**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**14 CFR Parts 255 and 399**

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

**RIN 2105–AC65**

## Computer Reservations System (CRS) Regulations; Statements of General Policy

**AGENCY:** Office of the Secretary, Department of Transportation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department's rules governing airline computer reservations systems (''CRSs'' or ''systems'') obligate the Department to revisit the need for CRS rules. The Department initiated this proceeding to examine whether its existing CRS rules were still necessary and, if so, whether they should be modified. The Department believes that it may be possible to eliminate some of the rules in ways that may promote competition in the CRS business and that rules regulating the sale of airline service over the Internet appear unnecessary. The Department thus is asking for comments on proposals to reduce its regulations in ways that could give airlines more flexibility in bargaining with the systems. The Department tentatively is proposing to maintain some but not all of the existing rules. The Department is also proposing to review its Statements of General Policy to clarify the requirements for the disclosure of service fees by travel agencies.

**DATES:** Comments must be submitted by January 14, 2003. Reply comments must be submitted by February 13, 2003.

**ADDRESSES:** To make sure your comments and related material are not entered more than once in the docket, please submit them (marked with docket numbers OST–97–2881, OST–97–3014, and OST–98–4775) by only one of the following means:

(1) By mail to the Docket Management Facility, U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001.

(2) By hand delivery to room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(3) Electronically through the Web Site for the Docket Management System at *http://dms.dot.gov.* Comments must be filed in Dockets OST–97–2881, OST–97–3014, and OST–98–4775, U.S. Department of Transportation, 400 7th St. SW., Washington, DC 20590. Late filed comments will be considered to the extent possible.

Due to security procedures in effect since October 2001 on mail deliveries, mail received through the Postal Service may be subject to delays. Commenters should consider using an express mail firm to ensure the timely filing of any comments not submitted electronically or by hand.

### Electronic Access

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**FOR FURTHER INFORMATION CONTACT:** Thomas Ray, Office of the General Counsel, 400 Seventh St. SW., Washington, DC 20590, (202) 366–4731.

**SUPPLEMENTARY INFORMATION:**

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### Glossary

ACAA Air Carrier Association of America, a low-fare airline trade association

Airline system A system owned or controlled by one or more airlines

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

E-fares (or webfares) Discount fares offered by an airline usually only either on its website or on the airline's website and through one or more on-line travel agencies

IATA International Air Transport Association

ITSA Interactive Travel Services Association
National Commission National Commission to Ensure Consumer Information and Choice in the Airline Industry
Network airlines The large airlines that operate hub-and-spoke route systems
Non-airline system A system that is neither owned nor controlled by any airline
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 required a participating airline to buy at least as high a level of service from the system as it did from any other system
Productivity pricing Pricing formula used in subscriber contracts that enables the subscriber to obtain lower CRS fees or other financial benefits from a system if the travel agency meets minimum monthly booking quotas established by the contract
Screen padding Excessive listings of the same flight under different airline codes
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

**A. Introduction**

The Department's existing rules governing computer reservations systems (the ''CRSs'' or ''systems'') obligate it to reexamine the need for those rules. Such a reexamination is particularly appropriate at this time due to two developments that may enable us to reduce our regulation of the CRS business. Those developments are the growing role of the Internet in airline distribution and the diminishing airline ownership of the systems.

Historically travel agencies have primarily relied on the systems to investigate what airline services are available, to make bookings, and to issue tickets (although the systems now are also commonly called global distribution systems, or GDSs, we will continue to refer to them as CRSs). Each system was originally developed by an airline for the travel agencies' use. Since travel agencies traditionally have sold most airline tickets, 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 to travel agents that gave an undue preference to the services operated by the owner airlines.

The Civil Aeronautics Board (''the Board'') therefore adopted rules governing the systems operated in the United States. 49 FR 32540 (August 15, 1984). After we took over the Board's responsibility for economic regulation in the airline industry, we reexamined the rules and readopted them with changes in 1992 based on the industry circumstances at that time. 14 CFR Part 255 adopted by 57 FR 43780 (September 22, 1992). Our rules contained a sunset date, originally December 31, 1997, to ensure that we would reexamine the need for the rules and their effectiveness. We are carrying out that task in this proceeding. Our staff has also been informally studying CRS issues and other developments in airline distribution, including the Internet's impact during the past few years. *See* 65 FR 45551, 45555 (July 24, 2000).

We began this proceeding by issuing an Advance Notice of Proposed Rulemaking on those issues. 62 FR 47606 (September 10, 1997). We later issued a Supplemental Advance Notice of Proposed Rulemaking asking interested persons to update their comments, to comment on the impact, if any, of the recent changes in the systems' ownership and control, and to comment on whether any of the rules should be applied to the distribution of airline services over the Internet. 65 FR 45551 (July 24, 2000). We have extended the rules' sunset date, most recently to March 31, 2003, to ensure that they would remain in effect until we complete our reexamination. 67 FR 14846 (March 28, 2002).

In this proceeding we have received comments from the four systems, most of the U.S. airlines using large jet aircraft, a number of foreign airlines, many travel agency parties, and other persons interested in the issues, including the Consumers Union and the European Union (in referring to the commenters, we will use their common names, for example, Alaska, United and American Express, rather than Alaska Airlines, United Airlines, and American Express Travel Related Services Company).

On the first major issue—whether the rules should be maintained—a number of parties, primarily smaller airlines and travel agencies, contend that the rules remain necessary to protect airline competition and consumers. These commenters disagree over which rules, if any, should be strengthened or revised.

In their written comments or in meetings with OMB, Orbitz and the major airlines—American, United, Delta, Northwest, and Continental—have contended that the rules are no longer necessary, especially with regard to those rules requiring airlines with system ownership interests to participate in all systems and prohibiting discriminatory booking fees.

The second issue—whether the rules should govern airline distribution through the Internet—generated more disagreement among the parties. A number of parties urge us to prevent on-line travel agencies from providing biased information, and many contend that rules preventing websites operated by two or more airlines from engaging in anticompetitive conduct are necessary. Other parties argue that any rules governing Internet operations would be unjustified.

After we began this proceeding, some parties asked us to resolve specific issues in separate proceedings that would be completed before we made a final decision in this rulemaking. America West Airlines filed a petition for rulemaking on booking fee issues, Docket OST–97–3014, and the Association of Retail Travel Agents filed a rulemaking petition on certain travel agency contract issues, Docket OST–98–4775. Amadeus Global Travel Distribution filed a petition asking that we interpret the existing rules as prohibiting the tying of a travel agency's access to an airline's corporate discount fares to the travel agency's choice of the CRS affiliated with that airline, Docket OST–99–5888. We have included the issues raised by these three petitions in this proceeding. The discussion in this notice also relies on the comments submitted in response to our last proposal to extend the current rules' sunset date, 67 FR 71000 (February 15, 2002), in Docket OST–2002–11577 and discusses ASTA's request in the proceeding for emergency relief on two issues, the systems' use of a pricing structure in their travel agency contracts that keeps travel agents from using the Internet for bookings and the systems' sale to airlines of detailed data on bookings made by individual travel agencies.

The creation of Orbitz, the on-line travel agency owned by the five largest U.S. airlines, generated proposals in this proceeding for rule amendments that would regulate Orbitz' operations. We also received requests to investigate Orbitz and force it and its owner airlines to abandon practices that assertedly would reduce competition in the airline

and airline distribution industries. The controversy over Orbitz led us to investigate it informally before it began operations to see whether its business plans would reduce competition in the airline and airline distribution businesses. We decided then that we did not have a basis for preventing Orbitz from launching its service or requiring it to change its business plans. *See* Letter dated April 13, 2001, from McDermott and Podberesky to Katz. We began a further investigation of Orbitz earlier this year and submitted a report to Congress on our monitoring of Orbitz thus far. The report did not reach any definitive conclusions, in part because of the continuing changes in the on-line distribution business, and in part because the Department of Justice has not concluded its own investigation into Orbitz. ''Report to Congress: Efforts to Monitor Orbitz,'' Office of Aviation & International Affairs (June 27, 2002).

In addition, Orbitz' plans for giving consumers notice of its $5 fee for buying airline tickets required us to reexamine our rules on travel agency advertisements of airfares. We allowed Orbitz to carry out its plans, subject to several conditions, but stated that we would reexamine our standards for the disclosure of such travel agency fees. Order 2001–12–7 (December 7, 2001). We are considering that issue in this proceeding.

**B. Summary of Proposed Rules**

In this rulemaking we must decide whether CRS practices still require regulation and, if so, which regulations are necessary, in light of the substantial changes in airline distribution and system ownership since our last reexamination of the rules. We seek comments on whether some of the rules could be eliminated or modified to create more scope for competitive market forces. We are in particular asking for comments on proposals to reduce regulations in ways that could give airlines more flexibility in bargaining with the systems. We are proposing not to adopt regulations covering the sale of airline services through the Internet.

We fully recognize the importance of the on-going changes in airline distribution, particularly the growing importance of the Internet as a vehicle for selling airline tickets. These developments may make these rules unnecessary in the future. It may be that the continuing developments in airline distribution have already given airlines additional bargaining leverage with the systems. Several airlines have argued that the elimination of our mandatory participation rule and the rule barring systems from charging airlines discriminatory fees could enable airlines to bargain for better terms for system participation. While the record appears to suggest that the systems continue to have market power, it may be that the airlines would have some ability to obtain better participation terms through bargaining. We are therefore seeking comments on proposals to eliminate the mandatory participation rule and to end the rule against discriminatory booking fees.

At this time, it seems necessary to maintain at least some rules to prevent practices by firms with apparent market power that would reduce competition and the adoption of alternatives to the systems. We are therefore seeking comment on a tentative proposal to maintain some of the CRS rules and to apply them to all systems, whether or not owned or controlled by airlines. Despite important changes in the industry, there is evidence that each of the systems continues to have market power against most airlines that could be used to distort airline competition and competition in the business of electronically providing airline information and booking capabilities to travel agents. The systems also still appear to have the ability to engage in practices that would mislead travel agents and their customers about the availability, price, and quality of airline service options.

Nevertheless, given that there may be costs associated with maintaining the rules and that the rules may not be effective enough in promoting competition to warrant these costs, we seek comment on the possible benefits versus costs of sunset in March 2003. Specific discussion about the feasibility and costs of transition associated with full and immediate sunset in March 2003 would be helpful. We also seek views on whether this potential for bias and possible prejudicial conduct are sufficient to justify maintaining rules as proposed in this notice.

As was true in our last rulemaking, we are additionally concerned about system practices that seem unreasonably to keep airlines and travel agencies from using alternatives to the systems. These kinds of practices would drive up airline costs, keep travel agencies from using the most efficient means of obtaining information and making bookings, and discourage other firms from developing new technology that could replace the systems' services. We also believe that the large airlines' access to detailed data on each travel agency's route-by-route bookings on individual airlines could reduce competition in the airline industry, particularly by prejudicing the competitive position of the low-fare new entrant airlines. We are therefore proposing rules which would prevent all such practices. In developing our proposals we sought ways to enable market forces to work more effectively in the CRS business, to avoid potentially burdensome regulations, and to allow airline distribution practices to develop in ways that may eliminate the need for the rules.

As stated above, we are convinced that continuing changes in the airline and CRS businesses will likely require another examination of the need for the rules and their effectiveness in several years, if we ultimately decide in this proceeding to readopt the rules, with or without revisions. We will monitor industry developments closely and conduct further proceedings as necessary.

In addition, it may be that the continuing developments in airline distribution have given airlines more bargaining leverage with the systems than has been thought. Several airlines have argued that the elimination of our mandatory participation rule and the rule barring systems from charging airlines discriminatory fees could enable airlines to bargain for better terms for system participation. While the record suggests that the systems may continue to have substantial market power, it may be that the airlines would have some ability to obtain better participation terms through bargaining. We are therefore seeking comments on proposals to eliminate the mandatory participation rule and to ending the rule against discriminatory booking fees.

We have tentatively determined at this time that the rules should not be extended to cover distribution practices by airlines and travel agencies on the Internet. Such regulation seems unnecessary at this time. If on-line agencies engage in deceptive practices that harm consumers, we will consider taking action under our enforcement authority. As stated above, we have been informally investigating allegations that Orbitz and its owner airlines are engaged in anticompetitive conduct and if necessary will take action against them under our enforcement authority.

The findings and conclusions set forth in this notice are tentative. We have not made a final decision on any of the proposals, including the question of whether CRS regulations remain necessary. We ask the parties to submit comments that thoroughly discuss the factual and policy issues raised by our proposals. As to all proposals the parties should provide detailed information on whether the rule would be necessary

and beneficial and estimates quantifying its likely benefits and costs.

Comments will be due sixty days after publication of this notice, and reply comments will be due thirty days thereafter. After considering the comments, we will issue a final rule.

**C. Procedural Issues**

As we have done in all of our CRS rulemakings, we are following the notice-and-comment procedures established by the Administrative Procedure Act for informal rulemakings. 57 FR 43792; 62 FR 59799–59800. These informal rulemaking procedures will give the parties a fair opportunity to present their evidence and policy and legal arguments and will enable us to resolve the issues rationally and efficiently.

We have largely based our proposals on the comments and the published sources cited in this notice. We have also relied on our informal investigations of airline distribution and the CRS business, as we planned to do. *See* 65 FR 45555. This notice reflects the staff's findings in its informal studies to the extent that we are using them. The parties now have the opportunity to comment on those findings as well as present any factual information and analysis of their own.

Some parties have filed motions for leave to file their comments or reply comments. We will grant all such motions.

As noted above, several parties have urged us to resolve some CRS issues before our completion of this proceeding. We have determined that it would be more efficient for us to consider all issues in this proceeding rather than decide issues piecemeal.

During the period since we issued our supplemental advance notice of proposed rulemaking, Department officials and members of the staff have met with a number of parties—Orbitz, Sabre and Travelocity, Expedia, Amadeus, Southwest, the Interactive Travel Services Association (''ITSA''), ASTA, and American Express—on the competitive and fairness questions presented by Orbitz that we have been informally investigating. These discussions focused on our informal investigation but also touched on issues involved in this proceeding. Before we issued the supplemental advance notice, Department officials and staff members met with ITSA, which asserted that the airlines were discriminating against on-line travel agencies. ITSA presented a written document on these issues, which it had filed in another docket, OST–97–3713, and Department officials agreed to have the document treated as a comment in this proceeding and to consider here the concerns expressed by ITSA.

Department officials and staff members also held discussions with other interested parties on airline distribution and CRS issues, including issues related to this rulemaking.

The staff met with the Air Carrier Association of America (''ACAA'') and several of its member airlines to discuss their concerns with the systems' sale of marketing and booking data, which the larger airlines allegedly use to deter travel agencies from booking customers on low-fare airline competitors. The ACAA group was particularly concerned with the availability of data on bookings made by individual travel agencies. The ACAA group contended that airlines do not need the marketing and booking data for route planning purposes and legitimate marketing needs in domestic markets, since their own booking data and data available from the Department provide adequate information for those purposes. The ACAA members assert that large airlines to use the domestic data to find out which travel agencies are selling significant amounts of travel on smaller airlines and that they put pressure on those agencies to discourage them from booking those airlines. The ACAA representatives viewed the marketing and booking data as probably useful for planning international routes and marketing strategies, since comparable information may not be readily available from other sources. They suggested that the rules be amended to allow systems to sell data only on airlines willing to have their data be made available for this purpose.

Staff members have also met with Lawton Roberts of Uniglobe Country Place Travel, a travel agency, to discuss the widespread concern among travel agencies about the airlines' refusal to allow all travel agencies to sell fares offered by airline websites and Orbitz.

While our draft notice of proposed rulemaking was under consideration by the Office of Management and Budget (''OMB'') pursuant to Executive Order 12866, Sabre, Cendant (Galileo), Worldspan, Amadeus, Orbitz, American, United, and Continental, among others, asked to meet with that agency. OMB met or held conference calls with the named parties. While we did not attend those meetings, OMB provided to us the written material presented at these meetings for inclusion in the docket for this proceeding. We are inviting commenters to address several of the ideas presented by the parties at those meetings.

**D. Background**

*1. The CRS Business*

Four systems are operating in the United States: Sabre, originally developed by American; Galileo, the product of a merger between United's Apollo system and a European system; Worldspan, the product of a merger between the PARS system owned by Northwest and TWA and Delta's DATAS II system; and Amadeus, a European firm that entered the United States by buying Continental's System One CRS. In 1999 the number of travel agency locations in the United States using each system was as follows: Sabre, 14, 961; Galileo, 11,840; Worldspan, 8,300; and Amadeus, 6,168. On a worldwide basis in 2001, Sabre was the largest, with about 65,000 locations, while Amadeus had 57,000, Galileo 45,000, and Worldspan 20,000. *Travel Distribution Report* (February 25, 2002) at 26; *Travel Distribution Report* (January 11, 2001) at 4. These figures do not precisely reflect market share, however, because one system may obtain substantially more bookings from its locations than other systems obtain from theirs. Sabre, for example, has claimed that it has a 48 percent share of CRS bookings in North America. *Travel Distribution Report* (May 31, 2001) at 2.

The systems have provided tremendous benefits for airlines, travel agencies, and consumers due to their efficiency. Transportation Research Board, *Entry and Competition in the U.S. Airline Industry* (1999) at 126. *See also* 57 FR 43781. Among other things, when an airline participating in a system enters a new city, the travel agents in that city that use that system will immediately learn of the airline's new service whenever they are checking service options for customers planning to travel on the route.

The practices followed by these systems have been important to airline competition and consumer welfare because of the travel agencies' dominant role in airline distribution and their reliance on CRSs to meet their customers' needs for advice and bookings. In 1999 travel agencies sold almost three-quarters of all airline tickets. Bear, Stearns & Co., ''Point, Click, Trip: An Introduction to the On-Line Travel Agency'' (April 2000) at 17. Almost every travel agent uses a system to investigate airline service options and make bookings for the agency's customers (a travel agency using a system is called a ''subscriber''). One survey reported that travel agencies made 93 percent of their domestic airline bookings and 81 percent of their international airline bookings through a

system in 1999. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 133. Travel agencies also use the systems to carry out back office functions like bookkeeping and recordkeeping. Both ''brick and mortar'' and on-line travel agencies depend on the systems, although Orbitz is planning to create direct connections between itself and many of its airline participants.

Travel agents have relied so much on the systems because they efficiently provide comprehensive information and booking capabilities on airlines and other travel suppliers. A CRS 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. A travel agent can compare the schedules and fares offered by different airlines and determine which would best meet a customer's needs. The agent can reserve a seat and issue a paper ticket or an E-ticket. While the systems formerly offered almost complete information on airline services, airlines now offer some low fares through their websites (and some on-line travel agencies) that they do not sell through any system. Airline transportation is the most important service sold through a system, but the systems also provide information and booking capabilities for rental cars, hotels, and other travel services. Travel agents usually access a system through computer terminals linked with the system's database.

Each system provides information and booking capabilities on the airlines and other travel suppliers that ''participate'' in the system, 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. Airlines typically either operate their internal systems themselves or arrange for another firm, often one of the systems, to operate it under contract.

