travel agency subscribers. We also proposed, however, to eliminate the rule barring discriminatory booking fees and the mandatory participation rule. We additionally asked for comment on whether we should terminate more of the rules.

If adopted, the proposals would not have subjected small entities to direct regulation, except for certain obligations imposed on participating airlines, but would have affected the systems' relationships with airlines and travel agencies. The notice included an initial regulatory flexibility analysis, which relied in part on the factual, policy, and legal analysis set forth in the remainder of the notice, as allowed by 5 U.S.C. 605(a). We tentatively concluded that our proposed rules would have a significant economic impact on a substantial number of small business entities, especially travel agencies and air carriers, including regional air carriers. The proposals would have given travel agencies a greater ability to use multiple systems and booking channels. To the extent that airlines could operate more efficiently and reduce their costs, the rules would also affect all small entities that purchase airline tickets, since airline fares may be somewhat lower than they would otherwise be, although the difference may be small. We expected that our proposals to prohibit or restrict productivity pricing could increase CRS costs for some travel agencies, but that the affected travel agencies would be the larger agencies. 67 FR 69423–69424.

We invited comments on our initial regulatory flexibility analysis. 67 FR 69424. We additionally gave interested persons ample opportunity to file comments and reply comments on our rule proposals and to participate in a public hearing. Members of the Congressional committees on small business, travel agency commenters, and the NFIB Legal Foundation assert that our initial regulatory flexibility analysis was inadequate and that we must give interested small entities a better opportunity to comment on the proposals and their potential impact on small businesses.

At the final rule stage, we have decided not to adopt most of the existing rules and not to adopt our proposals to strengthen the rules on subscriber contracts. We are not

readopting the existing rules regulating the travel agencies' relationships with the systems and airlines owning or marketing a system, and we are not adopting the proposals to strengthen the existing rules on matters such as the terms of the systems' contracts with subscribers. Our rules will no longer regulate the travel agencies' relationships with the systems and any airlines owning a system.

Our final rule will still affect the airlines' relationships with the systems, because it will prohibit display bias and bar systems from imposing certain types of contract requirements on participating airlines.

The Regulatory Flexibility Act requires us to publish a final regulatory flexibility analysis that considers such matters as the impact of a final rule on small entities if the rule will have ''a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). The rule may have a significant economic impact on a substantial number of airlines that are small entities, because almost 400 U.S. passenger airlines come within the definition of a small entity, according to the Small Business Administration. That impact will be beneficial, as the final rule will prohibit certain system practices that would likely harm the business position of small airlines. In view of the concerns expressed by commenters about the impact of any rule on travel agencies that are small entities, we are also discussing the final rule's impact on travel agencies, even though the impact is indirect. That impact should also be beneficial. As shown by the following discussion, we have carefully considered how the final rule may affect travel agencies and other small entities.

1. The Need for, and the Objectives of, the Final Rule

For a six-month period, our final rule will maintain the existing rules against display bias and will prohibit each system from requiring airlines to accept parity clauses and clauses requiring the airline to provide all of its publicly-available fares to the system as a condition to any participation in the system. These rules are necessary for preventing display bias, which could mislead travel agents using a system and their customers, and preventing contract practices that could reduce competition for the systems and deny airlines discretion on how to market their services through the systems and alternative booking channels. The rules' objectives are to prevent consumer deception, promote airline competition, and encourage market forces to discipline the systems' prices and terms for airline participation. These objectives will promote airline competition and lower costs for airline distribution, which would lead to lower airfares and more efficient airline operations.

2. Issues Raised by the Comments, and Our Assessment of Those Issues

Several commenters contend that our rule proposals would cause significant harm to small entities, primarily small travel agencies, and that our initial regulatory flexibility analysis was inadequate. *See* June 9, 2003, Letter from Senators Snowe and Kerry; March 19, 2003, Letter from the Democratic Members of the House Committee on Small Business; Comments of the Small Business Administration Office of Advocacy; NFIB Legal Foundation Comments; ASTA Comments at 51–54. These commenters allege that the rule proposals, if adopted, would deny travel agencies the tools they need for serving their customers, eliminate incentive payments to travel agencies from the systems (and thus make many travel agencies unprofitable), and limit flexibility for travel agency contracts for CRS services. These allegations involve our proposals to eliminate the mandatory participation rule, to bar productivity pricing, and to strengthen the existing rules regulating subscriber contracts, and our decision that we would not propose rules requiring airlines to make all publicly-available fares, such as webfares, saleable through each of the systems.

As a result of these comments as well as comments submitted by other persons and the on-going changes in the airline distribution and CRS businesses, we have decided not to adopt the proposed changes to the rules on subscriber contracts, including the proposed restrictions on productivity pricing, and to eliminate the existing rules regulating the contracts between the systems and subscribers. We have further decided to make final our decision to eliminate the mandatory participation rule and our decision not to adopt rules requiring each airline to make its webfares or other fares available through all distribution channels rather than just those channels selected by the airline.

We have discussed above in detail the basis for each of our decisions on the significant rulemaking issues. We will summarize that discussion in this regulatory flexibility statement.

In general, we have decided to terminate most of the existing rules, because the record does not show a need for continued CRS regulation in most areas. Our primary goal in adopting CRS regulations has always been the prevention of system practices that would prejudice airline competition. The systems are no longer subject to control by U.S. airlines, and the record does not show that any non-airline system is likely to operate in a manner that would distort airline competition, except insofar as the systems appear willing to sell display bias. We are maintaining the rules prohibiting display bias, but not the other rules that were originally designed to keep systems affiliated with airlines from prejudicing the competitive position of rival airlines. The record shows that, in other respects, the current rules unnecessarily limit the business discretion of systems and airlines, are no longer necessary in light of market developments, or are unlikely to be effective and enforceable.

Secondly, our statutory authority does not give us the authority to generally regulate the relationships between the systems, on the one hand, and airlines and travel agencies, on the other hand. As a result of Congress' decision 25 years ago to deregulate the airline industry, we have no overall authority to regulate the airlines' distribution practices or to adopt rules requiring changes in airline practices in order to promote fairer competition. Our authority for CRS rules, section 411, authorizes us to prevent unfair and deceptive practices and unfair methods of competition. We adopted the existing CRS rules under our authority to prohibit unfair methods of competition, except insofar as we have adopted rules prohibiting display bias, which we also based on our authority to prohibit deceptive practices. We may adopt the rule proposals discussed in the comments on our initial regulatory flexibility analysis only if we find those rules are necessary to prevent unfair methods of competition. As explained in our discussion above of the individual rule proposals, the record would not support a finding that several of the rule proposals advanced by travel agency commenters are necessary to prevent unfair methods of competition.

Against this background, we will discuss the final rules and alternative rule proposals of concern to the travel agencies and small airlines, beginning with the proposals on subscriber contracts, followed by the proposals to readopt the mandatory participation rule and to adopt a rule requiring airlines to make all publicly-available fares saleable through all systems, the rules governing the relationships between airlines and the systems, and the rule prohibiting display bias.

(a) *Regulation of Subscriber Contracts.* Our existing rules impose several requirements on subscriber contracts in order to give travel agencies a greater ability to switch systems and to use multiple systems and booking channels. The rules bar systems from requiring contracts with a term of more than five years (and require a system offering a five-year contract to a travel agency to also offer a three-year contract), from imposing minimum use requirements and parity clauses, from denying a subscriber the ability to use third-party hardware and software, and from blocking a subscriber from accessing any system or database from the subscriber's equipment if the equipment is not owned by the system. We proposed to maintain these rules, and we requested comment on whether we should shorten the maximum term for subscriber contracts (for example, by adopting the European Union's rule) and should restrict the types of damages recoverable by a system if a subscriber breached its contract. We also proposed to limit the systems' productivity pricing arrangements. 67 FR 69404–69409. We made these proposals, because we tentatively found, on the basis of the comments submitted in response to our advance notices of proposed rulemaking, that the systems' subscriber contracts substantially restricted the travel agencies' ability to switch systems or use multiple systems and booking channels. For example, while the rules require systems to offer travel agencies a three-year contract whenever a five-year contract is offered, the three-year contracts offered by systems then were sufficiently less attractive that most travel agencies until recent years were accepting five-year contracts. 67 FR 69405. We recognized, however, that the systems competed vigorously for subscribers. 67 FR 69371, 69405.

The comments submitted in response to our notice of proposed rulemaking allege that the systems' recent contracts now give travel agencies more flexibility. *See, e.g.*, Large Agency Coalition Comments at 7–14; ASTA Comments at 14–15; Sabre Comments at 151–153 and Fahy Declaration at 14–15. For example, the average subscriber contract has a term of no more than three years. The systems' current productivity pricing arrangements similarly allow subscribers to make a significant number of bookings outside the system without incurring a penalty. ASTA suggests that the major reasons for the travel agencies' insistence on more flexible contracts are their need to use the Internet and their need to respond to changing technology. ASTA Comments at 14–15. The systems' competition for subscribers requires them to meet travel agency demands for more flexibility. As a result, travel agencies, large and small, are obtaining contracts with terms that are more liberal than required by our existing rules.