Participation requires the airline to pay fees for each booking transaction (the fees paid by participating airlines and other travel suppliers 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 participating at a higher level of participation must pay higher booking fees. 62 FR 59784, 59785 (November 5, 1997).

In 2000 the average airline booking fee for the highest level of system service, the level used by the network airlines, was $3.54 per segment. Testimony of Inspector General Kenneth Mead before the Senate Commerce Committee, July 20, 2000, at 17. Sabre estimates that the network airlines' total booking fee costs equal about two percent of the revenue obtained through CRS bookings. Sabre Supp. Reply Comments at 36. Northwest has estimated that its booking fee costs in 2000 equaled 2.1 percent of its system passenger revenues. *Travel Distribution Report* (June 14, 2001) at 4. The systems usually increase their booking fees annually; Sabre, for example, raised its fees by about nine percent in 2001 and three percent in 2002. *Travel Distribution Report* (January 11, 2001) at 6; *Travel Distribution Report* (December 13, 2001) at 1.

The systems display information on computer screens. Since each screen can display only a limited number of flights, a system must use criteria for ranking the available flights. Display position is important, since travel agents are more likely to book the flights that are displayed first. 61 FR 42208, 42209 (August 14, 1996). The number of flight options available in most markets also requires the systems to edit their displays, since many options 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 have ranked flights in this type of display by listing all nonstop flights first, then listing one-stop flights and other direct flights, and ending with 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). 61 FR 42210–42211.

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

Corporate travel departments and consumers, not just travel agents, use the systems. A corporate travel department, which books travel for its company's employees, benefits from the systems' efficiencies and information. Corporate users can access a system through the Internet or by Intranet. *See, e.g.*, Sabre Comments at 4. Consumers using an on-line travel agency to obtain schedule and fare information and make bookings are indirectly accessing one of the systems; Travelocity uses Sabre as its booking engine, while Expedia uses Worldspan, for example.

The fees charged airlines were not effectively disciplined by competition and may have exceeded system costs by a significant amount. 56 FR 12586, 12595 (March 26, 1991).

In past years the fees paid by airlines and other travel suppliers accounted for about ninety percent of total system revenues, while the fees paid by travel agencies made up only ten percent of the total. 62 FR 59784, 59788 (November 5, 1997); Sabre Holdings 10–K reports for the years 1999 and 2000. The CRS business has economies of scale, so a system's profitability increases when travel agents use it for more bookings. *Study of Airline Computer Reservation Systems,* U.S. Dept. of Transportation (May 1988) at 24–25.

The systems have been able to maintain high booking fees, because most airlines have concluded that participation in each system is necessary. The systems accordingly have had little need to compete for airline participants. Almost every U.S. airline, including most of the low-fare airlines, participates in each of the systems.

Although four systems operate in the United States, each travel agency office has typically relied either exclusively or predominantly on one system. A 1996 survey reported that less than four percent of travel agency offices had more than one system. ASTA Comments at 19. Other commenters allege that few travel agency offices use more than one system. Alaska Supp. Reply at 6; Southwest Supp. Reply at 16. While the services offered by each system are comparable, using multiple systems could improve a travel agency's ability to serve its customers. Travel agents then could acquire more accurate and complete information on available airline flights, and the agencies' ability to use multiple systems would encourage the systems to compete more on the quality and range of their services. 57 FR 43797. Offsetting that factor, a travel agency's use of multiple systems can create some inefficiencies,

due to additional training needs and potential difficulties in keeping track of customer records. 56 FR 12607. Each system also offers inducements to travel agency customers to make most or all of their bookings on that system.

Travel agencies, unlike airlines, can usually choose which system to use. The systems' competition for travel agency customers has caused them to continuously improve the range and quality of services offered travel agencies. In addition, many large travel agencies obtain CRS services at little or no cost. Sabre has stated that competition among the systems for travel agency customers ''is particularly intense'' and that some systems ''aggressively pay economic incentives to travel agencies to obtain business.'' In addition, ''certain [Sabre] service contracts with significant subscribers contain booking fee productivity clauses and other provisions which allow subscribers to receive cash payments, and/or various amounts of additional equipment and other services from [Sabre] at no cost.'' Sabre Holdings 10–K Report for FiscalYear 2000 at 24, 37. Galileo has similarly stated that competition for travel agency customers is intense, that fees are often waived for travel agency customers, and that some obtain incentive payments. Galileo International 10–K Report for Fiscal Year 2000 at 5, 17. AAA and Apollo reportedly signed a five-year term contract that assumed that all AAA member clubs would use Apollo as their only system; AAA expected to earn $75 million from Apollo under the contract. *Travel Weekly* (September 25, 1997) at 46.

A system is willing to pay bonuses to capture a large agency's business in the expectation that it will capture all or almost all of the agency's business for a period of several years and thereby obtain a large and steady stream of airline booking fees. The large agencies have become more dependent on such payments due to the airlines' commission cuts. Sabre Holdings 10–K Report for Fiscal Year 2001 at 31. On the other hand, smaller travel agencies complain that they are overcharged for system services and forced to accept unreasonable contract terms. *See, e.g.*, ASTA Comments at 2–3, 10; ARTA Comments at 4–8; ARTA Emergency Petition. Furthermore, travel agencies located in cities dominated by one airline may feel compelled to use a system affiliated with that airline. These agencies depend on obtaining marketing benefits and access to corporate discount fares from the dominant airline to meet the needs and preferences of their customers. Large Agency Coalition Comments at 9–10.

*2. The Travel Agency Distribution System*

In the past the systems have been important because most airlines have depended on travel agencies for their distribution. Travel agencies have acted as agents for virtually all airlines and generally held themselves out to the public as sources of impartial advice on airline services and other travel services. 56 FR 12587. The travel agency system has traditionally provided an efficient means of distribution for most airlines. 57 FR 43782. As noted, in 1999 almost three-quarters of all airline tickets were sold by travel agencies, while only one-fourth of all bookings were made directly with an airline. Bear, Stearns & Co., ''Point, Click, Trip'' at 17. Even many low-fare airlines, the airlines that have tried hardest to distribute their tickets directly to consumers, have relied on travel agencies for a large share of their bookings. In the fourth quarter of 2001, AirTran, for example, obtained 33 percent of its bookings from travel agencies using a system. AirTran 10–K Report for fiscal year 2001 at 8.

Travel agencies historically derived most of their revenue from the commissions paid by airlines and other travel suppliers. Due to the airlines' reductions in commissions in recent years, travel agencies began charging fees to their customers. Almost ninety percent of all travel agencies charge some fees. *Travel Distribution Report* (May 31, 2001); *Travel Weekly* (February 25, 2002) at 27. The fees average $13.21 per ticket. ''Web air fares unlevel the playing field,'' *Chicago Tribune* (February 16, 2002); ''Travel Agents Cry Foul over Internet Fare Deals,'' *Los Angeles Times* (February 16, 2002).

Travel agencies do not operate as franchisees of one or a few airlines. Transportation Research Board, *Entry and Competition in the U.S. Airline Industry* at 125. Individual airlines, however, encourage travel agencies to sell their services rather than their competitors' services. An airline will often offer travel agencies override commissions, a type of incentive commission, that give a travel agency a larger commission on all of its bookings on the airline if the airline's share of the agency's total bookings (or total bookings in specific markets) exceeds a specified percentage, which is often related to the airline's share of all travel agency bookings in the agency's area. Since override commissions enable the agency to obtain a higher commission rate on all its bookings with an airline, the airline dominating a metropolitan area can use override commissions more effectively than can its competitors. Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, U.S. Department of Transportation, *Airline Marketing Practices* (February 1990) at 28.

Beginning in March 2002, the major airlines stopped paying base commissions to travel agencies in the United States and switched entirely to the use of incentive commissions. The incentive commission programs developed by these airlines, and the lack of any alternative pay from those carriers, will likely strengthen the travel agencies' interest in meeting the performance standards set by the airlines.

As discussed below in connection with proposals to bar travel agencies from creating biased CRS displays, some industry commentators and the Department's Inspector General have expressed a concern that override commissions can induce travel agencies to recommend airline services that will increase their commission payments rather than the services that best meet the needs of their customers. Office of the Inspector General, U.S. Dept. of Transportation, ''Report on Travel Agent Commission Overrides'' (March 2, 1999). The airlines' efforts to encourage travel agencies to give each airline a larger share of their business affect our analysis of several issues, including the systems' sale of marketing and booking data, but we are not addressing the override commission issue in this proceeding.

Not all travel agencies obtain override commission arrangements. In other respects as well, airlines have traditionally not treated all travel agencies the same since deregulation. A travel agency with a preferred supplier relationship with an airline can obtain marketing benefits, such as the ability to waive advance purchase restrictions and to book important clients on oversold flights, that are not available to other agencies. *Airline Marketing Practices* at 26.

*3. International CRS Operations*

Although U.S. airlines developed the first systems, the CRS business soon became international. European airlines, for example, created Amadeus, and Galileo is the product of the merger between United's Apollo system and the Galileo system developed by several European airlines. Sabre and Worldspan have no foreign airline owners but both compete for travel agency customers overseas.

The importance of CRS operations overseas has led other governmental entities like the European Union and Canada to adopt rules regulating the CRS business. *See, e.g.*, European Commission Comments. A number of the parties in this proceeding, primarily the European Union and several foreign airlines, have urged us to harmonize our rules with the rules applicable in the European Union.

CRS operations abroad concern the United States, since foreign systems and their owners could engage in practices that would prejudice the competitive position of U.S. airlines in international markets or the ability of U.S. systems to obtain travel agency customers in foreign countries. The United States accordingly 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.

In addition, the United States has taken action in some cases to ensure that U.S. systems are not denied access to foreign markets by discriminatory conduct by foreign airlines and other travel suppliers that own or market a competing system. *See, e.g.*, Orders 88–7–11 (July 8, 1988) (American complaint against British Airways) and 90–6–21 (June 8, 1990) (American complaint against Iberia).

Congress has stated its interest in preventing discriminatory practices by systems and affiliated airlines that would distort international competition. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106–181 (April 5, 2000), includes a provision, section 741, that expanded our authority under 49 U.S.C. 41310 to take countermeasures against an unjustifiably discriminatory or anticompetitive practice against a U.S. CRS or the imposition of unjustifiable restrictions on access by a U.S. system to a foreign market.

*4. Our Readoption of CRS Rules*

The CRS rules adopted by the Civil Aeronautics Board (''the Board'') in 1984 included an expiration date to ensure that we would reexamine the rules after they had been in force for several years. We conducted such a reexamination and, on the basis of the systems' continuing ownership by airlines and the airlines' continuing reliance on travel agencies for distribution, determined in 1992 that CRS rules remained necessary to safeguard 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. 57 FR 43783–43787, 43794. We reasoned as well that airlines had no practical ability to induce travel agencies to use systems charging lower fees, and we noted that travel agencies did not choose systems on the basis of their treatment of airlines. 57 FR 43831; 56 FR 12586, 12594–12595.

Our revised rules governed the operations of systems owned or marketed by an airline or airline affiliate insofar as the system was providing services to travel agencies. In adopting these rules, we relied on our authority under section 411 of the Federal Aviation Act, later recodified as 49 U.S.C. 41712, to prohibit unfair and deceptive practices and unfair methods of competition in air transportation and the sale of air transportation (we will refer to the statue by its traditional name, section 411). 57 FR 43789–43791.

One of the principal provisions that we readopted barred each system from using carrier identity as a factor for editing and ranking services. We did not, however, prescribe a display algorithm (the set of criteria for constructing displays), so each system was free to choose its own criteria for editing and ranking airline services. Secondly, the rules prohibited systems from charging discriminatory booking fees but did not set limits on the level of fees. Thirdly, each system had to make available to any participating airline the booking and marketing data generated by it from bookings for domestic travel made through the system. Finally, the rules proscribed certain types of restrictive contract provisions that unreasonably limited the travel agencies' ability to switch systems or use more than one system. For example, the rules limited the maximum length of subscriber contracts.

We modified the rules in several respects to strengthen them. Among other things, our revised rules required each system to provide non-owner airlines with information and booking capabilities as accurate and reliable as those provided the owner airline. We gave 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 used terminals provided by that system; we adopted this rule in part to spur the development of alternative ways of providing airline information and booking capabilities to travel agencies. We also required 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). We sought to prevent U.S. airlines from attempting to discourage travel agencies from choosing a competing system by limiting their participation in systems owned by other airlines.

We hoped that our revisions would enable airlines to develop alternative means of access to travel agencies and thereby begin to bring market forces to bear on the systems' terms for airline participation. We avoided rules that involved detailed management of system operations. 57 FR 43781.

We later adopted two additional rules to prevent system practices that distorted competition in the airline and CRS businesses. One rule 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 imposed by most systems on airline participants 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. While almost all airlines must participate in each system for economic reasons, many airlines do not need to participate at the more expensive higher levels.

The second rule strengthened the rules prohibiting 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 acted in large part because of concerns that United had caused Galileo to create displays that prejudiced United's competitors. 62 FR 63840–63841.

*5. Major Developments Since the Last Overall Rulemaking*

As we stated in our supplemental advance notice of proposed rulemaking, our decision in this proceeding must take into account two major developments in the CRS business and airline distribution that have occurred in recent years, the airlines' shrinking ownership of the systems and the

growth of Internet usage. 65 FR 45556–45557.

As noted above, when we last reexamined the rules, one or more airlines or airline affiliates owned each of the systems. That is no longer true, although the systems without airline ownership still have ties to their former owners.

Sabre, the largest system, which American developed, is now a publicly-owned company. Most of Galileo's airline owners sold their stock to the public by the end of 2000, although United continued to own eighteen percent of Galileo's stock, Swissair eight percent, and five other airlines 1.5 percent. Galileo Supp. Comments at 2. Cendant, a firm that owns Avis and several hotel franchises, bought Galileo in exchange for stock and cash in early October 2001. United received Cendant stock in exchange for its Galileo stock but has sold all of those shares. United April 19, 2002, and February 1, 2002, Press Releases.

Amadeus, a European system, entered the U.S. market by acquiring System One, the system owned by Continental. Continental thereafter sold its Amadeus shares. Amadeus is now controlled by three foreign airlines, Lufthansa, Air France, and Iberia. The public, however, now holds a significant portion of Amadeus' stock.

Worldspan is still owned entirely by airlines and airline affiliates. Its U.S. airline owners are Delta, Northwest, and American, since American acquired TWA's Worldspan stock when it bought TWA's assets.

Although some systems are no longer owned by airlines, every system still has marketing ties with one or more airlines. American and Southwest market Sabre, and United provides some marketing support for Galileo. Amadeus Supp. Comments at 4–5. Since our rules by their terms apply to systems owned or marketed by airlines, 14 CFR 255.2, Sabre and Galileo as well as Amadeus and Worldspan are subject to the rules.

The other major development is the growing use of the Internet for airline distribution. The Internet has given airlines and other travel suppliers new ways to obtain bookings and inform consumers of their services and to do so at significantly lower cost. *See, e.g.*, Statement of A. Bradley Mims, Deputy Assistant Secretary for Aviation and International Affairs, U.S. Department of Transportation, before the Senate Commerce Committee (July 20, 2000); General Accounting Office, ''Effects of Changes in How Airline Tickets Are Sold'' (July 1999) at 13. A consulting firm estimated that Internet bookings would account for fourteen percent of all airline revenues in calendar year 2001. ''Web Sales of Airline Tickets Are Making Hefty Advances,'' *New York Times* (July 5, 2001).

Most U.S. airlines have websites, and many offer special discount fares (E-fares or webfares) and other benefits to travelers who book seats through the airline's website instead of another distribution channel. For most airlines, their own individual websites have become their cheapest available distribution channel. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 17–18.

While airlines initially offered their E-fares exclusively through their own websites, Delta allows travel agents to book its E-fares through its website for travel agencies, although such bookings are non-commissionable. *Travel Distribution Report* (March 22, 2001) at 9; Delta Comments on Proposed Extension at 6–7. Other airlines have also created websites where travel agents may book their discount fares. Many airlines have agreed to give Orbitz the ability to sell their E-fares in exchange for a rebate of part of the CRS booking fees paid on all of the airline's bookings made through Orbitz.

Travel agents can book Internet fares for their customers even if they are not offered through the system used by the travel agency or an airline website dedicated to travel agents. Some do so. ''Travel agents charting other routes to profit,'' *Philadelphia Inquirer* (March 27, 2002). When travel agents book such fares through an airline website created for consumers or Orbitz, they usually receive no commission and earn no credits towards the minimum monthly booking quota set by the systems' subscriber contracts that use productivity pricing. ''Web air fares unlevel the playing field,'' *Chicago Tribune* (February 16, 2002); ''Travel Agents Cry Foul over Internet Fare Deals,'' *Los Angeles Times* (February 16, 2002). In addition, searching several websites for E-fares is less efficient for travel agents, complicates a travel agency's task of preparing reports for corporate customers, and makes it harder for corporate travel managers to manage travel programs. Susan Parr Travel Comments; NBTA Comments on Proposed Extension at 2. Several firms and the systems themselves are developing software that will enable travel agents to quickly search for fares on multiple websites and systems, however. ''Fare game: ''Beat the agent''', Travel Weekly (March 4, 2002) at 6. Orbitz'' agreement with Aqua should enable travel agents to use a program allowing them to simultaneously see the display of fares offered by a system and the fares available through Orbitz, including E-fares. May 16, 2002, Orbitz press release.

The share of airline bookings produced by airline websites has been growing rapidly. Delta's on-line revenues in the March 2002 quarter were 64 percent higher than in the March 2001 quarter, and Delta expected to obtain fifteen percent of its tickets from its own website in 2002. Delta April 24, 2002, Press Release. The percentage of Alaska's bookings obtained from its website grew from 10 percent in 2000 to 16 percent in 2001. Alaska 10–K Report for the year 2001. Continental reportedly expects forty to fifty percent of its bookings to come from Internet sites, including its own, Orbitz, and Hotwire, by 2005 or 2006. *Travel Distribution Report* (June 14, 2001) at 4. Most of the network airlines, however, have been obtaining a smaller share of their bookings from their websites. Thus, while consumer use of American's website is growing rapidly, the website produced only an estimated three percent of the airline's revenues in the first quarter of 2001. *Aviation Daily* (July 2, 2001).

Some low-fare airlines already obtain a large share of their bookings from their websites. JetBlue obtained 44 percent of its sales from its website in 2001. JetBlue Registration Statement on Form S–1 (filed April 10, 2002) at 41–42. Southwest's website produced forty percent of the airline's revenues in 2001. Southwest Airlines 10–K Report for the year 2001. AirTran was obtaining over half of its bookings through the Internet by the end of 2001. January 29, 2002, AirTran Press Release. Frontier obtained 28 percent of its bookings in the quarter ended December 31, 2001, from its website, and Internet bookings from all sources made up 39 percent of its revenue in that quarter (the comparable figures for the December 31, 2000 quarter were six percent and fifteen percent). February 5, 2002, Frontier Press Release. The two major European low-fare airlines obtain a much larger share of their total sales from on-line bookings. Ryanair obtained 91 percent of its bookings from its website in January 2002, while EasyJet sells tickets only through its own reservations center and website, not through travel agencies. Ryanair February 4, 2002, Press Release; ''About Our Fares'' at *www.easyjet.com.*

Airlines have created Internet sites for use by travel agencies and corporate customers as well. Delta has websites for travel agencies and corporate customers. Employees of businesses that have corporate sales agreements with Delta can book the negotiated discount

fares through that website, and corporate travel managers can track the bookings made through the website. *Aviation Daily* (July 2, 2001).

Internet bookings made directly with an airline are less costly. Delta recently stated that the cost of bookings made through its own website is only one-fourth the cost of bookings made through a travel agency using a system. Statement of Scott Yohe before the National Commission to Ensure Consumer Information and Choice in the Airline Industry (the ''National Commission'') at 11. Similarly, according to a 1999 study, each booking made through traditional travel agencies cost America West $23, a booking made through an electronic travel agency cost $20, a booking made through the airline's reservations agents cost $13, and a booking made through the airline's website cost $6. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 17. Southwest states that a booking costs Southwest $10 when made through a travel agency, $5 when made through a Southwest reservations agent, and $1 when made through Southwest's website. Southwest Supp. Reply at 20.

Airlines have taken other steps to reduce their costs. Airlines encourage passengers to use E-tickets—electronic tickets—instead of paper tickets since E-tickets involve no printing costs and lower handling and processing costs than paper tickets, which are negotiable documents. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 8. Beginning in 1995 airlines also cut the travel agencies' base commissions several times, which led to a decline in the number of travel agencies; forced travel agencies to focus on other travel activities, such as cruise bookings, which are more remunerative; and caused most travel agencies to charge consumers fees for their services. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 6, 9–11. In March 2002 the major airlines eliminated base commissions entirely and began paying travel agencies only incentive commissions.

These developments have significantly reduced airline costs. Delta has stated that its customers' use of the Internet saved Delta $45 million in commissions and booking fees in 2000, when thirteen percent of its tickets were sold through the Internet. ''Web Sales of Airline Tickets Are Making Hefty Advances,'' *New York Times* (July 5, 2001). Similarly, while Alaska's passenger revenue increased by 6.9 percent from the first quarter of 2000 to the first quarter of 2001, its commission expense increased by only 1.9 percent since a smaller share of its bookings were being made by travel agents, 61.6 percent in the first quarter of 2001 compared to 65.9 percent in the first quarter of 2000. Alaska 10–Q Report for the quarter ended March 31, 2001. The GAO has estimated that the cuts in commissions lowered airline commission costs by about $4 billion between 1995 and 1998. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 6–8.

Travel agencies also now provide information and make bookings over the Internet. Many traditional travel agencies— ''brick and mortar'' agencies—have established websites for use by consumers. Other firms started business as on-line agencies. The two largest on-line travel agencies are Travelocity, owned by Sabre, and Expedia, developed by Microsoft. In addition to selling airline tickets as agents for the airlines, some on-line agencies also buy blocks of airline seats and hotel rooms at negotiated prices substantially below the supplier's published rates. Bear, Stearns, ''Point, Click, Trip,'' at 48, 49.

In addition, five major airlines—United, American, Delta, Northwest, and Continental—created Orbitz to compete in the on-line agency business. Orbitz is initially using Worldspan as its booking engine but will create direct links with many of the airlines participating in Orbitz. ''Et tu, Orbitz?'' *Travel Weekly* (March 4, 2002) at 6; Orbitz Supp. Comments at 35. Orbitz is offering airlines rebates on their booking fees if they agree, among other things, to give Orbitz access to all of their publicly-available fares, including their Internet fares. Orbitz Supp. Reply at 24–25. Orbitz'' plans for gaining access to these fares, which airlines initially at least did not allow other travel agencies to sell, and Orbitz'' control by five major airlines have generated substantial controversy.

If an airline refuses to allow Orbitz to sell all of its publicly-available fares, consumers can still book the airline if the airline participates in Worldspan, but the airline will not get a rebate on the CRS fees. Orbitz is unable to make bookings on those airlines, such as Southwest, that neither participate in Worldspan nor provide fare and availability information and booking capabilities to Orbitz through another channel.

Orbitz is currently operating as an on-line travel agency. Orbitz could make its services available to travel agencies for use in making airline bookings. Since it charges participating airlines a fee for such bookings, it would become a system subject to all of the rules applicable to the existing four systems if it offered its services to travel agencies. As noted, under Orbitz'' agreement with Aqua, the latter firm will develop a program that would enable travel agencies to access Orbitz'' displays and booking capabilities.

Other firms selling travel on-line have created new marketing strategies. Priceline operates a site that allows consumers to ''name their own price'' for airline seats; a consumer using Priceline, however, only learns which airline is operating the service and the routing and departure time for the trip after the consumer makes a bid and the bid is accepted by Priceline. While giving consumers an opportunity to bid on a ticket price, Priceline only sells seats obtained through negotiated deals with airlines and other suppliers. Airlines use Priceline for selling distressed inventory. Bear, Stearns, ''Point, Click, Trip,'' at 53–55. Several major airlines have created another website, Hotwire, which offers a service like Priceline. Unlike Priceline, Hotwire tells the consumer what the fare will be for the trip before the customer decides whether to buy the ticket; like Priceline, Hotwire does not disclose the name of the airline, the routing, and the departure time until the consumer accepts Hotwire's offered fare. In 2001 Priceline and other opaque sites accounted for about two percent of all airline bookings. ''Web Sales of Airline Tickets Are Making Hefty Advances,'' *New York Times* (July 5, 2001).

While the growing use of the Internet and other changes in distribution practices will likely make it harder for some ''brick-and-mortar'' travel agencies to remain in business, the travel agency industry will not disappear. A Sabre official has predicted that travel agencies will account for 65 percent of all airline bookings in 2005 (45 percent by traditional travel agencies and 20 percent by travel agency websites). ''Sabre: Agents could retain 65% of air sales by 2005,'' *Travel Weekly* (April 3, 2000) at 10.

Travel agents provide services that benefit many consumers. Many travelers value the personal service provided by travel agents and their expertise with complex itineraries. ''Web Sales of Airline Tickets Are Making Hefty Advances,'' *New York Times* (July 5, 2001). A large proportion of the agencies' customers will probably continue to rely on ''brick-and-mortar'' agencies because they wish to have personal contact with a travel agent and will not use an Internet site for buying tickets. Bear, Stearns, ''Point, Click, Trip,'' at 17. Many consumers also prefer using a travel agency website

rather than an airline website since they believe that they are likely to get a better price from a travel agency website. April 17, 2000, PhoCusWright Press Release. In the past the GAO found that consumers were more likely to obtain the lowest available fare from a travel agent than from other sources of airline information. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 13. And travel agents can offer expert advice not easily available elsewhere (and use the Internet to reach customers interested in taking advantage of an agency's special expertise). *See, e.g.*, Travel Distribution Report (March 11, 2002) at 39.

While the recent continuing changes in airline distribution have provided substantial benefits for airlines (and consumers, when airlines pass on their cost savings), they may not have eliminated the need for CRS regulation, as we discuss next.

**E. Considerations That Support Maintaining CRS Rules**

In considering whether to readopt the rules with modifications, we must determine the extent to which our past findings remain valid, that is, whether the systems still have the power to distort airline competition and provide inaccurate or misleading information to consumers, and whether a system owned or controlled by an airline will have an incentive to use that power if not blocked by rules. The airlines' growing use of the Internet for distribution and the changes in the systems' ownership require us to reassess the validity of these past findings. We invite the parties to comment on possible alternatives that could reduce the extent of regulation and lead to a phase-out of the rules, as discussed below. In particular, we are proposing to end the mandatory participation rule and to end the ban against discriminatory booking fees. These changes could enable airlines to negotiate for better terms for CRS participation.

When we last reexamined the rules, we thought that a system could prejudice the competitive position of disfavored airlines by biasing its displays so that their flights were omitted or displayed only after the flights of favored airlines, charging some airlines substantially higher fees than those paid by their competitors, or imposing participation terms that disadvantage some airlines, for example. We also found that, without rules, the systems and their owners would be likely to engage in practices meant to distort competition in the CRS business and to prevent airlines from using alternative electronic means of providing information and booking capabilities to travel agencies. We ask the parties to address the current validity of those concerns, particularly in view of the on-going developments in airline distribution.

When we reexamined the rules ten years ago, all of the systems were owned and controlled by one or more airlines or airline affiliates, and we relied on that fact in concluding that the CRS rules should be readopted. Since two of the systems are no longer owned and controlled by airlines, we have considered whether our rules should govern the practices of such a system (we will refer to systems that are not owned and controlled by airlines as ''non-airline systems'' and systems owned or controlled by airlines as ''airline systems''). We tentatively believe that non-airline systems may have market power over airlines and that rules preventing those systems as well as airline systems from engaging in anticompetitive or deceptive practices may be necessary. We ask the parties to comment on whether a non-airline system, despite the lack of airline control, might use its power to distort airline competition or mislead consumers and engage in practices that would unreasonably restrict the ability of airlines and travel agencies to use alternatives to the systems, thereby increasing airline costs (and thus the fares paid by consumers), if we do not regulate such systems.

In addition, the systems' willingness to sell data on the bookings made by individual travel agencies on each airline on a route-by-route basis and flight-by-flight basis, and to do so almost as soon as bookings are made, may give a large airline that dominates a metropolitan area power to take actions undermining the ability of competing airlines, particularly low-fare airlines, to continue serving that area. Among other things, the large airlines may use the data to pressure travel agencies in such a metropolitan area to stop booking travelers with competing airlines. Tentatively, therefore, we are proposing restrictions on the data that airlines may obtain from the systems.

*1. Overview*

Computer reservations system practices originally presented regulatory concerns because of the potential for consumer injury. *See* 49 FR 32540 (August 15, 1984). After reexamining the need for CRS rules in our last major rulemaking, we decided that the rules remained necessary in view of the systems' ownership by airlines and the structure of airline distribution at that time. At that time, we determined that market forces did not discipline the systems' price and terms for the services offered participating airlines. The systems' practices were not affected by market forces because the systems did not need to compete for airline participants. Airlines relied on travel agents for the great majority of their revenues, travel agencies used systems to make almost all of their airline bookings, and almost all travel agencies relied entirely or predominantly on one system to learn what airline services were available and to make bookings for their customers. 57 FR 43783–43784. Travel agents relied on the systems because they efficiently provide comprehensive information and booking capabilities on participating airlines and other travel suppliers. A CRS presented displays that integrate all participating airline services offered in a market. Each system showed the schedules and fares offered by those airlines in each market and whether seats were available on specific flights at specific fares. A travel agent could compare the schedules and fares offered by different airlines and determine which would best meet a customer's needs. 57 FR 43782; 56 FR 12587.

If an airline failed to participate in one system, the travel agents using that system could neither book its services readily nor find its services in the system's displays. The airline as a result would lose a substantial portion of its bookings from those travel agents.

The economics of the airline industry are such that the addition or loss of a few passengers on a flight will determine whether the flight is profitable. The importance of marginal revenues in the airline business means that airlines cannot afford to lose access to any significant distribution channel. 57 FR 43780, 43783 (September 22, 1992). As one industry economist, Daniel Kasper, stated, Orbitz Supp. Reply, Daniel Kasper Statement at 7:

> 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.

*Cf.* Bear, Stearns & Co., ''Point, Click, Trip: An Introduction to the On-Line Travel Agency'' (April 2000) at 24–25.

Virtually every airline therefore was compelled to participate in each of the four systems operating in the United

States. The Justice Department thus stated in an earlier rulemaking, quoted at 62 FR 59789,

> 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.

As a result, the systems did not need to compete for airline participants. They could therefore impose costly and burdensome requirements on participating airlines. As American has stated, ''This market structure allows CRSs to charge exorbitant fees to airlines.'' Statement of George Nicoud before the National Commission at 7.

When we most recently reviewed the rules, we found that, while the roles of the travel agents and the systems in airline distribution gave each of the systems market power, the systems also engaged in practices that buttressed their market power by reducing the ability of airlines and travel agencies to use alternative electronic means for the tasks of communicating information and making bookings. Until we revised our rules, the systems refused to allow travel agencies to buy third-party hardware and software, and each system refused to allow travel agencies to use the system equipment to access alternative databases and systems. Each system's contracts with travel agencies generally imposed substantial penalties on travel agencies that did not use that system for a major share of its bookings. The systems additionally required travel agencies to accept five-year contracts. 56 FR 12605, 12621.

It is important to note that substantial changes in the airline distribution business have occurred since our last overall reexamination of the CRS business. The Internet is an increasingly important means of airline distribution, and a number of airlines are obtaining a growing share of their total bookings from their own websites. The airlines' ability to sell tickets through their own websites gives them an inexpensive and efficient alternative to the travel agency system (and to their own reservations agents) and a way to bypass the systems for a significant number of bookings. In addition, two of the four systems operating in the United States are no longer owned by airlines. These developments present the question of whether CRS rules remain necessary.

According to a number of commenters, CRS rules may continue to be necessary to prevent system practices that could prejudice airline competition, although consumer use of the Internet and other on-going changes in airline distribution may in the future eliminate the need for most or all of the rules. In addition, the systems may continue to engage in practices that deter airlines and travel agencies from using alternative electronic means for providing information and making bookings. The changes in airline distribution and system ownership thus far may not have substantially eroded the systems' market power or the rationale for our adoption of rules. In considering whether rules remain necessary, we must also bear in mind that the air services agreements between the United States and many foreign countries obligate the United States to ensure that foreign airlines are not subject to unreasonably discriminatory treatment in the systems operating in this country and that those systems do not bias their displays of international services.

We recognize, however, that on-going developments in the airline distribution and CRS businesses are making participation in each system less necessary than before. In time these and other developments may clearly eliminate the need for many or all of our rules and may already have made some of the rules unnecessary. If we readopt rules governing the CRS business, we will monitor those developments to see whether the rules can be eliminated in whole or in part.

The following discussion analyzes the potential basis for some continued CRS regulation: we first discuss the impact of the Internet, then discuss whether the systems may continue to have market power against most airlines, consider whether the systems (whether or not owned by airlines) would use that power to distort airline competition and harm consumers if the rules were not readopted, discuss whether airlines have any bargaining leverage against the systems, and end by discussing other possible measures that may preclude anti-competitive conduct.

*2. The Impact of the Internet on the Systems' Role in Airline Distribution*

Despite the high cost of distribution through CRSs, most airlines continue to sell their services through them because they are still the best way to get inventory on travel agent desktops, a distribution channel that is still very important. Airlines ''also value the GDSs' ability to reach corporate accounts as well as more remote markets, from Alabama to Zimbabwe.'' Forrester Research, ''Travel: Direct Connect Isn't Enough'' (October 2001) at 5–6. The Internet has not changed these two sales objectives. As discussed below, the Internet may have increased the systems' importance for most airlines to date. Many airlines said in a recent survey that they ''would not even consider cutting the cord.'' ''Travel: Direct Connect Isn't Enough'' at 5–6.

Although the Internet has the potential to introduce more competition with CRS-type services in the future by using new and cheaper technologies to replicate some CRS functions, many believe that in some ways the Internet thus far may have reinforced the power of the CRSs. Indeed, travel became the most successful high-priced product sold over the Internet because the CRSs provided a readily available, consolidated, and integrated electronic source of price and inventory information that could be easily linked to web-based customer user interfaces. Like the customers of traditional travel agents, on-line consumers seek the integrated comparison-shopping and booking functionality that only a CRS can provide. All of the major online travel agencies use a CRS for their booking functionality, and many also use CRSs to search flights and fares for customer displays. Because the CRSs enable online consumers to comparison shop and make bookings for a full range of travel services, CRS performance, both collectively and individually, is even more critical to an airline's success than in the past. Worldspan, for example, serves nearly 20,000 travel agencies and processes more than 50 percent of all online travel agency bookings. Statement of Paul J. Blackney, President and CEO, Worldspan, Testimony before the National Commission June 26, 2002.

PhoCusWright, an Internet research firm, reports that the Internet represented 14 percent of all airline sales for U.S. airlines in 2001, up from 8 percent in 2000, excluding sales made through corporate on-line systems. Airline websites now represent 58 percent of airlines' total Internet sales, while the remaining 42 percent of Internet sales are now made through on-line travel agencies. ''Airline Web Sales Soar Despite Sour Year,'' PhoCusWright, Inc. (May 2002) at 1–2. Thus, in 2001, 42 percent of all U.S. airline Internet sales were made through CRSs. As bookings through on-line agencies grow, bookings made through CRSs will also continue to grow, as long as on-line agencies, like their traditional counterparts, remain dependent on CRSs. Airline website sales were up 50 percent in 2001 compared to 2000, but on-line agency sales also grew rapidly, up 40 percent. *Id.* at 1.

Forrester Research, an Internet research firm, reports that, before the advent of the Internet, about eighty percent of an airline's business came via travel agencies using CRSs, with the remainder coming from direct sales via airline reservation centers or ticket offices. Since 1995, airline websites like delta.com have helped airlines raise their direct sales and cut CRS sales to 70 percent of passenger revenues. Forrester Research, ''Travel: Direct Connect Isn't Enough'' (October 2001) at 5–6. Northwest Airlines reports that it obtains ''nearly 70% of its revenue from traditional travel agents, and nearly 10% from third party travel agents like Travelocity, Expedia, and Orbitz.'' Testimony of Al Lenza, National Commission (June 12, 2002) at 5. Thus, nearly 80 percent of Northwest's total bookings were made through a CRS.

While the Internet and other new technologies have the potential for reducing airline dependence on CRSs, that development is at an early stage. Airlines have achieved some success in increasing direct sales through better use of the Internet, but an airline's ability to reduce its dependence on a CRS still largely depends on its ability to encourage more customers to book directly with it. More generally, an airline's ability to encourage direct bookings through its own website is limited to the subset of air travel consumers who have readily available Internet access and are willing to send credit card information over the Internet. According to a recent Department of Commerce report, 143 million Americans, or about 54 percent of the population, were using the Internet. Among those using the Internet, only 39 percent are making purchases online. ''A Nation Online: How Americans Are Expanding Their Use of the Internet,'' U.S. Department of Commerce (February 2002) at 1, 2. While Internet usage is expected to continue to grow rapidly as is consumer confidence in using it to make purchases, a substantial portion of the U.S. population still does not use the Internet at all. Thus, despite the Internet, an airline cannot encourage these users to make bookings on its website rather than through a traditional travel agent (using a CRS).

Since many consumers still prefer to use on-line and traditional travel agencies, airlines and other travel suppliers also seek to reduce their dependence on CRSs further by expanding direct sales into ''direct connection'' where travel agencies and corporate accounts directly access each airline's host central reservations system. In short, travel agents would access an airline's inventory via an enhanced version of each airline's agents-only website. Forrester Research: ''Travel: Direct Connect Isn't Enough'' (October 2001) at 8. But direct connect is only a first step in transforming CRS-based travel distribution. Forrester Research notes that limited interconnectivity and resistance among high-value travel agents who have significant influence over corporate travel and complex leisure travel are likely to limit the degree to which airline dependence on CRSs can be reduced. Ultimately, most industry observers believe that integrated direct connect is the form of direct connection that has the most promise of reducing airline dependence on CRSs because it would allow travel agents to integrate an airline booking with separately made hotel or car rental reservations and facilitate the integration of various travel elements in a single itinerary in much the same way as the CRSs currently do. *Id.* at 10. Orbitz plans to inaugurate direct connections with several carriers this year. Although this will further reduce those airlines' dependence on the systems, the process will take some time, and substantial additional industry initiatives will be required to reach the scale and scope necessary to have a significant impact on the current CRS-dependent travel distribution model. Orbitz's direct connection program may prompt other on-line agencies to launch similar initiatives in an effort to reduce airline distribution costs in order to gain access to webfare inventory.