The commenters additionally allege that any rules designed to encourage travel agencies to use multiple systems rather than one system will inevitably be ineffective. Travel agencies are unwilling to make substantial use of more than one system because using multiple systems is inefficient for travel agencies. *See, e.g.*, ASTA Comments at 3–4.

The record thus suggests that the systems' current contracts do not prevent travel agencies from using alternative booking channels, like the Internet, when travel agents wish to use them, that any efforts by us to encourage travel agents to use multiple systems will be unavailing, and that the systems' competition for travel agency subscribers will continue to enable travel agencies to obtain flexible contracts if we did not readopt the existing rules. We have therefore decided that we should neither readopt our existing subscriber contract rules nor adopt any of the rule proposals on which we invited comment. Our decision not to adopt restrictions on the systems' productivity pricing arrangements is, of course, consistent with the position taken by almost all travel agency commenters.

Our decision not to readopt the existing rules on subscriber contracts is consistent with the position taken by some commenters that the rules should not limit the terms of contracts between systems and travel agencies, although some travel agency commenters support the readoption of some restrictions on subscriber contracts. Our decision to allow those rules to expire will not harm travel agencies, because the systems are already offering travel agencies better terms than those required by our rules.

(b) *Access to Complete Information on Fares and Services.* The other major issue raised by the commenters on our initial regulatory flexibility statement was the complaint that our decision on which rules should be proposed would allegedly deny travel agencies the tools that they need to serve their customers. This complaint stems from our proposed elimination of the mandatory participation rule and our tentative decision that we should not adopt a rule requiring airlines to make all publicly-available fares, or at least all webfares, saleable through each of the systems. The comments have not persuaded us that either tentative decision was erroneous. Ending the mandatory participation rule, and not requiring airlines to make all fares available through all distribution channels, will promote competition in the airline distribution business without causing significant harm to travel agents.

The travel agencies' interest in these rule issues arises because of their desire to be able to book webfares through their systems. If travel agents can only book webfares through an airline's own website, or through on-line agencies that have access to webfares, travel agents will be unable to operate as efficiently. Travel agents want access to webfares, even though webfares make up a small share of all ticket sales, because webfares can be significantly lower than other fares.

While maintaining the mandatory participation rule and the adoption of a rule requiring each airline to provide each system with access to all of its publicly-available fares could benefit travel agencies, the record in this proceeding would not justify the imposition of such requirements on airlines, as explained next, starting with the mandatory participation rule.

(i) *The Mandatory Participation Rule.* The mandatory participation rule covers airlines with a significant ownership interest in a system. As a result of Worldspan's sale by its three U.S. airline owners, no system now has any significant U.S. airline ownership, although Amadeus, the system with the smallest U.S. market share, is primarily owned by three foreign airlines, Air France, Iberia, and Lufthansa. Those three airlines are currently the only airlines subject to the mandatory participation requirement. Orbitz' five U.S. airline owners would become subject to the requirement if Orbitz began operating as a system, but Orbitz represents that it will not enter the CRS business if its owners would then become subject to the mandatory participation rule. Transcript at 78–79.

We have concluded that maintaining the mandatory participation rule would unreasonably restrict the ability of airlines to negotiate with the systems for better terms for participation. An airline with a system ownership interest should be able to choose whether and at what level it will participate in competing systems, and its ability to choose will give it some bargaining leverage that may enable it to obtain better terms for participation. *See also* Justice Department Reply Comments at 23.

Furthermore, the U.S. airlines' divestiture of their CRS ownership

interests has eliminated the original basis for the rule. We originally adopted the rule as a result of evidence suggesting that some airlines with a CRS ownership interest lowered their participation level in competing systems, or denied those systems access to fares and functionality desired by travel agents, in order to give their affiliated system a competitive advantage. 56 FR 12608. When we adopted the rule, competition between the systems, each then controlled by one or more airlines, represented another avenue for airline competition. That is no longer the case, because no system now has a U.S. airline owner. While the systems continue to have marketing relationships with their former owners, those ties have become relatively unimportant in determining an airline's decisions on the extent of its participation in rival systems. American Comments at 30; Large Agency Coalition Comments at 14; Large Agency Coalition Reply Comments at 16–17.

More importantly, eliminating the mandatory participation rule should not harm travel agencies, even if the rule covered several U.S. airlines rather than only three European airlines. Recent experience suggests that the elimination of the mandatory participation rule will not lead to radical changes in CRS participation levels by the airlines that have had a system ownership interest. Each system has some market power over most airlines, because the airlines' distribution needs require most airlines to participate in each system. All of the major network airlines participate in each system at the highest level, and they do so in order to promote the sale of their services by the travel agents using each system. Transcript at 140; Amadeus Reply Comments at 24. United has chosen to participate at the highest level even though it has not been subject to the mandatory participation rule for some time. In addition, each of Orbitz' owner airlines has agreed with Sabre and Galileo to make its webfares saleable through the system in return for reduced booking fees and other commitments, even though Orbitz'' ability to sell webfares had been a major selling point for that on-line travel agency and some airlines complain that the booking fee reductions were not as large as they should have been. The willingness of these airlines to sell their webfares through Sabre and Galileo supports our expectation that the elimination of the mandatory participation rule will not lead airlines to deny the systems reasonable access to their fares and services.

Even if the record suggested, however, that the elimination of the mandatory participation rule would harm travel agencies by leading to major changes in participation levels, we would likely be unable to readopt the rule. Section 411 authorizes us to prohibit practices that violate the antitrust laws or antitrust principles, as discussed above, but does not empower us to impose requirements on airlines in order to increase the efficiency of travel agency operations or give travel agencies a better opportunity to compete against other distribution channels. For purposes of our regulatory flexibility analysis, we are not obligated to treat rule proposals that could not be adopted under our statutory authority as alternatives that must be considered in the final regulatory flexibility analysis. *Greater Dallas Home Care Alliance* v. *United States,* 36 F. Supp. 3d 765, 769–770 (N.D. Tex. 1999). *Cf. American Airlines* v. *Dept. of Transportation,* 202 F.3d 788, 803–804 (5th Cir. 2000).

(ii) *Requiring Airlines To Make Fares Available Through All Distribution Channels.* To facilitate their ability to win and serve customers, several travel agency commenters also ask us to require airlines to make all fares available through all distribution channels. This proposal originated in the airlines' initial practice of making webfares available only through an airline's own Web site and then, as a result of Orbitz' offer to give airlines a rebate on their booking fees in exchange for access to the webfares, of making the fares saleable through Orbitz as well. Until recently webfares typically were not available through any system. Travel agents thus could not book webfares through a system, and they could learn whether the fares were available only by accessing the airline's own website or an on-line travel agency that offered webfares. Going outside the system to look for webfares and booking webfares through Orbitz or an airline website are not as efficient for travel agents.

A rule requiring airlines to offer all fares through all channels no longer appears necessary. Two of the systems—Sabre and Galileo—have gained access to the webfares of several major airlines by offering to reduce their booking fees in exchange for a commitment to make all publicly-available fares saleable through the system. Subscribers to Sabre and Galileo, which together have a 65 percent market share, now have access to the webfares offered by major airlines. The other two systems—Amadeus and Worldspan—should be able to obtain access to many webfares by making similar offers to participating airlines.

Requiring airlines to make all publicly-available fares saleable through each system would provide efficiency benefits for travel agents and make it easier for consumers to obtain comprehensive information on the fares and services available in each airline market. Consumers, however, would be unlikely to obtain all of the low fares now being offered by airlines. If airlines had to make all fares, including webfares, available through all distribution channels, no matter how costly, airlines would presumably cut back their offering of discount fares like webfares. Airlines are more willing to offer lower fares when they can use distribution channels that are less costly. Because the travel agency/CRS distribution channel is a relatively costly channel for airlines, requiring airlines to make low fares available through that channel would probably eliminate the low fares that can be economically offered only when doing so will save distribution costs. America West Comments at 32; United Reply Comments at 51–52.

Such a requirement would also unreasonably limit each airline's discretion on how it should best distribute its services. Airlines should be free to offer special fares and services through distribution channels that are less costly or more effective. Airlines in fact have long given selected distribution channels the ability to sell fares that other channels cannot sell. *See, e.g.*, 67 FR 69413; America West Comments at 33. Travel agencies have engaged in similar behavior. 67 FR 69413. Two successful low-fare U.S. airlines—Southwest and JetBlue—have chosen not to participate in all of the systems and instead to focus their marketing efforts on encouraging travelers to buy tickets directly from their reservations agents and websites. New entrant airlines like JetBlue will necessarily be small entities. Compelling those airlines to change their distribution strategies would be a radical departure from our past use of our section 411 authority.