Integrated direct connect solutions are extremely complex and require substantial investment by airlines and other travel suppliers. Integrated direct connect on a substantial scale is unlikely for the next several years because an alternative to IBM's transaction processing facility (TPF), the primary high-volume transaction messaging platform, must be developed and is not expected until at least 2004. *Id.* at 13. Because of the significant financial investments involved, some airlines, particularly smaller airlines, may choose not to direct connect at all. Even after integrated direct connect is developed, however, most observers see a continuing need for CRSs to complete complicated transactions, particularly interline transactions and transactions involving smaller carriers and foreign carriers that have not invested in integrated direct connect. Indeed, Forrester Research estimates that full industry-wide implementation of integrated technologies will not be complete until 2008 or beyond. *Id.* at 14.

The fact that major CRS companies have acquired control of on-line agencies could maintain their market power. Sabre recently reacquired complete ownership of Travelocity, and Cendant/Galileo owns Trip.com and Cheaptickets.com. The systems could use these integrated businesses to thwart the introduction of alternative technologies that could perform core CRS functions at a lower cost and thereby provide more competition for CRS services. ''Report to Congress: Efforts to Monitor Orbitz'' at 19. These on-line travel agencies are captive to their CRS hosts—a relationship which mirrors the central problem in the traditional travel agency marketplace where travel agents are bound to systems by five year contracts. On-line and ''brick-and-mortar'' travel agents alike have high switching costs.

In sum, it appears possible that several industry characteristics that led to the regulation of the CRSs may continue to exist, notwithstanding Internet-based technologies and innovation. First, most airlines cannot avoid participating in CRSs by creating a new system. Even with new technologies, the fixed investments of time and money to replicate the systems' integrated complexity are prohibitive. Second, because a substantial number of airline Internet sales are made through the CRSs, the Internet has not mitigated the risk that the systems (whether or not owned by airlines) may use that power to distort airline competition. Third, although airlines have increased direct sales through their own websites, the Internet may not yet have given airlines substantial bargaining leverage against the systems. Fourth, on-line and ''brick-and-mortar'' travel agencies alike appear to be both dependent on and locked into long-term relationships with their CRS providers due to very high switching costs.

*3. The Potential Existence of System Market Power*

As explained next, the developments in airline distribution may not have eroded the systems' market power as to airlines: travel agents sell most airline tickets, travel agents usually use a system to investigate airline service options and to make bookings, and each travel agency office relies entirely or predominantly on one system. Each of the on-line travel agencies also uses a system for making bookings, and almost all rely on a system for obtaining fare and schedule information as well.

Our tentative belief that the systems continue to have market power is consistent with the comments of a

number of airlines. While Northwest supports ending the rules, Northwest also asserts:

> 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.

Northwest Comments on Proposed Extension at 5.

(a) The Airlines' Dependence on Travel Agents

The travel agency network traditionally provided an efficient means of distribution for most airlines, and airlines derived most of their revenue from sales made by travel agents. 57 FR 43782. Despite the changes in airline distribution, travel agents continue to sell the majority of tickets for most airlines. In 2000, travel agencies sold over $76 billion worth of air travel. Statement of William A. Maloney before the National Commission at 9. In 1999 travel agencies sold almost three-quarters of all airline tickets. Bear, Stearns & Co., ''Point, Click, Trip: An Introduction to the On-Line Travel Agency'' (April 2000) at 17. Recent remarks from American Airlines indicate that travel agencies account for 70 percent of that carrier's bookings today. Statement of George A. Nicoud III before the National Commission at 3. Northwest states that 70 percent of its revenue comes from bookings made through ''traditional'' travel agents with another 10 percent being derived from sales through ''third party travel agents like Travelocity, Expedia, and Orbitz.'' Statement of Al Lenza before National Commission at 5.

Travel agents seem likely to maintain their predominant role in airline distribution despite the growing use of the Internet and other changes in distribution practices. ''Brick-and-mortar'' travel agents provide expertise and services that many consumers find valuable, as explained in our earlier discussion of the impact of the Internet.

A large portion of consumers buying tickets through the Internet also use on-line travel agencies, not airline websites, for their ticket purchases. In 2001, U.S. airlines sold $11.8 billion worth of tickets through the Internet. Online travel agencies accounted for $4.9 billion, or 42 percent, of those online sales. ''Airline Web Sales Soar Despite Sour Year,'' PhoCusWright Snapshot, May 2002 (2–3).

Travel agents therefore should remain an important part of the airline distribution system. A Sabre official has predicted that travel agencies will account for 65 percent of all airline bookings in 2005 (45 percent by traditional travel agencies and 20 percent by travel agency websites). ''Sabre: Agents could retain 65% of air sales by 2005,'' *Travel Weekly* (April 3, 2000) at 10.

We recognize that some airlines, especially the low-fare airlines and several other airlines that are not among the largest airlines, have been successful in encouraging a growing number of customers to buy tickets through their own websites, as discussed above. As we noted, for example, Alaska obtained sixteen percent of its total bookings from its website in 2001, Southwest's website produced forty percent of the airline's revenues in 2001, and Frontier obtained 28 percent of its bookings in the quarter ended December 31, 2001, from its website.

A few of the largest airlines have succeeded in obtaining a significant number of bookings through the Internet. Delta expected to obtain fifteen percent of its tickets from its own website in 2002. Delta April 24, 2002, Press Release. Delta, however, still derives 47 percent of its tickets and 64 percent of its revenues from traditional travel agents. Statement of Scott Yohe before the National Commission at 8. And most of the network airlines have been obtaining a smaller share of their bookings from their websites. The websites of American and United each produce only five percent of the airline's revenues. ''Executive Flight: The Age of 'Wal-Mart' Airlines Crunches the Biggest Carriers,'' *Wall Street Journal* (June 18, 2002). United has stated that it still derives more than seventy percent of its revenues from travel agency bookings. June 26, 2002, United Press Release.

The Internet does not seem to have markedly undermined each system's market power. Indeed, in some ways the Internet may have reinforced the systems' power. First, as noted above, many Internet bookings are made through on-line travel agencies (42 percent of all on-line bookings in 2001), and those agencies rely on the systems (Orbitz is a partial exception, since it does not use a system to obtain fare and schedule information). Worldspan alone processes more than half of all online agency bookings made today. Statement of Paul J. Blackney before the National Commission at 3.

Second, individual airline websites are unlikely to replace travel agencies as the dominant form of airline distribution for several reasons. As shown, travel agents offer expertise and personal services that many travellers consider invaluable. Those travellers will not be likely to switch to airline websites for their bookings. Many consumers may continue to be unwilling to use the Internet to buy airline tickets, which can be relatively expensive and can require the consumer to choose among a variety of routings and fare options subject to different conditions and restrictions. In addition, while the Internet provides extensive information and buying facilities for consumers, many travel websites do not present this information in a manner that readily enables consumers to obtain a complete or largely complete list of travel options and to compare the suppliers' different prices and service features. Each system has provided efficiency benefits to travel agents and more recently consumers because it displays flight and fare information for all airlines serving a city-pair market that participate in the system. Consumers can access a fairly complete display of airline services through the Internet by logging onto a website that uses a system (or, like Orbitz, that has supplemented a system's information with information obtained through other sources). If a consumer instead views a travel supplier's website, he or she will likely see only the services offered by that airline and any airlines with which it has alliances. In contrast, a travel agent can give a customer advice on most of the available service options in a market, primarily because the integrated displays offered by each system will list the services and most fares offered by every airline participating in a system.

Airlines, moreover, have little ability to encourage most consumers to shift their bookings from travel agents to their own websites. Several have used offers of additional discounts and frequent flyer mile bonuses to increase the number of travellers using websites, but many travellers would presumably continue to use travel agents unless the discounts and bonus offers became so large that they cancelled out the airline's cost savings otherwise achievable from its website.

The existence of one distribution channel that is attractive to a significant and growing number of travellers does not make that channel competitive with another channel that a larger if shrinking share of travellers finds preferable. With a very few exceptions, any airline that uses only one channel will not obtain the business of those travellers that prefer the other channel. Similarly, while the airlines were able in the 1980's to sell a substantial number of tickets through their own

reservations centers, they depended on the travel agency system for the sale of most of their tickets.

We recognize that Southwest has never participated in any system except Sabre and participates even in Sabre at a limited level. While Southwest has thrived without significant system participation, its success does not indicate that other airlines can succeed while avoiding participation in the systems. Southwest has an unusual business plan. Southwest, for example, focuses on operating frequent point-to-point service in dense markets, does not have a hub-and-spoke route system, and has a relatively simple fare structure. Transportation Research Board, *Entry and Competition* at 49–50. Southwest has well-established brand recognition and buys relatively large amounts of advertising. While JetBlue has also prospered thus far while obtaining only a small share of its total revenues from travel agents, its experience similarly does not demonstrate that other airlines can forgo reliance on the travel agency distribution system. Most of the other low-fare airlines, like AirTran and Frontier, have concluded that participation in each system is necessary. 62 FR 47608; Frontier Comments at 4. In the fourth quarter of 2001, AirTran, for example, obtained 33 percent of its bookings from travel agencies using a system. AirTran 10–K Report for fiscal year 2001 at 8. The systems' apparent market power over most of the airlines exists because those airlines do not operate like Southwest or JetBlue, and we have no evidence that other carriers could feasibly adopt Southwest's marketing strategy without incurring substantial costs.

(b) The Travel Agents' Dependence on the Systems

Almost every travel agent has used a system to investigate airline service options and make bookings for the agency's customers (each on-line travel agency, moreover, also uses a system, as noted above). One survey reported that travel agencies made 93 percent of their domestic airline bookings and 81 percent of their international airline bookings through a system in 1999. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 133.

The extensive reliance on the systems by on-line and ''brick-and-mortar'' travel agencies has stemmed both from the efficiency benefits provided by the systems and from the systems' contractual practices designed to deter travel agents from using alternatives to the systems. Each system offers an integrated display of airline services that enables a travel agent to quickly see the services and fares offered by every airline in a market (except for the few airlines that do not participate in the system) and to book any of those airlines. If a travel agent did not use a system, the agent would have to search a variety of sources to learn what services were available, which would necessarily be more time-consuming and inefficient. Since travel agents typically work under significant time pressure, they have an incentive to use one system, rather than multiple sources of information. Previously, the widespread use of display bias arose from the travel agents' same desire to take as little time as possible acting on customer requests. *See, e.g.*, Mark Pestronk, ''Change to GDS 'model' not likely,'' *Travel Weekly* (July 15, 2002).

Travel agency business practices provide an additional incentive for travel agents to use a system for as many airline bookings as possible. The travel agency back-office systems used for accounting, billing, and record-keeping functions are tied to transactions made through the agency's system. Travel agencies are therefore reluctant to make transactions outside of the system because those transactions will not be automatically entered in most travel agency back-office systems.

As a result, searching several websites for E-fares is less efficient for travel agents, complicates a travel agency's task of preparing reports for corporate customers, and makes it harder for corporate travel managers to manage travel programs. Susan Parr Travel Comments; NBTA Comments on Proposed Extension at 2. Thus, while many travel agents have Internet access and could book airline seats over the web, either through an individual airline site or another travel agency site, it appears they use the Internet for making a relatively small portion of their airline bookings. They have used the Internet primarily for booking hotels, tours, and railroad services. *See Travel Distribution Report* (October 18, 2001) at 1. Travel agents nonetheless are increasingly using the Internet for bookings. ''Online travel is booming,'' *Travel Weekly* (August 26, 2002).

The systems' contract practices, however, also discourage most travel agencies from using more than one system. The systems' productivity pricing structures seem to deter travel agents from using the Internet. When travel agents book E-fares through the Internet, for example, they run the risk of failing to satisfy the minimum monthly booking quota set by the productivity pricing provisions. ''Web air fares unlevel the playing field,'' *Chicago Tribune* (February 16, 2002); ''Travel Agents Cry Foul over Internet Fare Deals,'' *Los Angeles Times* (February 16, 2002); All About Travel Supp. Comments. The potential loss of the lower CRS rates may deter travel agents from booking E-fares when doing so would be in the best interests of their customers. ASTA thus alleges that productivity pricing clauses ''have served mainly as a deterrent to the agency's looking to non-CRS sources, such as the Internet, to make bookings that more nearly conform to their clients' needs.'' ASTA Comments on Proposed Extension at 3.

Our existing rules have furthered several of the developments that may be reducing the systems' market power. Before we revised the rules, for example, the systems generally denied subscribers the ability to use third-party equipment. 56 FR 12605. Our revised rules gave travel agencies the right to use their own equipment. Travel agencies have been taking advantage of that rule, for in 1999 thirty-six percent of all travel agencies used their own terminals. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 131, 132, 133.

As noted, travel agency offices have typically relied entirely or predominantly on just one system for these tasks. While the services offered by each system are comparable, using multiple systems could improve a travel agency's ability to serve its customers. Travel agents then could acquire more accurate and complete information on available airline flights, and the agencies' ability to use multiple systems would encourage the systems to compete more on the quality and range of their services. 57 FR 43797. Offsetting that factor, a travel agency's use of multiple systems can create some inefficiencies, due to additional training needs and potential difficulties in keeping track of customer records. 56 FR 12607. Each system also offers large financial inducements to most travel agency customers to make most or all of their bookings on that system. Since the large majority of travel agencies therefore depend on one system, almost all airlines must participate in each system in order to make its services readily saleable by the travel agencies using that system. Delta Comments at 5; American Supp. Comments at 5; Continental Supp. Comments at 5; Midwest Express Supp. Comments at 3–4.

Customer demands may push travel agencies into using additional sources of information like the Internet. ''Online travel is booming,'' *Travel Weekly* (August 26, 2002). Airlines generally offer many of their lowest fares only on

their own websites and, for airlines that are Orbitz ''charter associates,'' on Orbitz. Airlines generally do not make these webfares (or E-fares) available for sale through any of the systems used by travel agents. Some airlines like Delta allow travel agents to book these fares on their websites created for travel agency use. Travel agents could also book such fares through Orbitz. Booking an E-fare (or any fare) through an airline website or Orbitz or another on-line travel agency is now an inefficient process for travel agents, as discussed above. Several firms are developing software that will enable travel agents to quickly search for fares on multiple websites and systems, however. ''Fare game: 'Beat the agent''', *Travel Weekly* (March 4, 2002) at 6. By agreement with Orbitz, Aqua will also develop a program allowing travel agents to simultaneously see the display of fares offered by a system and the fares offered through Orbitz, including the E-fares sold through Orbitz that airlines do not sell through the systems used by travel agencies. May 16, 2002, Orbitz Press Release.

When travel agents can easily and efficiently access websites that provide information and booking capabilities, they will be more likely to use such alternatives to the systems. A substantial use of such alternatives would reduce each system's market power, since an airline would not necessarily lose a substantial amount of revenue if it ended its participation in one of the systems. The travel agents using that system would have alternative means for obtaining the airline's fare and schedule information and for booking the airline. The programs under development by independent firms will not necessarily achieve that result, however. The developers are focusing on giving travel agents easy access to E-fares. E-fares, however, make up a relatively small share of all airline bookings. PhoCus Wright reports that such fares constitute less than 2 percent of an airline's total ticket sales. ''Airline Web Sales Soar Despite Sour Year,'' PhoCusWright Snapshot, May 2002(3). If the programs do not give travel agents quick access to other fares, or if travel agents only use the programs to investigate whether E-fares are available, they would not cause a substantial shift of bookings away from the systems.

The systems themselves are also responding to travel agency demands for easy access to webfares. Certain systems are developing programs that would enable travel agents to sell webfares without leaving the system. Galileo Press Release dated May 23, 2002. Sabre recently signed an agreement with FareChase, a web automation technology provider, that enables travel agencies using Sabre and subscribing to its eVoya product to have the option of using a FareChase program that searches multiple airline websites for webfares and presents a display of the results alongside fares available for booking through the system. FareChase Press Release April 29, 2002, and FareChase Information Page at Sabre website. These developments will both increase the efficiency and quality of service provided by travel agents but at the same time make it less necessary for them to use alternatives to the system to research and, in some cases, book, airline services. The systems' attempts to provide mechanisms for travel agencies to more easily access webfares may serve to increase agency dependence on the systems and further reduce the incentive for travel agents to use alternative electronic means of obtaining information and making bookings. Such a development could inhibit the introduction of more competition to the systems in the airline distribution arena.

(c) The Airlines' Apparent Lack of Bargaining Leverage Against the Systems

Because most airlines have relied on travel agencies to sell most of their tickets, and because travel agencies have typically relied on one system to learn what airline services are available, airlines (with a few exceptions) generally have not been able to afford not to participate in each of the systems. As discussed, an airline's withdrawal from one system would likely substantially reduce its bookings from travel agents using that system. As a result, airlines have not had significant bargaining leverage against the systems, because the systems have not needed to compete for airline participants.

Despite the advent of the Internet, travel suppliers in general, and most of the airline industry in particular, may continue to depend substantially on the systems to distribute their products. Midwest Express, for example, states that in the first half of 2000, 26 percent of its total bookings came through Sabre, 18 percent through Galileo, and 14 percent through Worldspan. Midwest Express Supp. Comments at Exhibit 1. According to a survey conducted by Forrester Research, 59 percent of travel industry supplier respondents indicate that ''more than half of their revenue still comes through a GDS.'' In 2001, travel industry wide, 55 percent of revenues came through a system while 45 percent resulted from direct sales. However, among airline industry survey respondents only, 70 percent of revenues flowed through a system while only 30 percent were attributable to direct sales. Forrester Research: ''Travel: Direct Connect Isn't Enough'' October 2001, at 3, 6. Thus, the airline industry remains more dependent than its travel industry counterparts on travel agency sales made through the systems.

In 2000, bookings fees accounted for 82 percent of system revenues. The captivity of the airline industry in particular to the systems is again illustrated by the fact 87 percent of total system travel booking fee revenues were generated by airline reservations. Forrester Research: ''Travel: Direct Connect Isn't Enough'' October 2001 at 14.

Some parties have argued that the rules, such as the mandatory participation rule, enable the systems to impose unreasonable terms for airline participation because they require the major airlines to participate in each system. As discussed below, we are considering whether the mandatory participation rule may limit the airlines' negotiating power. When we readopted the rules, we found that the airlines' economic needs compelled almost all of them to participate in each system. If airlines had been able to avoid participating in systems whose terms were unreasonable or unduly expensive, we would have allowed the rules to expire. A number of smaller airlines are not subject to the mandatory participation rule, since they have held no ownership interest in any system, yet most participate in each of the systems, as discussed above. However, since several airlines have presented a persuasive argument that they could obtain better terms for participation if we eliminated the mandatory participation rule, we are proposing to do so. If these airline assertions are correct, ending that rule could expose the systems to new competitive discipline.