Airlines, moreover, should be able to use their control over access to their webfares as a bargaining tool for getting better terms for CRS participation. Amadeus Comments at 10; American Comments at 27. The airlines' ability to deny access to their webfares has caused two of the systems, Sabre and Galileo, to give airlines booking fee reductions in exchange for the ability to sell their webfares.

The National Commission to Ensure Consumer Information and Choice in the Airline Industry, which had been charged by Congress to study travel agency access to webfares and related issues, issued a report that concluded that airlines should not be required to

make all fares available through all distribution channels. The Commission reasoned that such a requirement would substantially harm consumers, because airlines would stop offering some low webfares, would be contrary to the industry's use of different distribution channels to dispose of specific types of inventory, and would not solve the travel agency industry's basic problems, particularly the growing use of the Internet. ''Upheaval in Travel Distribution: Impact on Consumers and Travel Agents,'' National Commission to Ensure Consumer Information and Choice in the Airline Industry'' (November 13, 2002), at 56–58.

Furthermore, our authority under section 411 would not allow us to adopt a rule requiring airlines to make all fares—or even all webfares—available through all distribution channels. Such a rule accordingly is not an available alternative to the rules we are adopting. As shown, section 411 authorizes us to prohibit practices that violate the antitrust laws or antitrust principles. The antitrust laws generally do not prohibit firms from choosing to distribute their products and services through some outlets and not others. The antitrust laws do not restrict a firm's distribution choices, even if those choices undermine the ability of some distributors to stay in business, unless the firm's conduct unreasonably restricts competition. While section 411 gives us somewhat broader authority over business practices in the airline and airline distribution businesses, the record in this proceeding would not justify a finding that an airline's decision to limit the offering of some fares or services to selected distribution channels is an unfair method of competition.

(iii) *Relationships between Airlines and Systems.* The final rule will affect the systems' treatment of airlines by prohibiting display bias and certain types of contractual provisions that will tend to maintain the systems' market power and unreasonably deny airlines the ability to determine how to distribute their services. The final rule will not include such provisions of the existing rules as the rule prohibiting discriminatory booking fees.

The commenters on our initial regulatory flexibility analysis did not address the potential impact of our rule proposals on airlines that are small entities. The final rule, as indicated, will prohibit certain types of system conduct that could unduly prejudice the competitive position of some airlines and deny them a reasonable opportunity to determine how best to distribute their services. These provisions will give smaller airlines more choice. The final rule will also maintain the rules prohibiting display bias. These provisions should benefit participating airlines, particularly smaller airlines. At the same time, we are not readopting other provisions, such as the prohibition against differential booking fees, which could protect smaller airlines against potential system practices that might undermine the competitive position of individual airlines. As discussed earlier in this rule, we have concluded that the record in this proceeding and the limits of our authority under section 411 would not allow us to readopt those rules. In particular, the record would not justify a finding that a system would be engaged in an unfair method of competition if it charged some airlines higher fees than those paid by other airlines.

The earlier discussion in this document explains the overall basis for our decision to bar the two types of unreasonably restrictive clauses in contracts between airlines and systems. These rule provisions will impose no burden or restriction on airlines. These provisions will benefit airlines that are small entities, because the provisions will prevent system practices that would deny an airline the ability to choose the level of service that it will buy from each system and to choose which distribution channels (and which systems, if any) will have access to its most attractive fares, including its webfares. Airlines could potentially reduce their distribution costs if they could choose to buy a lower level of service in one system without being compelled by a parity clause to pay for a higher level of service in that system. Similarly, an airline could encourage travellers to use lower-cost distribution channels, which would lower its distribution costs, if it could reserve attractive fares for the lower-cost channels rather then be required by contract to make the same fares available for sale through travel agents using a system, which tends to be a higher-cost method of distribution. Of course, airlines may bargain for lower CRS fees by agreeing to make all of their fares available for sale through a system and by accepting parity clauses. To the extent that systems may have market power and could therefore impose unreasonably restrictive terms for system participation if not barred from doing so, such system practices would be more likely to harm smaller airlines than larger airlines.

(iv) *Prohibition of Display Bias.* The final rule will maintain the existing prohibitions against display bias for six months. Maintaining the prohibition against display bias will enable travel agents to operate more efficiently and give airlines a better opportunity to compete on the basis of the relative price and quality of their services. The six-month period will facilitate an orderly transition to complete deregulation.