The systems, however, in the absence of any rules might impose requirements on participating airlines that would further limit the airlines' ability to choose whether to participate in a system and at what level. After our last major rulemaking, for example, we determined that we should prohibit the 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 imposed by most systems on airline participants 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 (while almost all airlines must participate in each system for economic reasons, many airlines do not need to participate at the more expensive higher levels). As we explained then, ''[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.

If an airline could create its own system, it could obtain some bargaining leverage. In the past we have found that doing so would probably not be feasible. Developing the hardware and software required for a new system would likely be prohibitively expensive. The economies of scale in the CRS business would prevent a new system from operating profitably unless it obtained a substantial number of subscribers. But a new system would encounter great difficulty in obtaining an adequate subscriber base, since virtually all travel agencies already have agreed to use one of the existing systems under long-term contracts that normally will deter the agency from using another system for a significant number of bookings while they remain in effect. *Airline Marketing Practices* at 49–50; 57 FR 43784.

The Internet has likely made it easier to create a competing service that would provide airline information and booking capabilities for travel agents and consumers. Since any such service could be accessed through the Internet, a firm entering the business would not need to create communications links with the users of its service. Any such firm, however, would still incur substantial programming and equipment costs in creating an information and booking service and establishing the computing facilities necessary to handle all requests for information and bookings.

The five largest airlines, of course, may be establishing such a service through Orbitz, though Orbitz was originally developed as an on-line travel agency to be used by consumers. The costs of Orbitz'' development demonstrate the great expense of an on-line agency using alternative technologies that would replicate some system functions. As of March 31, 2002, Orbitz' owners had invested $205 million, Orbitz had incurred losses of $153 million, and Orbitz expected to continue incurring operating losses for some time. Amended Registration Statement at 9, 26. By agreement with Orbitz, as noted, Aqua will develop a program that will enable travel agents using a system to simultaneously see and book the airline services available on Orbitz.

Orbitz' entry into the on-line reservations business does not necessarily suggest that entry would be feasible for other firms. Commentators have stated that the on-line travel agency business is likely to be dominated by Orbitz and the two larger on-line travel agencies, Travelocity and Expedia. Further large-scale entry into that business seems unlikely. Orbitz, moreover, was helped by the business and financial resources of its five owners, and its most-favored-nation clause with those airlines and the other charter associate airlines has probably been necessary to its ability to become the third-largest on-line travel agency. ''Report to Congress: Efforts to Monitor Orbitz,'' Office of Aviation & International Affairs (June 27, 2002), at 18–19.

If airlines could practicably persuade travel agencies to use one system rather than another, airlines 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. The airlines, however, have not been able to do that thus far. Since travel agencies do not pay booking fees, they have no direct incentive to use the system charging the lowest fees. Airlines have had no effective incentives that they can offer travel agencies to encourage the use of one system rather than another. Most travel agencies have multi-year contracts to use one system. These contracts typically include financial terms that encourage each travel agency to use one system for all or almost all of its airline bookings and deter the agency from using the Internet to book airlines directly.

The growing importance for many travellers of webfares, however, could give airlines some bargaining leverage. Airlines might obtain leverage by selectively giving systems access to their webfares (and perhaps corporate discount fares) according to the relative attractiveness of each system's prices and service quality.

In some cases large airlines can compel travel agencies (and corporate travel departments) to switch from one system to another. Airlines that dominate an area's airline markets, like Delta at Atlanta and American in southern Florida, can achieve this result by denying the disfavored system the ability to sell their corporate discount fares. Dominant airlines have that ability because travel agencies in the area cannot easily succeed without the ability to sell the corporate discount fares demanded by many business travellers. We have not seen evidence, however, that those airlines (or other airlines) have used their leverage in local airline markets as a tool to obtain better terms for participation from one of the systems, and airlines have such leverage only in areas where they account for the largest share of service.

In a more general sense, United's apparent inability thus far to obtain better terms from any system, even though it is no longer subject to the mandatory participation clause, raises the question of whether the largest airlines have bargaining power against the systems. United's sale of its ownership interest in Galileo freed it from the requirements of the mandatory participation rule. Our past experience suggests that airlines might not have much leverage against the systems, given their dependence on travel agency distribution and the travel agents' reliance on the systems, if the rules were eliminated. It is not clear that the on-going developments in airline distribution have proceeded far enough to give the airlines significant bargaining leverage against the systems. Many airlines, however, have become less dependent on the systems, and the systems have become more dependent on the airlines' willingness to provide complete access to their fares, as shown by the systems' efforts to obtain webfares for sale through the CRSs.

The major airlines may obtain such leverage if Aqua succeeds in obtaining a large number of travel agency subscribers to its service giving travel agents ready access to Orbitz' displays. A major airline's lack of participation in a system then might not lead to a substantial loss in bookings from the travel agents using that system if its schedules and fares are displayed in Orbitz. An Orbitz owner (or other major airline) conceivably might then begin denying complete information on its fares and services to one or all of the existing systems (or lower its participation level) until that system agreed to lower the airline's booking fees and improved its other terms for participation. A system might be more likely to give such an airline lower fees if it were not required by our rules to do the same for all participating airlines. A system might have incentives to offer better terms to a major airline, since such an airline's withdrawal from the system would make the system markedly less attractive to travel agencies. A system's inability to offer complete information and full functionality on an airline frequently booked by travel agents in one region

could undermine the system's ability to obtain subscribers in that area.

None of Orbitz' owner airlines (or any other airline) has said that it intends to bargain with systems by threatening to deny them access to its fares and services. If they did so, they might be able to obtain better terms for participation. That would lower their costs and improve the efficiency of their distribution. Such a result, however, may not benefit competition overall. Any improvement in terms likely would not be shared with smaller airlines, which also depend on travel agents and the systems for distribution. Some on-line travel agencies have alleged that some Orbitz owners have been willing to give them access to E-fares only if the agency ends all efforts to promote the services of competitors in certain markets.

Nonetheless, while in the past some airlines that have had an ownership or marketing relationship with one system may have limited their participation in competing systems in order to create a marketing advantage for their affiliated system, airlines could legitimately limit their participation in a system on the ground that the system's services are unsatisfactory in some respects or are too expensive. We adopted the rule barring parity clauses for this reason, subject to an exception for airlines owning or marketing a system. We also found that airlines seemed to possess some limited ability to obtain better terms, for they could choose not to participate in the more expensive levels of service offered by a system. The parity clause rulemaking itself resulted from Alaska's efforts to downgrade its participation in Sabre. Given the assertions of some airlines that they could obtain better terms by bargaining with the systems if they were not subject to the mandatory participation requirement, we are proposing not to readopt that rule. Eliminating that rule and the rule barring discriminatory fees could serve as an experiment to determine whether airlines can obtain lower fees and better service from the systems and whether the resultant benefits would be offset by the kind of practices that originally caused us to adopt the mandatory participation rule.

*4. The Costs Imposed by System Practices*

Because market forces in the past have not disciplined the systems' prices and terms for services provided airline participants, it appears that the systems have been able to impose, and have imposed, costly and burdensome requirements on airline participants. It appears that the fees charged airlines have not been effectively disciplined by competition and may well exceed system costs by a significant amount. 56 FR 12586, 12595 (March 26, 1991). In past years the fees paid by airlines and other travel suppliers accounted for about ninety percent of total system revenues, while the fees paid by travel agencies made up only ten percent of the total. 62 FR 59784, 59788 (November 5, 1997); Sabre Holdings 10–K reports for the years 1999 and 2000. Delta's CRS booking fee expenses exceeded $350 million in 2001. Statement of Scott Yohe before the National Commission at 9. Northwest estimates that it will pay over $200 million in booking fees in 2002 despite reduced traffic levels. Statement of Al Lenza before the National Commission at 3.

The systems' market power enabled them to drive up airline costs in other ways as well. The systems' practice of charging airlines for passive bookings was one example (passive bookings are bookings made by a travel agent through a system that do not involve sending a message to the airline's internal reservations system). Travel agents often make passive bookings in order to serve their customers, but such transactions usually do not directly benefit the airlines. The systems nonetheless charged booking fees for passive transactions. In addition, the record suggests that some travel agents may have used the passive booking capability for unnecessary transactions in order to meet the minimum booking quota established by the systems' productivity pricing formulas. The annual fee liability for passive bookings and other bookings considered unnecessary by participating airlines amounted to $5 million to $10 million for some airlines, and such bookings accounted for eight to ten percent of their total fees. Aloha December 23, 1997 Supp. Comments at 2; Alitalia Comments at 4; Qantas Comments at 4. Systems stopped charging participating airlines for passive bookings after we began this proceeding, but their action does not necessarily indicate that participating airlines have any leverage over the price charged for CRS services. Furthermore, the systems that stopped charging for passive bookings raised other fees and appeared to have incurred no reduction in their overall revenues.

In addition, three of the systems adopted and enforced parity clauses against airlines. A system's parity clause required a participating airline to buy at least as high a level of service from that system as the airline bought from any other system, whether or not the airline considered the price and quality of the system's higher level of functionality to be reasonable. Alaska and Midwest Express estimated that Sabre's plan to enforce its parity clause against them would increase their CRS costs by about ten percent. 61 FR 42201.

Finally, Galileo revised its display algorithm several years ago to benefit United by diverting bookings away from some of United's competitors. Galileo's revised display algorithm may have reduced Alaska's annual revenues by $15 million and Midwest Express' annual revenues by several million dollars. Galileo's algorithm often gave United's services a better display position than services offered by competing airlines that better met the needs of travel agency customers, and it was significantly less efficient for travel agents who wished to find the best service for their customers. 61 FR 42212–42213.

The higher costs that may be attributable to system practices (and different distribution costs generally) can make a significant difference in an airline's ability to compete. American states that, due to the differing levels with which it and Southwest rely on travel agents and, by extension, on the systems for distribution, American pays $3 in booking fees per passenger boarded while it estimates that Southwest pays less than 50 cents. Statement of George Nicoud before the National Commission at 4.

*5. The Potential for Anti-Competitive Conduct*

The sale of air transportation through all four of the systems operating in the United States has been subject to regulation since the Board originally adopted CRS rules. Our rules now cover systems owned or marketed by an airline or airline affiliate. Several airlines own Worldspan and Amadeus, and Sabre and Galileo are each marketed by its principal former airline owner. Ten years ago, when each system was controlled by one or more airlines or airline affiliates, we concluded that the systems' conduct before the rules took effect demonstrated the need for rules to prevent system practices that would deceive consumers and their travel agents and prejudice airline competition.

Two of the systems now have no significant airline ownership, though both are marketed by airlines, and the other two are owned by several airlines rather than being controlled by a single airline. One or more of the systems may cease to be owned or marketed by any airline. We believe, however, that, if the systems continue to have market power,

there might be a significant risk that systems would use their market power to distort airline competition, whether or not they are owned or marketed by airlines. Northwest has thus predicted:

> To the extent that any CRS has market power over the distribution of air travel, the CRS will have incentives to exercise that power, with negative consequences for airlines, travel agents, and consumers.

Northwest Comments on Proposed Extension at 5

First, experience has shown that a substantial risk exists that a system with substantial airline ownership would engage in conduct that would violate section 411 but for our rules. Galileo revised its display of airline services within North America in a way that gave United a substantial competitive advantage over airlines like Alaska that operated many single-plane flights and relied less on hub-and-spoke operations. Galileo created displays designed to promote United's interests even though they made it harder for travel agents to serve their customers. 61 FR 42208, 42212–42213 (August 14, 1996).

While the two larger systems, Sabre and Galileo, no longer have significant airline ownership, each continues to rely on its former major airline owner for marketing support. American markets Sabre, and United markets Galileo (Southwest is also marketing Sabre). Amadeus Supp. Comments at 4–5. The systems' retention of the marketing relationships is consistent with our conclusion that a system without any airline ties could not easily compete in the CRS business. *See also* ''Editorial: Three fateful mistakes crippled Galileo,'' *Travel Distribution Reports* (June 28, 2001). Sabre and Galileo have other contractual relationships with American and United, respectively. Galileo hosts United's internal reservations system and provides other technological services. Amadeus Supp. Comments at 4–5. Sabre provides information technology services to American, and American provides management services to Sabre. Sabre Holdings 10–K Report for the Year 2000 at 16. The two systems also depend on their former owners for a substantial share of their total revenue. In 2000 Galileo obtained twelve percent of its total revenue from United. Galileo International 10–K Report for Fiscal Year 2000 at 10. In 1999 Sabre obtained twenty-four percent of its revenues from American. Amadeus Supp. Comments at 4.

It appears that, in the past, systems and their airline affiliates have taken steps to prejudice each other's competitors. Some of those airlines have taken actions that seem likely to injure their own marketing position in an apparent effort to strengthen the marketing position of the affiliated system. According to System One, American, Northwest, and TWA delayed their introduction of E-ticketing in Amadeus in order to benefit their affiliated system. United allegedly denied travel agents using one of Galileo's competitors the ability to reliably grant frequent flyer upgrade requests. System One Comments; System One Reply Comments.

Airlines with only a marketing relationship with a system have similarly made it more difficult for travel agents using another system to obtain complete information and make bookings, thus encouraging the agencies to choose the system marketed by the airline. For example, Amadeus asserts that American has continued to deny travel agents using systems other than Sabre access to some of its discount fares even though American has spun off all of its Sabre stock. Amadeus Supp. Reply at 22.

This apparent willingness of airlines to engage in practices likely to harm the sale of their tickets in order to promote the marketing efforts of an affiliated system indicates the strength of the continuing ties between each system and its owners (or former owners). Even if no airline had a tie with a system, a system might still engage in conduct that would prejudice airline competition and make it difficult for consumers to obtain unbiased or complete information, as Northwest has asserted. One commenter alleges that one system relegated a rental car company to a poor display position because competing rental car companies bought a preferential display position, a move that caused the disfavored car rental company to lose many bookings. Marshall A. Fein Supp. Comments. Whether in fact non-airline systems are likely to engage in conduct that could distort airline competition will be the basis of our decision on whether the rules should treat non-airline systems the same as airline systems.

We note, however, that our rules cover only the sale of airline services through the systems. We do not regulate the systems' treatment of the display and sale of other travel services, such as hotels and rental cars. We invite the parties to present evidence on the systems' participation terms for the suppliers of other travel services. Such evidence would help us determine whether there is still a need for rules governing the systems' treatment of participating airlines.

*6. Potential Anti-Competitive Practices in an Unregulated Environment*

The original rules focused on regulations that would either prevent display bias or keep the systems' airline owners from using their control of the systems to prejudice the competitive position of rival airlines. While these issues were crucial in our last rulemaking, we also worked on developing rules that would allow market forces to discipline system practices to some extent. We therefore adopted rules giving subscribers the right to use third-party hardware and software and to access any system or airline information source from equipment that was not owned by the system. We additionally prohibited certain types of subscriber contract terms that unreasonably denied travel agencies the ability to use alternative systems or databases. More recently we found it necessary to bar systems from enforcing airline parity clauses.

Every system seems to continue to engage in subscriber contract practices that keep airlines and travel agencies from using alternatives to the systems and thereby entrench each system's market power. The likely result is higher airline costs and thus higher fares for consumers. A number of the parties assert that our rulemaking should focus on these types of contractual provisions. Delta, for example, had contended that our primary objective ''should be to increase competition among CRS vendors for information services and booking fees by eliminating contract and other CRS vendor-created barriers that prevent or limit travel agents from using multiple CRS databases and Internet connections to competitive sources of travel information.'' Delta Comments at 2. Similarly, Alaska states, ''[O]ne critical objective * * * should be the elimination of the incentives and disincentives that lock travel agents into a particular CRS and discourage agents' use of alternative means of communicating with participating carriers.'' Alaska Comments at 7.

Finally, airlines affiliated with a system may engage in conduct that may restrict competition and that would not be outweighed by consumer benefits. As discussed below, they have in the past denied competing systems full access to their fares and withheld some types of functionality in order to give a competitive advantage to their affiliated system. While some argue that the mandatory participation rule inhibits competition between the systems by requiring owner airlines to participate in all systems at the same level as in

their affiliated systems, this potential disadvantage may be outweighed by the rule's potentially positive impact in fostering effective competition between smaller carriers and the major carriers.

**F. The Department's Authority Under Section 411 To Adopt CRS Rules**

As discussed, our authority under section 411 of the Federal Aviation Act, recodified as 49 U.S.C. 41712, has provided the basis for our rules governing CRS operations. Section 411 authorizes us 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.''

Thus, to readopt rules governing system operations, we must find that rules are necessary to prevent conduct that would constitute unfair or deceptive practices or unfair methods of competition in violation of section 411. A deceptive practice is one that will tend to deceive a significant number of consumers. *United Air Lines*, 766 F.2d 1107, 1113 (7th Cir. 1985). 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.

Section 411, of course, does not give us unlimited authority to regulate the practices of airlines and ticket agents. Airline deregulation has made the airlines generally free to determine how to distribute and sell their services, including sales through travel agencies. The antitrust laws similarly 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. 65 FR 45554, 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).

While section 411 also authorizes us to prohibit unfair practices as well as deceptive practices and unfair methods of competition, we have followed the principle that a practice is ''unfair'' if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing benefits. *Complaint of Ass'n of Discount Travel Brokers*, Order 92–5–60 (May 29, 1992) at 12, citing *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n. 5 (1972). *See also American Financial Services* v. *FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985). We have relied primarily on our authority to prohibit deceptive practices and unfair methods of competition as the basis for our proposed rules.

Maintaining CRS rules would comply with our duty under 49 U.S.C. 40105(b)(1)(A) to exercise our authority consistently with the United States' obligations under international agreements. The United States has a number of international air services agreements that require it to ensure that U.S. systems do not subject foreign airlines to discriminatory treatment.

The public policy provisions of our governing statute, moreover, would support the readoption of CRS rules to the extent that they remain necessary to prevent practices that would unreasonably reduce competition. Congress has stated that we must consider the following matters, among others, to be in the public interest: (i) The prevention of predatory or anticompetitive practices in the airline industry, (ii) the prevention of unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would allow an airline unreasonably to increase fares, reduce service, or exclude competition, and (iii) the encouragement of entry by new and existing air carriers. 49 U.S.C. 40101(a)(9), (10), (13).

*1. Our Authority To Regulate Non-Airline Systems as Ticket Agents*

We have in the past regulated airline systems by making the airlines that own or market a system responsible for ensuring the system's compliance with our rules. That approach made sense, because each system was originally created by an airline, was owned by an airline or airline affiliate, and was marketed by one or more airlines. The change in ownership of Sabre and Galileo, which are no longer owned and controlled by any airline, requires us to reexamine our authority to regulate the systems under section 411. We have tentatively concluded that section 411 empowers us to regulate such systems if necessary to prevent unfair and deceptive practices and unfair methods of competition. We may regulate a firm under section 411 if it is an air carrier or a ticket agent. It appears that a non-airline system (as well as an airline system) is a ticket agent.

We are addressing this question despite the suggestions from several parties that we need not decide here whether we may regulate non-airline systems. First, resolving the issue in this proceeding rather than in a future separate proceeding should be more efficient. Secondly, resolving the issue here would remove any ambiguity about our jurisdiction. After American spun off its remaining Sabre stock, Sabre informally began taking the position that it was no longer subject to our rules since it was no longer owned or controlled by an airline, *see* Orbitz Supp. Reply at 2, notwithstanding the express language in the rules making them applicable to any system marketed by an airline. While Sabre later changed its position, Sabre Supp. Comments at 8, its initial conduct suggests that it believed that we may not regulate a system that is not owned by an airline, even if an airline markets the system. United, moreover, contends that a marketing relationship cannot justify subjecting a non-airline system to the rules. United Supp. Comments at 18, n. 20.

We have therefore determined that we should resolve the question of whether section 411 authorizes us to regulate a non-airline system. We may do so if a system is a ticket agent. By statute a ticket agent is a person ''that as a 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). Travel agencies are clearly ticket agents, but the statute does not confine the category of ticket agents to travel agents alone. In our view a system's functions bring it within the definition of ticket agent, since each system ''offers for sale'' and ''holds itself out as * * * arranging'' air transportation.

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 carry out these functions under contracts with the airlines, which pay the systems for providing the information and booking capabilities to travel agencies and other system users.

By listing airline services in its display and enabling travel agents to book those services, each system is offering air transportation for sale. The system, moreover, is an active participant in any sales transaction, not just a transmitter of messages between travel agent and airline. Systems, for example, may require an airline to accept any booking made by a travel agent using the system. *See* America West Petition at 23, n.12. This requirement indicates that systems view themselves as responsible for the booking transaction itself, not just for providing a communications link.

Because each system does more than just transmit messages between airlines and travel agents, a system is quite different from a straight communications link, the analogy cited by United for its argument that a system cannot be considered a ticket agent. United Comments at 13. When a consumer uses the telephone to buy goods and services, for example, 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. Even then much of the communication will be with the system. Furthermore, telephone companies do not choose which data will be sent to the listener. The systems, in contrast, edit their displays of airline services. In fact they must edit and rearrange the schedule and fare data obtained by them for their integrated displays of airline services, since the raw information they obtain directly or indirectly from airlines is not in a form that would be useful to travel agents.

The systems also provide other functions to travel agents that enable them to serve their customers when buying airline tickets. The systems' passive booking functionality makes it possible for travel agents to print itineraries for customers participating in a group booking and to issue tickets for customers who earlier reserved their seat directly with the airline. These functions confirm the systems' status as active participants in the sale of air transportation.

We know of no judicial or agency decisions construing the term ''ticket agent'' in a manner which would preclude treating a system as a ticket agent. When we and the Board determined that the CRS rules should not cover systems not owned or marketed by an airline, neither we nor the Board concluded that our authority under section 411 would not permit us to regulate the practices of a non-airline system. 49 FR 32548; 57 FR 43794.

In addition, we have some power to bar airlines and travel agencies from doing business with systems that do not comply with at least some of the standards set by our rules. Regulating the systems' contractual relationships with airlines and travel agencies could enable us to prohibit some potentially prejudicial practices. We could, for example, bar airlines from purchasing favorable bias in system displays or from acquiring the systems' marketing and booking data. We are proposing some such rules in this proceeding. In other respects, however, regulating CRS practices by regulating airline conduct may not be entirely workable under the terms of section 411. The section authorizes us to adopt rules when necessary to prevent unlawful conduct by an airline or ticket agent, not by a party doing business with an airline or ticket agent. Barring an airline or travel agency from doing business with a system that does not follow the rules' standards would seem to require findings that the airline or travel agency would otherwise be engaged in a deceptive practice or unfair method of competition. Whether such findings could be made as to all of the practices covered by our proposed rules is uncertain.

It appears that rules governing non-airline systems may be necessary due to the potential risk for unfair and deceptive practices and unfair methods of competition. It also appears that extending the rules to such systems may not significantly interfere with their ability to compete and innovate. First, all of the systems are currently bound by the rules, which govern systems owned or marketed by an airline. And, as Galileo has stated, the systems have learned to live with the rules. Galileo Comments at 10–11. Whether or not we maintain our rules, the systems will remain subject to rules in Canada and Europe that are comparable in most respects to our current rules. Secondly, the on-going changes in airline distribution may ultimately make most or all of our rules unnecessary, particularly if the development of alternatives means for accessing travel agencies creates effective competition for the systems.

Furthermore, requiring the airline systems to comply with the rules while allowing the non-airline systems to operate without restriction would create competitive disadvantages for the airline systems. Gaileo Supp. Comments at 10–12. The adoption of rules governing non-airline systems would equalize the treatment of all systems, whether or not they have significant airline ownership, and be consistent with the United States' obligations under its bilateral air services agreements. Of course, we ask the parties to address whether we should adopt rules governing non-airline systems, if we find a need for continued CRS regulation, and whether section 411 would authorize our doing so.

*2. Antitrust Principles Relevant to System Practices*

This section explains our tentative belief that the practices that would be regulated by our proposed rules would violate section 411. It appears that they would either reduce competition in the airline and airline distribution industries and be analogous to antitrust law violations, or would cause consumers and their travel agents to receive biased or inaccurate information on airline services. We believe that the systems can engage in such practices because each system still seems to have market power over airlines. Market forces therefore have not disciplined the price and terms of services offered airlines by the systems. In particular, the systems appear to be charging booking fees that seem to exceed the fees that would be charged in a competitive industry. The record also shows that the systems have engaged in other practices that their customer airlines would likely not accept if the industry were competitive, such as imposing charges for booking fee bills and fees for passive booking transactions that allegedly provide no benefit for the airlines.

In *Eastman Kodak Co.* v. *Image Technical Services*, 504 U.S. 451 (1992), the Supreme Court explained 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 Court's definition of market power appears to fit each system's relationship with the airlines, since the systems appear to have been able to impose high fees and unattractive terms for participation on airlines. In *Eastman Kodak* the Court also noted that market power is usually inferred from the seller's possession of ''a predominant share of the market.''

504 U.S. at 464. Insofar as electronic access to travel agency subscribers is concerned, it appears that each system effectively holds such a predominant market share, as explained above.

We believe that the actions that would be covered by our proposed rules may violate section 411 whether done by airline or non-airline systems. In our last rulemaking, we did not examine whether a non-airline system's operations could harm competition in the airline and airline distribution businesses. At that time, no non-airline systems existed, and we doubted that any non-airline system could operate successfully. We suggested that there should be no need to regulate a non-airline system since, without airline control, such a system would lack incentives to engage in conduct that would distort airline competition. We did not wish to apply the rules to a non-airline system when there appeared to be only a theoretical possibility that such a firm might operate. 57 FR 43794. In light of developments over the past several years, however, as explained above, we now believe that there are reasons to consider applying the rules to non-airline systems as well as airline systems. It is possible that a system that had no ownership or marketing ties with an airline might engage in conduct that would prejudice airline competition and make it difficult for consumers to obtain unbiased or complete information. *See* Northwest Comments on Proposed Extension at 6; Marshall A. Fein Supp. Comments.

Given the systems' market power over airlines, we concluded in our last reexamination of the rules that the practices addressed by those rules constituted unfair methods of competition. Those practices are analogous to conduct prohibited by the antitrust laws: A firm's refusal to allow competitors to obtain access to an essential facility on reasonable terms, and monopoly leveraging (the use of market power in one line of business to obtain unfair competitive advantages in a second line of business). These antitrust analogies were applicable because each of the systems was controlled by airlines that competed with other airlines whose ability to market their services depended on their ability to participate in the systems on reasonable terms. 57 FR 43789–43791.

The Seventh Circuit affirmed the Board's rules, which were based on very similar findings. *United Air Lines* v. *CAB*, 766 F.2d 1107 (7th Cir. 1985). 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.

The antitrust principles underlying our proposed rules include the essential facility and monopoly leveraging doctrines that we relied upon in our earlier rulemakings. In addition, some of our proposed rules derive support from other antitrust principles.

First, we have been concerned by system practices that prevent travel agencies and airlines from bypassing a travel agency's principal system and that thereby entrench each system's existing market power over the airlines. That concern led us ten years ago to adopt the rule giving travel agencies the right to use third-party hardware and software and to access any system or database from the agency's computer terminals, unless the system owned that equipment. Several current system practices that seem problematic to us give systems the ability to obtain all or most of a travel agency's bookings. These practices appear to violate the principle that a firm that dominates a market may not engage in conduct that is designed primarily to maintain or increase its dominance.

The Sherman Act allows a dominant firm to increase its market share by being more efficient or offering better products or services. *See, e.g.*, *Foremost Pro Color* v. *Eastman Kodak Co.*, 703 F.2d 534, 544–546 (9th Cir. 1983). The antitrust laws prohibit dominant firms, however, from using exclusivity agreements when they significantly limit opportunities for other firms to remain in or enter the market by foreclosing ''a substantial share of the relevant market.'' *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 328 (1961).

A monopolist generally may not engage in conduct that is economically rational if it eliminates competition. *See, e.g.*, *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The principle that a dominant firm may not engage in conduct designed to prevent competition will be applicable to both airline and non-airline systems.

Other practices by systems and the airlines owning or marketing a system may be contrary to the antitrust laws' prohibition against tying clauses. We prohibited airline parity clauses because they resembled tying arrangements prohibited by the antitrust laws, and our rules prohibit each system from requiring airlines to buy unrelated services from the system as a condition for participation. 49 FR 32554–32555; 49 FR 11656, 11664; 62 FR 59795–59796. A tying arrangement—a seller's agreement to sell one product only on condition that the buyer purchase a second product from the seller (or promise not to buy the product from another seller)—is a violation of the Sherman Act if the seller has appreciable market power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product. *Eastman Kodak Co.* v. *Image Technical Services, supra*, 504 U.S. at 461–462. Tying arrangements are objectionable because they force buyers to accept conditions that they would not accept in a competitive market. *See, e.g.*, *Jefferson Parish Hospital*, 466 U.S. at 12–15. As the Court has explained, ''[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.'' When a seller imposes a tying arrangement on a buyer, ''competition on the merits in the market for the tied item is restrained * * *'' *Jefferson Parish Hospital*, 466 U.S. at 12. A tying arrangement can cause consumers to pay higher prices, a result contrary to the goals of the antitrust laws. *Eastman Kodak Co.*, 504 U.S. at 478. We based our prohibition of the enforcement of the systems' parity clauses on findings that those contract provisions had the harmful effects of tying provisions—they limited competition between the systems, and they increased the prices paid by the systems' customers. 62 FR 59795.

Some types of conduct by airline systems may violate the monopoly leveraging principle: a firm may not illegitimately use its monopoly power in one industry to acquire an unfair competitive advantage in a second industry. Two courts have accepted this principle as a basis for finding a Sherman Act violation. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); *Kerasotes Michigan Theatres, Inc.* v. *National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988). The

monopoly leveraging theory is also consistent with the Supreme Court's reasoning in *United States* v. *Griffith*, 334 U.S. 100 (1948). We recognize that other courts have argued that monopoly leveraging is unlawful under the antitrust laws only where the conduct otherwise violates that statute. *See* 57 FR 43790–43791. Monopoly leveraging nonetheless should be a valid basis for finding that a firm has engaged in an unfair method of competition under section 411, since we may prohibit conduct that does not violate the antitrust laws.

In addition, our proposed rules would keep airline systems from engaging in actions that may be proscribed by the essential facility doctrine. That doctrine requires a firm that controls a facility essential for competition to give its competitors access to the facility on reasonable terms. The firm will violate section 2 of the Sherman Act if it denies access (or imposes unreasonable conditions on access). A facility is essential if it cannot be feasibly duplicated by a competitor and if the competitor's inability to use it will severely handicap its ability to compete. 61 FR 42203, citing *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); and *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990). In our last major rulemaking we determined that each of the systems is comparable to an essential facility and must therefore offer airlines access to its services on reasonable terms. 57 FR 43790. This was an alternative ground for our prohibition of airline parity clauses and our requirements that the systems' terms for airline participation must be non-discriminatory. 62 FR 59796.

Several of these principles are equally applicable to the non-airline system practices regulated by our rules. For example, the essential facility doctrine is applicable when a firm that does not own an essential facility is able to deny reasonable access to its competitors by agreement with the facility's owner. *See, e.g., Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977). In addition, the Federal Trade Commission has held that its authority to prohibit unfair methods of competition in other industries under section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, which is analogous to section 411, authorizes it to prohibit practices by a monopolist in one industry that unreasonably restrict or distort competition in a second industry, even if the monopolist does not participate in the second industry.

In *LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966), the Fifth Circuit affirmed such an FTC order. The FTC had held that a monopolist manufacturer of shrimp peeling machinery had engaged in an unfair method of competition by charging shrimp canners in the Pacific Northwest prices twice as high as those charged Gulf Coast shrimp canners. The manufacturer charged different prices largely because the machinery produced greater cost savings for the Pacific Northwest canners. The Fifth Circuit affirmed the order on the ground that the FTC could bar a monopolist from charging discriminatory prices that affected competition in a second industry. *LaPeyre* thus held that ''a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an adjacent market,'' *Fulton* v. *Hecht*, 580 F.2d 1243, 1249, n. 2 (5th Cir. 1978).

The Second Circuit, however, has taken a somewhat narrower view of the FTC's authority. That court held that the FTC could not regulate the conduct of a firm with monopoly power in one industry in order to promote competition in a second industry unless the monopolist either competes in the second industry as well or intends to restrain competition in the second market or acts coercively. *Official Airline Guides, Inc.* v. *FTC*, 630 F.2d 920, 927–928 (2nd Cir. 1980). The Court therefore reversed an FTC order requiring the Official Airline Guide, the publisher of the standard sourcebook for information on airline schedules, to improve its listings of commuter airline flights so that commuter airlines would be better able to compete with the jet airlines. The Court reasoned that allowing the FTC to generally regulate a monopolist's conduct insofar as it affected competition in an industry in which the monopolist did not compete would give the agency too much control over businesses. 630 F.2d at 927. The FTC, however, has stated that the Second Circuit's decision was ''erroneous'', although the Commission apparently has not since issued a decision holding that a monopolist committed an unfair method of competition due to its business practices with customers in an industry where the monopolist did not operate. *See* Earl Kintner & William Kratzke, VII *Federal Antitrust Law* (1988) at 54–55.

The Second Circuit's opinion suggests that the FTC could regulate a monopolist's conduct in one industry in order to prevent that firm from carrying out intent to restrain competition in a second industry or from acting coercively. 630 F.2d at 927–928. The rules we are proposing to adopt as to non-airline systems (and airline systems) are intended to prevent systems from trying to reduce competition in the airline industry and from engaging in coercive conduct.

We thus have tentatively concluded that there is a legal basis for our proposed rules regulating system practices in established antitrust principles and that the rules would be within our authority under section 411 to prohibit unfair methods of competition.

*3. Antitrust Principles Relevant to Airline Practices*

We also propose to expand the rules governing the practices of airlines affiliated with a system or using system services. We are proposing to restrict the airlines' ability to obtain some types of marketing and booking information, since we believe that the detailed information now being provided by the systems likely reduces fare competition and enables airlines dominating metropolitan area markets to pressure travel agencies into diverting sales from competing airlines. While we are tentatively proposing to eliminate the mandatory participation rule, we request that parties comment on whether we should maintain or strengthen that rule.

Such airline practices may violate antitrust principles, if the airlines do not have legitimate business reasons for their conduct and the market structure and other factors would cause the practices to significantly reduce competition. An airline's refusal to give travel agencies access to its corporate discount fares unless they use the system affiliated with that airline could be analogous to unlawful tying.

Other possible airline practices that would be covered by our proposed rules appear to be contrary to antitrust principles because they involve the use of an airline's dominant position in some local markets either to maintain or increase that dominance or to distort competition in the area's CRS market. Airlines can obtain a dominant position in some metropolitan area airline markets due to the hub-and-spoke system used by all network airlines. The airline that has a hub at a city usually has a dominant share of the city's airline market. This dominance results in large part from the competitive advantages given it by operating a hub—it serves more cities from the hub, and it offers more frequent service on most of its routes at the hub. Airlines capitalize on the advantages of having a large market share by offering frequent flyer programs and travel agency override commission programs that will be more attractive to travellers and travel agencies, respectively. General

Accounting Office, ''Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets'' (October 1996) at 14–19; Findings and Conclusions on the Economic, Policy, and Legal Issues, *Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry* (January 17, 2001) at 23–24.

The hubbing airline's dominance of the local airline market, however, also enables it to force travel agencies to comply with its wishes. Travel agents in that city will book their customers most often with that airline, and their ability to obtain marketing benefits from that airline, such as the ability to book important customers on oversold flights and to sell its corporate discount fares, may make or break their business. *Cf. Airline Marketing Practices* at 25. As a result, travel agencies cannot easily resist demands by the dominant airline that they stop booking customers with competing airlines or that they use the system affiliated with that airline. *See* Large Agencies Coalition Comments at 9.

An airline's abuse of a dominant position in local airline markets to increase or continue that position would violate the principle that firms with market power may not engage in transactions designed only or primarily to protect such power. When such an airline engages in conduct designed to compel travel agencies to use its affiliated system, it is leveraging its market power in one industry to increase its market share in another industry. Monopoly leveraging is contrary to antitrust principles for purposes of section 411.

*4. The Continuation of Rules on Display Bias*

Insofar as we have based our rules against display bias on our authority to prohibit unfair and deceptive practices, our authority to readopt those rules is clear. The types of display bias barred by the rules are deceptive practices that would tend to deceive a significant number of consumers. The Seventh Circuit held on review of the Board's rules that the Board's findings sufficed to bring the adoption of the rules prohibiting display bias within the Board's authority under section 411. *United Air Lines,* 766 F.2d at 1113.

Since we believe that the non-airline systems are ''ticket agents'' within the meaning of section 411, we may require them to comply with the rules barring display bias.

**G. Considerations Favoring Fewer Regulations**

Some parties have argued that we should consider terminating or phasing out the rules instead of strengthening them. They have questioned the effectiveness of the current CRS rules, most recently in their comments on our proposal to extend the rules for another year. They argue that the continuing growth in on-line distribution of tickets is favorably changing the competitive structure of airline distribution in ways that could make the termination or phasing out of the rules viable. They argue at a minimum that we must carefully analyze the changing structure before we strengthen or perpetuate the existing rules.

Several parties, particularly United, have asserted that the changes in the systems' ownership and the Internet's growing role in airline distribution have made the rules obsolete. We based the current rules on each system's ownership by airlines, but the two largest systems now have no significant airline ownership, and the two smaller systems each have several airline owners. According to these parties, the existing rules may actually cause rather than prevent anti-competitive behavior. They assert, for example, that the dominant systems seem to have decided that coverage of the rules enhances their market power rather than limits it. They argue that the allegedly obsolete rules actually impose substantial hidden costs, citing the systems' sharply escalating booking fees, which they attribute to the current rules that insulate the systems from competition. Since airlines must do business with all of the systems, the latter have no incentive to reform their business practices or lower their prices. Meanwhile, the airlines have no leverage to obtain better terms and conditions through negotiations with the systems. Our rules allegedly inhibit negotiations between the systems and participating airlines over fees and participation levels.