Immediately ending the prohibition against display bias would enable systems to sell bias—preferential display positions—to individual airlines. While an airline's purchase of bias would enable that airline to obtain more bookings, even if rival airlines offered more attractive service or better fares, the airline would incur the cost of buying the bias, which would increase its total expenses. Moreover, allowing systems to sell preferential display positions could increase the airlines' aggregate expenses while not generating increased traffic. Display bias could benefit larger airlines at the expense of smaller airlines, because larger airlines could have additional resources for purchasing bias, and operate route systems of greater scope.

Some airlines and travel agency commenters urge us to broaden the rule against display bias by prohibiting systems from displaying a single service under multiple airline codes. We have determined not to adopt that proposal. The multiple display of code-share services for a single flight can put competing airline services at a disadvantage by lowering their position in a system's display. Code-sharing arrangements generally involve at least one large airline. However, the arrangements typically involve smaller airlines as well, such as commuter airlines serving smaller communities from a major airline's hubs or airlines like Alaska that have entered into code-share agreements with larger airlines. Two of the systems—Sabre and Amadeus—already limit the display of code-share services, and the other two systems could do so if they wish. Because the systems no longer are owned or controlled by U.S. airlines, they should have an incentive to limit the display of code-share flights if travel agents consider the multiple listings of a single service under different codes to reduce the value of the display.

(c) *Description of Small Entities To Which the Rule Will Apply.* Our final rule will directly regulate the systems' practices in several respects, but none of the systems is a small entity.

Most U.S. airlines are small entities, and our final rule will bar systems from imposing certain types of contract requirements on participating airlines. The statistics given us by the Small Business Administration (''SBA'')

indicate that there are 383 small entities that are U.S. passenger airlines out of a total of 397 U.S. passenger airlines. These rule provisions will benefit small airlines, as will the prohibition against display bias.

The rule will not apply to any other small entities. The rule will indirectly affect travel agencies, most of which are small entities, primarily because the rule will continue to prohibit display bias, a practice that decreases the efficiency of travel agency operations and the ability of travel agents to select the airline services that best meet their customers' needs. The final rule maintains none of the existing rules regulating contracts between systems and subscribers. The SBA has concluded that less than 500 travel agencies are not small entities. In 2001, there were 18,425 travel agencies, of which 117 had annual airline ticket sales that exceeded $50 million while 1,015 had annual airline ticket sales between $5 million and $50 million and the remaining 17,293 had annual airline ticket sales of less than $5 million. ''Upheaval in Travel Distribution: Impact on Consumers and Travel Agents,'' National Commission to Ensure Consumer Information and Choice in the Airline Industry'' (November 13, 2002), at 113.

The NFIB Legal Foundation suggests that we should consider the interests of small businesses as consumers of air transportation, particularly because many of them rely on travel agents for researching and booking air transportation. NFIB Legal Foundation Comments at 2. We expect that our final rule will encourage more competition in the airline and airline distribution businesses, which will benefit consumers. The Regulatory Flexibility Act, however, requires a final regulatory flexibility statement only insofar as the agency rule directly regulates small entities. *American Trucking Ass'ns* v. *U.S. EPA,* 175 F.3d 1027, 1043–1045 (D.C. Cir. 1999), *rev'd on other grounds,* 531 U.S. 457 (2001); *Motor & Equipment Mfrs. Ass'n* v. *Nichols,* 142 F.3d 449, 467 (D.C. Cir. 1998); *United Distribution Companies* v. *FERC,* 88 F.3d 1105, 1170 (D.C. Cir. 1996); *Mid-Tex Electric Cooperative* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985). No additional analysis is therefore required by the Regulatory Flexibility Act on the possible impact on consumers, but, as noted, we expect that the final rule will benefit consumers.

(d) *Reporting, Recordkeeping, and Other Compliance Requirements.* Our final rule contains no direct reporting, record-keeping, or other compliance requirements that would affect small entities. There are no other federal rules that duplicate, overlap, or conflict with our proposed rules.