We have set forth our tentative views on these issues elsewhere in this notice. We presently believe that the airlines' inability to obtain better terms from the systems has largely been the result of the systems' market power, not a product of our rules. Nonetheless, we are specifically requesting comment on alternative proposals that would promote competition in the CRS business. The assertions made by United and other airlines about the impact of the mandatory participation rule and the rule prohibiting discriminatory booking fees may be correct. We are therefore proposing to end those rules, as discussed below.

There may be other options that would move in the direction of less regulation of the traditional systems during a period in which we would expect growing competition in the on-line market to improve the overall competitive potential of the airline distribution system. Proposed options have included a suspension option and a phase out of the rules that would be completed when on-line sales constitute a large enough share of the total market.

For example, Worldspan and Delta's comments on our proposed extension of the rules' sunset date suggested that we should suspend the rules for two years as an experiment to see what rules are actually necessary in light of the current operation of the airline and airline distribution industries.

More recently, Continental has suggested that the rules should be phased out with a transitional period beginning immediately and lasting until the systems account for less than forty percent of airline ticket sales. During the transitional period, we should retain only the basic CRS provisions such as the rules on the display of information designed to ensure that an unbiased display remains available to travel agents.

Our current proposals would modify rather than eliminate the rules, however, we acknowledge the possibility that sunset of the rules or more flexible CRS rules might create more effective competition in the CRS sector in relation to growing competition on the Internet. We have tried to take such factors into account in shaping our specific rule proposals, as discussed below. However, we invite comment on all of these proposals aimed at determining how we can make these proposals most effective. For example, as noted above, we are proposing more flexible provisions in areas such as mandatory participation and constraints on fees that could encourage more effective negotiations between participating airlines and the systems.

This leads to one of the more significant generic issues in this proceeding. In the face of largely unregulated Internet competition, one question that arises is whether we should affirmatively consider a package of participation requirements and alternative pricing approaches (booking fees and contract arrangements affecting travel agencies) geared to making the overall distribution network (including the traditional regulated CRS sector) maximally ''incentive compatible'' with growing competition from diverse

marketing arrangements burgeoning in the on-line distribution sector.

If we find appropriate and workable approaches in the context of this proceeding, we will carefully evaluate them. This evaluation will also shape our final proposals for the continuing review of CRS issues over the next several years.

**H. The Specific Rule Proposals**

While we are looking at a range of options, such as allowing the rules to expire or phasing them out, we are also proposing specific rules in the event that we determine that CRS regulation remains necessary for an additional period. The rules being proposed by us are intended to prevent deceptive practices that could mislead consumers and unfair methods of competition that would reduce competition in the airline and CRS businesses and increase airline costs. If we conclude that rules are necessary, we will prefer to adopt rules that will help enable market forces to discipline the systems' terms for airline participation to the maximum extent possible, as we stated when we began this rulemaking. 62 FR 47609. The development of system competition for airline customers would lessen the need for detailed regulation by us. Enabling market forces to operate effectively in the CRS business, combined with on-going developments in airline distribution, may eventually eliminate the need for most or all CRS rules. For the most part our proposed rules are intended to create more competition in the CRS and airline businesses.

We are not trying to adopt rules that would address all potential problems. Any such comprehensive and detailed set of regulations would necessarily impose significant burdens on the systems, and creating rules designed to eliminate all risk of possible illegal conduct would likely interfere with legitimate business practices. As to each issue we therefore are considering the likelihood and seriousness of the harm that could result in the absence of regulation, along with the benefits and costs likely to result from the adoption of a rule.

Developing rules sometimes requires us to choose among goals that cannot easily be reconciled. Rules proposed to solve one problem may worsen another problem. For example, increased competition between the systems for travel agency customers would be desirable, and a number of parties, particularly the travel agency groups, have proposed rule changes that would give travel agencies more leeway to switch systems and use multiple systems. However, increasing the systems' competition for travel agency customers could drive up the systems' marketing expenses and thus lead to higher fees for their captive customers, the airlines.

We will discuss the major rule proposals in the following order: (i) The scope of the rules, (ii) the use of third-party hardware and software by travel agencies and their ability to use one terminal to access several systems and databases, (iii) mandatory participation, (iv) display bias, (v) booking fees, (vi) booking and marketing information, (vii) travel agency contracts, (viii) Internet regulation, and (ix) international issues.

We will discuss only the more significant issues raised by the comments and our proposed rules. Where we are proposing to readopt existing rules, we will rely on the findings and analysis in our last review of the rules unless we have updated or modified them in this notice.

*1. The Scope of the Rules*

The current 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. The rules do not cover computer systems that provide some but not 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, services used by corporate travel departments and consumers accessing a system through the Internet). The rules also do not cover the operations of traditional travel agencies or on-line travel agencies. The description of the rules' applicability is set forth in section 255.2, and the definition of ''system'' is in section 255.3.

The major issue on the rules coverage is whether the rules should govern non-airline systems. We are proposing to apply the rules to both airline and non-airline systems, as discussed above.

Many parties have urged us to expand the scope of the rules in other respects. We discuss one such request—the proposal that the rules cover at least some of the practices of Internet sites where consumers can obtain information and make bookings on airlines—below in our discussion of Internet rule proposals.

A number of parties contend that the rules should cover the relationships between the systems and corporate users, primarily corporate travel departments. Their major concern is the tying by an airline of access to its corporate discount fares with the use of the system affiliated with that airline. The parties have an opportunity to comment on whether this kind of tying and similar system practices should be considered unfair methods of competition, as discussed below in our discussion of the mandatory participation requirements.

Our current rules do not expressly regulate the terms for airline participation when someone other than a travel agent uses a system. As a result, a system could believe, for example, that it could charge discriminatory booking fees for bookings made by someone other than a travel agent. Given the systems' apparent market power, each system could also impose unreasonable terms for airline participation for non-travel agency sales. The record does not indicate that the systems have imposed prices and terms for system participation in such circumstances that would be contrary to the rules' requirements for travel agency sales. We therefore are not proposing any rule on this issue.

Amtrak and various bus companies contend that the rules should require an improved display of train and bus services. Amtrak wants the systems to be required to list high-speed rail service together with airline flights, while Greyhound and the Airport Ground Transportation Association urge us to require systems to display bus services operated to airports. IATA counters that such expanded displays of non-airline services could impose substantial costs on the airlines, due to the existing coding system's limited capacity to handle a wide variety of non-airline services. We cannot grant the requests to mandate better displays of train and bus services. Our jurisdiction under section 411 is limited to the marketing of air transportation. 56 FR 12604; 57 FR at 43797.

*2. Definitions*

Our major proposal for revising the rules' definitions involves changes to the definition of ''system''. First, as discussed above, we propose to include non-airline systems within the scope of the rules. Doing so will require changing the definition of a system by omitting the requirement that the system be offered by an airline or its affiliate.

Secondly, we want to ensure that information and booking services accessed by travel agencies over the Internet are not treated as systems subject to the rules, when they do not present a potential for anticompetitive conduct and deceptive conduct. Our goal is to facilitate the development of alternatives to the systems for both travel agencies and airlines and thereby

reduce the systems' market power and potentially eliminate or reduce the need to regulate them. The Internet can provide alternatives to the systems for travel agents willing to use them. Individual airlines like Delta have set up websites for travel agent use. A number of travel agents use sites primarily created for consumer use, like Orbitz, to obtain information and make bookings. In addition, firms are developing software products that allow travel agents to search multiple websites and make bookings. *See, e.g.*, ''Fare game: 'Beat the Agent,' '' *Travel Weekly* (March 4, 2002) at 6. We doubt that such sites should be covered by our rules when used as alternatives to one of the existing systems, either on a transaction-by-transaction basis or on a short-term basis. Defining a ''system'' as an information and booking tool used by subscribers under a long-term contract might exclude such services, but other changes could more effectively exclude such services while continuing to cover CRS services that should be covered. We ask the parties to comment on how best to exclude Internet sites from the scope of our rules, when their use should not require regulation.

Since we would keep the condition that the system charge airlines for bookings made through its service, the definition would not cover direct connection services offered by individual airlines and other firms that do not charge booking fees. This proposal and the previous proposal thus would exempt firms from being covered as a system if they do not charge booking fees or if they provide services to travel agencies only under short-term contracts or on a transaction-by-transaction basis.

In addition, under the current rules a computer reservations system is not subject to the rules unless it provides airline information and a booking and ticketing capability. We assumed that travel agencies would not choose a system that was unable to perform all of these three functions. 57 FR 43794. Since then the airlines have developed E-ticketing, and most passengers no longer use paper tickets. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 8; March 7, 2002, Press Releases by American and United. Given the growth of E-ticketing, the ability to issue tickets may no longer be a crucial function needed by travel agencies. We therefore propose to redefine the systems subject to the rules as computer reservations systems that provide airline information and a booking capability. A firm that only provides information on airline services, whether electronically or otherwise, will continue to be outside our rules.

The rules currently define a ''system owner'' as an airline that owns at least five percent of a system's equity, in order to implement the rule requiring each airline with a significant ownership interest in one system to participate in competing systems at the same level at which it participates in its own system and certain similar rules regulating relations between such an airline and travel agency subscribers. While we are proposing to eliminate the mandatory participation rule, the rules impose other obligations on system owners. If we did extend the mandatory participation rule to airlines that market a system, whether or not they have any ownership interest, as has been urged by some commenters, the rule presumably should also cover airlines with any ownership interest in one system. At the same time we doubt that the rules should cover an airline that indirectly holds a small ownership interest in a system because it holds a non-controlling amount of stock in a public company that owns a system. We ask the parties for suggestions on whether and how we should redefine system owner.

We also ask the parties whether we should change the definition of ''subscriber,'' now described 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. Because many travel agencies obtain incentive commissions from one or more airlines, they may favor the airlines likely to pay them a higher commission. We recognize, however, that virtually all, if not all, travel agencies currently hold themselves out as impartial sources of information for consumers. Since we would like the rules to be consistent with industry developments, we invite the parties to comment on whether the definition should be changed by striking the word ''neutral.''

Finally, while we are not proposing to base the coverage of the rules on whether a system is owned or marketed by an airline, several of our proposed rules would impose obligations on airlines that market a system (or limit the rights given airlines if they market a system). We are not proposing to define the kind of marketing relationship that would make these provisions applicable. We invite the parties to comment on whether a tighter definition should be used.

*3. Third-Party Hardware and Software*

When we last reexamined the rules, travel agencies normally used equipment provided by a system, and with rare exceptions no system allowed subscribers to use its equipment to access other systems or other databases providing airline information and booking capabilities. If a travel agency wanted to access another system, it would have to acquire a separate set of computer terminals. That was sufficiently cumbersome and expensive that few agencies took the trouble to do so. 56 FR 12607; 57 FR 43796–43797.

To enable travel agencies to use several systems and have direct links with internal airline reservations systems and other databases, we adopted a rule, section 255.9, that allows travel agencies to obtain their own equipment for CRS access and to access any system or database with airline information from the terminals used by an agency, unless a system owns the equipment. The rule additionally allows travel agencies to use third-party hardware and software in conjunction with system services, except as necessary to protect a system's integrity. Several airlines had stated that they would create direct links between their internal reservations systems and travel agency computer terminals. That would give airlines some opportunity to bypass CRSs and perhaps the ability to decline to participate in every system unless the terms for participation were reasonable. 57 FR 43797.

In proposing the rule, we expected that it would benefit competition in several respects:

> This proposal, if effective, could be the least regulatory means of alleviating the continuing competitive problems created by the systems. Giving agencies the ability to switch easily among systems using the same terminal would encourage vendors to compete on improving the functionality and information of each system in order to encourage subscribers to make greater use of it. It could also enable participating carriers to gain some bargaining power over booking fees by enabling them to encourage agencies to use a system with the lowest booking fees. If so, that would limit booking fees, which are otherwise unrestrained by market forces.

56 FR 12607.

We further noted that giving travel agencies the right to use third-party hardware and software and to use the same terminal to access different systems and databases would be consistent with the trends in other computer service industries, for networking was becoming increasingly important and common. Our proposal was also consistent with the Federal Communications Commission's decisions on telephone access, for the FCC had held that telephone companies could not arbitrarily restrict their

customers from connecting third-party equipment with the telephone system. 56 FR 12605.

The rule has had some impact. In 1999 thirty-six percent of all travel agencies used their own terminals, and twenty-eight percent of all agencies used third-party software as a front-end for a system. About thirty percent of all travel agents used a system to access the Internet, whereas only three percent could do so in 1997. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 131, 132, 133. The rule nonetheless has been less beneficial than expected. Few travel agencies use more than one system, few seem to bypass the systems by using the Internet for a significant number of airline bookings, and airlines have found it impracticable to establish direct links with individual travel agencies.

Technical problems do not block travel agents from accessing different systems and databases from one terminal. Both United and Galileo point out that travel agencies can obtain software enabling them to access multiple systems and databases. Galileo Supp. Comments at 7, n.6; United Supp. Reply at 23. Travel agencies nonetheless rarely make use of this capability. Legitimate business reasons in part explain the agencies' continuing reliance on one system and failure to seek information and make bookings with multiple systems and databases. Before the Internet, creating a direct link between an agency and an airline was relatively expensive. In addition, using multiple systems and databases could increase an agency's training costs and make keeping track of records more difficult. 56 FR 12607.

Notwithstanding the foregoing considerations, we presently believe that the systems' contract practices may be the major reason for the travel agencies' failure to use multiple systems and databases. Our rule allows each system to keep subscribers from using computer terminals owned by the system to access competing systems and databases. The systems have discouraged travel agencies from buying their own equipment by offering them equipment in conjunction with CRS services on very attractive terms. The systems allegedly offer travel agencies a package of system services and equipment at a price barely above the price of system services without equipment. This makes it too costly for agencies to acquire their own equipment. Large Agency Coalition Comments at 3–4; Midwest Agents Selling Travel Comments at 2; Delta Comments at 10. As a result, travel agencies typically have not bought their own equipment. The agencies then cannot take advantage of our rule giving them the right to access multiple systems and databases from equipment owned by any entity other than the system itself.

The systems could, of course, allow subscribers to use system-owned equipment to access other systems and databases, but they apparently rarely grant such permission. Delta Comments at 8–10; Alaska Comments at 10–11. The systems also may have restricted subscriber access to the Internet from system-owned equipment. ''U.S. Travel Agency Survey 2000,'' *Travel Weekly* (August 24, 2000) at 140.

Each system additionally has offered financial incentives to its subscribers that encouraged each to make all or most of its bookings on that system. The most common such incentive is productivity pricing. A productivity pricing structure gives travel agencies large discounts from the standard charges for system services and equipment if the travel agency meets a specified minimum booking level for each terminal. The booking quota is high enough so that the agency as a practical matter cannot afford to make substantial use of another system or database for its bookings. Alaska alleges that the systems' use of productivity pricing (and their restrictions on travel agency use of system-owned equipment) made it difficult for Alaska to establish direct links between its internal reservations system and selected major travel agencies. Alaska Comments at 4–5. ASTA contends that productivity pricing keeps travel agents from using the Internet to book fares lower than those sold through a system. ASTA Comments on Proposed Extension at 3.

As a result of these system practices, few travel agencies have accessed multiple systems and databases from the computer terminals in their offices for airline bookings. *See, e.g.*, Delta Comments at 10. The continuing prevalence and impact of such restrictions is unclear, since travel agents are increasingly using the Internet for airline bookings. ''Online travel is booming,'' *Travel Weekly* (August 26, 2002).

Because the rule's exception for system-owned equipment may have effectively annulled it, a number of parties urge us to revise the rule to allow agencies to access any system or database from equipment owned by the system as well as equipment not owned by the system. These parties include Delta, U.S. Airways, America West, Alaska, Midwest Express, Qantas, Varig, the Asia Pacific airline group, ASTA, and Amtrak.

Worldspan would not oppose this revision as long as the rule stated that any equipment or software connected with the system must be compatible with the system.

Sabre and Galileo oppose any change in this rule. They argue that travel agencies have the option of buying their own equipment if they want to access other databases and that changing the rule would override the system's rights as the owner of the equipment. Sabre also asserts that changing the rule would destroy the economics of the business, since the system could no longer expect to obtain the booking fees generated by the travel agency. Sabre Reply at 36.

We are proposing to readopt the existing rule with one change, the elimination of the provision that allows a system to block travel agencies from using equipment owned by the system to access other systems and databases. We believe that our findings on the potential competitive benefits of such a rule remain valid. Enabling travel agencies to access different systems and databases and travel suppliers from one computer would encourage competition between the systems and between the systems and alternative electronic sources of information and transaction capabilities for travel agencies. That in turn would apply some competitive discipline to booking fee levels. Experience seems to show that making such a rule effective will require both eliminating the exception for system-owned equipment and restricting the use of productivity pricing and other contract provisions that cause travel agencies to use one system for all or most of their bookings (our tentative findings on productivity pricing and related issues are discussed below in connection with the other subscriber contract issues).

These findings are consistent with the recommendations of several parties. Delta's initial comments thus asserted that our primary objective ''should be to increase competition among CRS vendors for information services and booking fees by eliminating contract and other CRS vendor-created barriers that prevent or limit travel agents from using multiple CRS databases and Internet connections to competitive sources of travel information.'' Delta Comments at 2. Similarly, Alaska states, ''[O]ne critical objective * * * should be the elimination of the incentives and disincentives that lock travel agents into a particular CRS and discourage agents' use of alternative means of communicating with participating carriers.'' Alaska Comments at 7.

Enabling other firms to compete with the systems for a share of each travel agency's business, moreover, would encourage technological innovation. A firm that can develop superior technology should have a competitive advantage in obtaining travel agency customers. This may not occur as long as the systems' contract provisions and restrictions on the use of equipment block travel agencies from choosing a service that better meets their needs. Several firms are already developing more efficient programs that travel agencies can use for searching several systems and websites for information and making bookings in the location with the best fare and service. ''Fare game: ''Beat the agent' '', *Travel Weekly* (March 4, 2002) at 6.

Moreover, as explained below in our discussion of the airline proposals for rules requiring CRS fees to be reasonable or cost-related, the most practicable and desirable solution for the airlines' complaints about CRS practices is to foster alternatives that airlines can use if the terms for system participation are unacceptable and that airlines can encourage travel agencies to use.

In the last rulemaking, we decided to allow each system to limit the use of its own equipment on the basis that the system providing the equipment should be able to control its property and obtain some compensation for its use. 57 FR 43800. After reexamining the issue, we think that eliminating the exception for system-owned equipment would not treat systems unfairly when they choose to provide equipment. Systems can provide services to travel agencies without providing the equipment, since travel agencies can obtain equipment elsewhere. More importantly, we would not be restricting the systems' ability to charge travel agencies for the use of their equipment. We would only be preventing them from unreasonably restricting the equipment's use.

We believe that the restrictions tend to maintain the systems' ability to obtain monopoly rents from airlines. It appears that the trend in the business world and in the regulatory arena has been to eliminate restrictions that limit access to computer terminals and telephone equipment. Our proposed rule would duplicate the practices already followed in several foreign countries at the time of our last rulemaking. 56 FR 12607; 57 FR 43799.