(e) *Steps Taken to Minimize the Significant Economic Impact.* Our discussion above of the significant issues raised by the public comments and our response to those comments explains why we are adopting the final rule rather than the other rule proposals suggested in our notice of proposed rulemaking and the comments. As stated, our final rule will have no direct economic impact on any small entities, except small airlines, because the final rule regulates only the systems' displays and certain features of their contracts with participating airlines. The final rule will impose no direct regulatory requirements on airlines that are small entities (or on travel agencies or other firms that are small entities). We have found, as discussed above, that the rule's direct economic impact on airlines should be beneficial. We have considered as a matter of overall economic policy whether we should adopt fewer rules, or rules that would impose fewer restrictions on the systems' operations. Because the impact on small entities should be beneficial, we have not needed to whether alternatives are available that would minimize the rule's impact on the small entities affected by the rule, the smaller airlines. The final rule contains no provision regulating the systems' relationships with travel agencies. The final rule will indirectly affect small entities, because we are not readopting most of the existing rules governing the systems' relationships with participating airlines or any of the current rules governing subscriber contracts.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law. 104–121, we want to assist small entities in understanding the rule so that they can better evaluate its effects on them and take it into account in operating their businesses. If the rule affects your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or requirements, please consult Thomas Ray at (202) 366–4731.

Paperwork Reduction Act

These rules contain no collection-of-information requirements subject to the Paperwork Reduction Act, Public Law 96–511, 44 U.S.C. Chapter 35. *See* 57 FR at 43834.

Federalism Implications

These rules will have no substantial direct effects 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. Therefore, in accordance with Executive Order 13132, dated August 4, 1999, we have determined that the rules do not present sufficient federalism implications to warrant consultations with State and local governments.

Taking of Private Property

These rules will not effect a taking or private property or otherwise have taking implications under Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

These rules meet applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed these rules under Executive Order 13045, Protection of Children from Environmental Heath Risks and Safety Risks. These rules do not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Consultation and Coordination With Tribal Governments.

These rules will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Therefore, they are exempt from the consultation requirements of Executive Order 13175. No tribal implications were identified during the comment period.

Energy Effects

We have analyzed these rules under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that they are not classified as a ''significant energy action'' under that order because they are a ''significant regulatory action'' under Executive Order 12866 and would not have a significant adverse effect on the supply, distribution, or use of energy.

Environment

These rules will have no significant impact on the environment. Therefore, an Environmental Impact Statement is

not required under the National Environmental Policy Act of 1969.

List of Subjects in 14 CFR Part 255

Air carriers, Antitrust, Consumer protection, Reporting and recordkeeping requirements, Travel agents.

■ 1. Accordingly the Department revises 14 CFR Part 255 to read as follows:

PART 255—AIRLINE COMPUTER RESERVATIONS SYSTEMS

Sec.

Authority: 49 U.S.C. 40101, 40102, 40105, 40113, 41712.

§ 255.1. Purpose.

(a) The purpose of this part is to set forth requirements for the operation of computer reservations systems used by travel agents and certain related air carrier distribution practices so as to prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation and the sale of air transportation.

(b) Nothing in this part operates to exempt any person from the operation of the antitrust laws set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12).

§ 255.2. Applicability.

This part applies to firms that operate computerized reservations systems for travel agents in the United States, and to the sale in the United States of interstate, overseas, and foreign air transportation through such systems.

§ 255.3. Definitions.

''Availability'' means information provided in displays with respect to the seats a carrier holds out as available for sale on a particular flight.

''Carrier'' means any air carrier, any foreign air carrier, and any commuter air carrier, as defined in 49 U.S.C. 40102(3), 49 U.S.C. 40102(22), and 14 CFR 298.2(f), respectively, that is engaged directly in the operation of aircraft in passenger air transportation.

''Display'' means the system's presentation of carrier schedules, fares, rules or availability to a subscriber by means of a computer terminal.

''Integrated display'' means any display that includes the schedules, fares, rules, or availability of all or a significant proportion of the system's participating carriers.

''On-time performance code'' means a single-character code supplied by a carrier to the system in accordance with the provisions of 14 CFR Part 234 that reflects the monthly on-time performance history of a nonstop flight or one-stop or multi-stop single plane operation held out by the carrier in a CRS.

''Participating carrier'' means a carrier that has an agreement with a system for display of its schedules, fares, or seat availability, or for the making of reservations or issuance of tickets through a system.

''Subscriber'' means a ticket agent, as defined in 49 U.S.C. 40102(40), that holds itself out as a source of information about, or reservations for, the air transportation industry and that uses a system.

''System'' means a computerized reservations system offered to subscribers for use in the United States that contains information about schedules, fares, rules or availability of carriers and provides subscribers with the ability to make reservations, if it charges any carrier a fee for system services. It does not mean direct connections between a ticket agent and the internal reservations systems of individual carriers.

§ 255.4 Display of information.

(a) All systems shall provide at least one integrated display that includes the schedules, fares, rules, and availability of all participating carriers in accordance with the provisions of this section. This display shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other displays maintained by the system vendor. No system shall make available to subscribers any integrated display unless that display complies with the requirements of this section.

(1) Each system must offer an integrated display that uses the same editing and ranking criteria for both on-line and interline connections and does not give on-line connections a system-imposed preference over interline connections. This display shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other display maintained by the system vendor.

(2) Each integrated display offered by a system must either use elapsed time as a significant factor in selecting service options from the database or give single-plane flights a preference over connecting services in ranking services in displays.

(b) In ordering the information contained in an integrated display, systems shall not use any factors directly or indirectly relating to carrier identity.

(1) Systems may order the display of information on the basis of any service criteria that do not reflect carrier identity and that are consistently applied to all carriers and to all markets.

(2) When a flight involves a change of aircraft at a point before the final destination, the display shall indicate that passengers on the flight will change from one aircraft to another.

(3) Each system shall provide to any person upon request the current criteria used in editing and ordering flights for the integrated displays and the weight given to each criterion and the specifications used by the system's programmers in constructing the algorithm.

(c) Systems shall not use any factors directly or indirectly relating to carrier identity in constructing the display of connecting flights in an integrated display.

(1) Systems shall select the connecting points (and double connect points) to be used in the construction of connecting flights for each city pair on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers and to all markets.

(2) Systems shall select connecting flights for inclusion (''edit'') on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers.

(3) Systems shall provide to any person upon request current information on:

(i) All connecting points and double connect points used for each market;

(ii) All criteria used to select connecting points and double connect points;

(iii) All criteria used to ''edit'' connecting flights; and

(iv) The weight given to each criterion in paragraphs (c)(3)(ii) and (iii) of this section.

(4) Participating carriers shall be entitled to request that a system use up to five connect points (and double connect points) in constructing connecting flights for the display of service in a market. The system may require participating carriers to use specified procedures for such requests, but no such procedures may be unreasonably burdensome, and any procedures required of participating carriers must be applied without

unreasonable discrimination between participating airlines.

(5) When a system selects connecting points and double connect points for use in constructing connecting flights it shall use at least fifteen points and six double connect points for each city-pair, except that a system may select fewer such connect or double connect points for a city-pair where:

(i) Fewer than fifteen connecting points and six double connect points meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The system has used all the points that meet those criteria, along with all additional connecting points and double connect points requested by participating carriers.

(6) If a system selects connecting points and double connect points for use in constructing connecting flights it shall use every point requested by a participating carrier up to the maximum number of points that the system can use. The system may use fewer than all the connect points requested by participating carriers to the extent that:

(i) Points requested by participating carriers do not meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The system has used all the points that meet those criteria.

(d) Each system shall apply the same standards of care and timeliness to loading information concerning every participating carrier. Each system shall display accurately information submitted by participating carriers. Each system shall provide to any person upon request all current data base update procedures and data formats.

(e) Systems shall use or display information concerning on-time performance of flights as follows:

(1) Within 10 days after receiving the information from participating carriers or third parties, each system shall include in all integrated schedule and availability displays the on-time performance code for each nonstop flight segment and one-stop or multi-stop single plane flight, for which a participating carrier provides a code.

(2) A system shall not use on-time flight performance as a ranking factor in ordering information contained in an integrated display.

(f) Each participating carrier shall ensure that complete and accurate information is provided each system in a form such that the system is able to display its flights in accordance with this section.

(g) A system may make available to subscribers the internal reservations system display of a participating carrier, provided that a subscriber and its employees may see any such display only by requesting it for a specific transaction.

§ 255.5 Contracts with participating carriers.

(a) No system may require a carrier to maintain any particular level of participation or buy any enhancements in its system on the basis of participation levels or enhancements selected by that carrier in any other foreign or domestic computerized reservations system, as a condition to participation in the system.

(b) No system may require any carrier as a condition to participation to provide it with fares that the carrier has chosen not to sell through that system.

§ 255.6 Exceptions.

The obligations of a system under § 255.4 shall not apply with respect to a carrier that refuses to enter into and comply with a participating airline contract with that system.

§ 255.7 Prohibition against Carrier Bias.

No carrier may induce or attempt to induce a system to create a display that would not comply with the requirements of § 255.4.

§ 255.8 Sunset Date.

Unless extended by a document published in the **Federal Register**, these rules shall terminate on July 31, 2004.

Issued in Washington, DC, on December 31, 2003.

Norman Y. Mineta,

Secretary of Transportation.

[FR Doc. 03–32338 Filed 12–31–03; 3:16 pm]

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