The record suggests, moreover, that the systems have offered travel agencies equipment at little or no cost, which enables the systems to prevent travel agencies accepting those offers from accessing competing systems and databases from one computer terminal. The systems have done so, notwithstanding our intent that travel agencies be able to use more than one system and that no system should be entitled to obtain all or most of its subscribers' bookings during the terms of their CRS contracts. *See, e.g.*, 57 FR 43827–43828. For this reason we cannot accept Sabre's objection to the proposed rule. Sabre asserts that the systems would likely become unwilling to provide equipment and that the proposal would undermine the systems' assumption that the equipment supplied by a system to a travel agency will generate booking fee income. Sabre Reply at 36. Sabre's position is contrary to our long-standing policy that a subscriber should be free to use multiple systems and databases and that a system therefore should not be entitled to obtain—or expect to obtain—most or all of a subscriber's bookings.

To provide travel agencies some additional assurance that they may use third-party hardware and software we invite comment on additional provisions that would prohibit systems from discriminating against subscribers for using a back-office system in conjunction with bookings outside the system and from charging disproportionately high fees for system services to subscribers that do not use equipment provided by a system. The latter provision would not affect the systems' pricing of equipment. These proposals would add some specificity to the existing rule that bars systems from directly or indirectly prohibiting or restricting subscribers from using third-party hardware and software or using the same equipment for accessing one system and other systems or databases.

*4. Contract Clauses Restricting Airline Choices on System Usage*

As discussed above, we seek to enable airlines to use alternatives to the systems so that market forces may discipline the prices and terms offered airlines for CRS services. To achieve this goal, airlines must be able to choose whether they will participate in a system and at what level, and to encourage travel agencies to obtain information and make bookings in ways that would bypass the systems. We therefore adopted a rule prohibiting the systems from enforcing parity clauses except as to airlines that owned or marketed a competing system. The parity clauses imposed by most systems required each participating airline to buy at least as high a level of service from the system as it did from any other system (for example, Sabre's parity clause required any airline participating in any competing system at the full availability level to participate in Sabre at that level or a higher level). We prohibited the enforcement of parity clauses because they 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 recognized, however, that 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 fourteen days advance notice of its intent to do so. 62 FR 59797–59799.

None of the parties has asked us to reexamine the rule prohibiting the enforcement of parity clauses, subject to the exception for airlines marketing or owning a system, so we propose to readopt the rule. Our proposal to end the mandatory participation requirement, if adopted, may require that the parity clause rule be changed to eliminate that exception.

Sabre, however, raises two related issues regarding system contract practices that appear to limit airline choices on system participation (a third issue, the tying of participation in the system's services provided to travel agencies with participation in websites using the system, is examined below with the other Internet issues). Sabre states that its contract with participating airlines prohibits them from discriminating against travel agencies using Sabre. If broadly interpreted, the clause arguably could keep airlines from taking steps to encourage travel agencies to use an alternative system that might be more efficient or less costly for the airline. Sabre's contracts also give it the right to limit a participating airline's ability to withhold fares from Sabre; Sabre alleges, for example, that the

contract gives it the right to demand that airlines make their E-fares available through Sabre although Sabre ''has chosen not to do so at this time.'' Sabre Reply at 10.

If Sabre's contracts are typical, the systems may be imposing contract terms on airlines that unreasonably restrict airline choices on how to distribute their services. Such contract clauses could keep an airline from pursuing the most efficient and least costly distribution channels. Airlines should be free to choose to offer E-fares only through their own websites, without being obligated by system contracts to make them available through other distribution channels. This kind of contract clause would 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.

In addition, a participating airline should have some ability if practicable to persuade travel agencies to use a system or similar electronic service that provides better service or charges lower fees. Insofar as Sabre's contract would bar this, it would keep an airline from taking steps to reduce its CRS expenses. It would also be directly contrary to our conclusion in the parity clause rulemaking that airlines should normally be free to choose the quantity and quality of service bought from their suppliers. 62 FR 59784–59785, 59792.

We therefore request comment on a rule proposal that would prohibit a system (i) from barring an airline from ''discriminating'' against the travel agencies using the system, at least if the alleged discrimination results because the system has higher booking fees and poorer service than other systems, and (ii) from requiring any airline as a condition for participation to provide that system with fares that the airline has chosen not to sell through travel agencies or the systems. This proposal should be consistent with our rule prohibiting parity clauses, section 255.6(e).

Parties should comment on whether the rule should create an exception for airlines that own or market a competing system.

We ask the parties to provide additional information on the systems' current practices and on the benefits and harm that could result from such a rule and suggestions on how to implement a rule allowing airlines to favor users of one system over another.

*5. The Mandatory Participation Rule*

Our mandatory participation rule, section 255.7, requires each airline with an ownership interest of five percent or more in a system (a ''system owner'') to 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. We adopted the rule 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 denied complete information on their fares and services to competing systems. 56 FR 12608; 57 FR 43800. U.S. systems have encountered similar conduct internationally by foreign travel suppliers that own or market a competing system. 62 FR 59797.

The U.S. airlines now covered by the rule are American, Delta, and Northwest; the rule also applies to Amadeus' European airline owners. As a result of Cendant's acquisition of Galileo and United's sale of its Cendant shares, United is no longer subject to the mandatory participation rule. American, moreover, reportedly plans to sell its Worldspan stock, which it acquired as part of its acquisition of TWA's assets. Although United and potentially American are no longer system owners for purposes of our mandatory participation rule, each continues to market the system that it formerly owned, and Southwest also markets Sabre.

The mandatory participation rule has generated substantial controversy in this proceeding in three respects: (i) Several airlines and Orbitz claim that the rule is counterproductive, since it allegedly enables systems to dictate terms for airline participation; (ii) some airlines and systems insist that the rule should be maintained and extended to airlines that market a system, not just airlines with a significant ownership interest; and (iii) some airlines, systems, and travel agencies contend that the rule must prohibit each system owner from denying access to its corporate discount fares to travel agencies that do not use its system. We will discuss each of these three issues in this section.

(a) Ending the Mandatory Participation Requirement

The larger airlines urge us to abolish or cut back the rule. American, United, and Delta contend that the rule should be eliminated. Northwest asserts that only a basic level of participation should be required of airlines with system ownership interests. United and Delta claim that the systems use the rule to force airlines with an ownership interest in another system to participate in all enhancements, whether or not they benefit the airline. United further claims that abolishing the rule would give large airlines some leverage over the systems, since an airline could refuse to participate in a system (or all of its features) unless the system offered attractive terms for participation. According to United, the airlines' ability to negotiate over the terms for participation would allegedly create competitive discipline for the systems.

Galileo, Worldspan, Amadeus, System One, and America West initially argued that we should maintain the rule. Several of them cite cases where an airline that owns or markets a system allegedly has unreasonably limited its participation in competing systems in order to encourage travel agencies to choose its affiliated system, notwithstanding the rule. For example, System One, which markets Amadeus, alleges that airlines associated with Sabre and Worldspan have denied certain types of transactional capability to Amadeus in order to handicap Amadeus' ability to obtain travel agency subscribers. System One Comments at 5–10. Worldspan has since advised OMB that it believes that the mandatory participation rule should be eliminated.

We are proposing to end the requirement that airlines affiliated with a system must participate in competing systems at the same level that they participate in their own system as long as the terms are commercially reasonable. We believe that ending the requirement may be beneficial, but we invite the parties to discuss further whether the requirement should be maintained.

We adopted the current rule due to our experience that airlines owning or marketing a system have at times limited their participation in competing systems (or denied complete fare and schedule information to competing systems) in order to compel travel agencies in areas dominated by such airlines to choose systems affiliated with those airlines. 56 FR 12608; 61 FR 42206. The rule was also consistent with our decisions finding that a foreign airline had engaged in unfair discriminatory conduct by refusing to participate fully in a U.S. system that was competing with a system owned or marketed by the foreign airline. 57 FR 43800. In addition, the United States' aviation agreements with a number of foreign countries similarly require airline participation in competing systems.

Nonetheless, the mandatory participation rule may unduly limit the ability of individual airlines to bargain for better terms with the systems. If so, as asserted by several of the airline commenters, ending the requirement could enable market forces to discipline the systems' terms for airline participation to a greater extent than now. While the systems then seemed to have substantial market power, we concluded when we adopted our rule prohibiting parity clauses that airlines had some ability to choose which levels of participation should be purchased. For that reason, we barred the systems from enforcing parity clauses against airlines that did not own or market a system. The large airlines opposing the requirement contend that they could negotiate with other systems for better terms if the rule did not force them to participate at a specified level. Delta claims, for example, that it obtained better terms for some system features before our rule took effect. Delta Comments at 22.

The airlines' potential ability to limit their purchase of system services should enable them to demand better terms in return for participating in higher levels of service. Any additional market discipline would provide significant public benefits by cutting the cost of airline distribution. Further, ending a rule limiting the ability of airlines to choose which services they will buy would be consistent with our overall goal of creating more choices for airlines. Given our past findings on the systems' market power, however, we ask the parties to comment on whether and how this proposal would lead to lower fees and better terms for airlines participating in a system.

We recognize that airlines affiliated with a system have at times limited their participation in competing systems in an effort to prejudice their ability to compete for travel agency subscribers. Indeed, a number of the commenters complain that airlines owning or marketing a system continue to engage in practices that seem to be designed only to create a competitive advantage for their affiliated system. However, in this proceeding we are focusing on proposals that would benefit consumers by promoting airline competition. In the past, when one or more airlines owned each system, competition between the systems had a substantial impact on airline competition. Most of the systems have weaker ties with their former owners, and the more equal functionality offered each participating airline by each system has lessened the impact of competition between systems on competition between airlines. The airlines currently subject to the rule also own a share in Orbitz, and their Orbitz ownership interests may deter them from making marketing decisions on the basis of their ties with one of the systems. Ending the mandatory participation rule may provide a test of the airlines' ability to negotiate better terms for system participation. American submitted to OMB a report by the Association of European Airlines that analyzes in detail the potential advantages and disadvantages of such a change.

In any event, the potential benefits obtainable from ending the rule, according to the proposal's proponents, would outweigh any adverse impact on competition between the systems. The travel agencies' increasing ability to use alternatives to a system may also reduce the anti-competitive effects produced when an airline reduces its participation in competing systems in order to create a competitive advantage for its affiliated system. In addition, even without a rule, section 411 might bar airlines from using their dominance of local airline markets and ability to restrict their participation in unaffiliated systems as a way to compel travel agencies to subscribe to the airlines' affiliated system. The parties should discuss the potential benefits and harms for the travelling public from our proposal to end the mandatory participation rule. They should also address the implications of such a change for the United States' compliance with its international obligations.

We are proposing to eliminate the mandatory participation rule, but a possible alternative would be a readoption or extension of the rule if commenters can show that doing so would provide significant benefits. We are uncertain whether the airlines seeking the rule's end would have much bargaining leverage if we terminated the rule. There may also be some continuing validity to our historical concern that airlines affiliated with a system may limit their participation in competing systems or withhold information from those systems in order to distort CRS competition. Commenters that believe so should present information supporting such a position and address whether and how such conduct could affect airline competition and consumers.

The existing rule requires each airline with a significant ownership interest to participate in competing systems at the same level at which it participates in its affiliated system, if the competing systems' terms for participation are commercially reasonable. We invite parties to comment on an alternative rule that should be less burdensome, if we determine that airlines owning or marketing a system should have some obligation to participate in competing systems. Instead of requiring airlines affiliated with one system to participate in competing systems, such a rule would prohibit airlines from declining to participate in competing systems due to an intent to distort competition in the CRS business. The rule could create a presumption that an airline's refusal to participate at an equivalent level in competing systems was designed to restrict competition, if the systems' terms for participation were commercially reasonable. The basis for the presumption would be the airlines' usual interest in making their services available through all significant distribution channels. Such a rule would allow an airline to show that legitimate business reasons made it unwilling to participate at an equivalent level in the competing systems.

This should provide airlines that own (or market) a system greater flexibility in choosing which services to use in competing systems. On the other hand, as we reasoned in our last reexamination of the rules, such a requirement would require us to resolve potentially difficult issues of intent. 57 FR 43801. The potential advantages of this rule over the existing rule may outweigh this disadvantage, however.

Delta asserts that the rule forces it to participate in features even when their performance and quality do not live up to the system's initial claims. Delta Comments at 22. We believe that an airline covered by the existing mandatory participation rule would not be required to participate in a competing system's enhancement if the same enhancement offered by the airline's own system provides better service at the same price. Our rule requires participation only if the terms are commercially reasonable.

While we are proposing to end the mandatory participation rule, some of the arguments made against it seem unpersuasive. United claims, for example, that the rule causes the systems to match each other's fees. United Comments at 23. The systems, however, were matching each other's fees before we adopted the rule in 1992. *Airline Marketing Practices* at 56–57.

United further asserts that we have no jurisdiction or responsibility for promoting competition in the CRS industry. United Supp. Reply at 30, n. 41. United's argument wrongly assumes that systems are not ticket agents within our jurisdiction under section 411. In addition, airline efforts to distort competition between the systems may

help preserve the systems' market power in a manner contrary to antitrust principles. By limiting the travel agencies' ability to choose between systems, they may increase airline distribution costs and travel agency costs. *Cf.* 62 FR 59794. As noted above, however, our focus is on airline competition, and CRS competition now may have less of an impact on airline competition than when we last reexamined the rules.

(b) Extending the Rule

We are proposing to end the mandatory participation requirement. However, parties may comment on whether the requirement, if readopted, should be broadened. As noted, the mandatory participation rule currently covers only airlines with a significant equity interest in a system. American will not be covered if it sells its Worldspan stock, and United is no longer covered. American, United, and Southwest each market a system in the United States, even though they have no ownership interest.

Galileo, Worldspan, Amadeus, Northwest, Continental, and America West have argued that the mandatory participation rule, if kept, should cover airlines marketing a system. Sabre, American, and Southwest oppose any such broadening of the rule.

Parties should comment on whether the mandatory participation rule should cover airlines that market a system, if we determine to readopt the requirement at the conclusion of this proceeding. Such an airline may have incentives to limit its participation in competing systems in order to undermine their ability to compete for travel agency customers, as shown by experience. That may distort competition in the CRS business.

We would, of course, prefer not to interfere with the contracts between systems and marketing airlines, but it is possible that doing so may be necessary to prevent discrimination against some systems designed to give an affiliated system a competitive edge. In addition, we doubt that we could maintain a mandatory participation requirement for airlines with a CRS ownership interest when airlines marketing a system remain free of any such requirement.

A related issue concerns the refusal by some airlines affiliated with a system to give travel agencies (and corporate travel departments) access to their corporate discount fares unless the agency (or corporate travel department) uses the airline's affiliated system. Balboa Travel Management, a San Diego travel agency, states that it lost a potential corporate customer because the airline booked most often by the corporation warned that its discount fares would not be available through the system used by Balboa. Balboa Travel Management Supp. Comments at 1. System One cites cases where American and Delta offered corporate discount fares only if booked through Sabre and Worldspan, respectively, and Galileo describes similar conduct by Northwest and American. System One Comments at 3–4; Galileo Supp. Comments at 12 and Exhibit B. *See also* AAA Comments at 2; American Express Comments at 2; Large Agency Coalition Comments at 7; Midwest Agents Selling Travel Comments at 4.

An airline's denial of access to corporate discount fares to travel agencies that do not use its affiliated system is an effective competitive weapon against rival systems. Amadeus Supp. Comments at 32–34; November 10, 1998, Amadeus Supp. Comments; Continental Response to Amadeus Petition at 3–4.

The existing rules require each airline with a significant CRS ownership interest to make all of its fares and services that are ''commonly available to subscribers to its own system'' available to competing systems. Section 255.7(b). We did not require system owners to provide all information on their services, since some information, such as information on frequent flyer programs, was traditionally shared only with the airline's own system. We declined to adopt a general prohibition against a system owner's tying of access to special discount fares with the use of the owner's system. We stated, however, that an airline would violate its obligation to provide access to its commonly-available fares to users of all systems if it ''widely offers a discount fare to businesses on the condition that they use its CRS for booking the fare.'' 57 FR 43801.

Some airlines treat their corporate discount fares as fares that are not generally available and so are not subject to the rule. Amadeus filed a petition (Docket OST–99–5888) asking us to declare that the current rules prohibit an airline owning a system from refusing to provide its corporate discount fares to competing systems or, in the alternative, to amend the rules to prohibit the tying of access to the fares with the use of the airline's system.

Galileo (if the mandatory participation rule is kept), Amadeus, System One, Continental, America West, ASTA, AAA, American Express, and the Large Agency Coalition contend that we should prohibit an airline's tying of access to its corporate discount fares with a travel agency's use of the airline's CRS. United, Northwest, and the Asia Pacific airline group oppose any prohibition of such tying.

While we are proposing to eliminate the mandatory participation rule, parties should comment on whether the rule should be kept and, if so, should require airlines affiliated with a system to provide corporate discount fares to competing systems.

*6. Rules Barring Display Bias*

(a) Background

Our rules prohibit systems from biasing their displays but do not prescribe how a system must display airline services. Section 255.4. As explained above, the systems must determine which flights will be listed in the display of services provided travel agents and the order in which the flights are listed. 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. Each system must, for example, apply its editing and ranking criteria consistently to all markets. It 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. Each system must follow the same standards of care and timeliness for loading information on participating airlines and information on airlines owning the system.

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).

In our last overall rulemaking we found that display bias would mislead travel agents and their customers. It would also keep non-owner airlines from being able to compete on the basis of the price and quality of their service, since it would shift significant amounts of revenue to the airline benefited by the bias. 57 FR 43786.

When we strengthened our display bias rules in 1997, we noted that a Galileo display, created to prejudice some of United's competitors, might be reducing Alaska's annual revenues by as much as $15 million and Midwest Express' annual revenues by several million dollars. Galileo's display, while

ostensibly neutral, often and unreasonably gave the flights of United, one of Galileo's owners, a better display position than flights offered by competitors that better met the needs of travellers and travel agents. 61 FR 42212–42213.

Bias could be effective for several reasons. Travel agents tend to book the first flight displayed by a system. Their customers depend on them to extract information from the system display, which consumers do not view themselves. Travel agents generally work under time pressure that often keeps them from taking the trouble to overcome display bias by searching several display screens. The systems also hid the extent of their bias. Furthermore, the systems' contracts with travel agencies limited each agency's ability to offset one system's bias by switching systems or using multiple systems. As a result, consumers were often unable to obtain accurate and complete information on schedules and fares from travel agents relying on a system for their information. 57 FR 43785–43786.

Since the rules do not generally prescribe what criteria must be used for editing and ranking flights, Sabre, for example, could choose criteria for editing and ranking flights that give American's flights a better position due to the characteristics of American's service. *See* 56 FR 12611.

The rules also do not regulate the displays created by travel agencies for their travel agents and thus do not prohibit agencies from biasing those displays. 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.

No party is arguing that we should end the rules against display bias if we conclude that the systems still require some regulation. The rules generally seem to work well, and no party is urging us to drastically revise them. Worldspan, however, told OMB that it sees no need for rules regulating system displays. Several other parties contend that the rules require strengthening. Sabre asserts that we should bar ''screen padding,'' multiple listings of the same flights under different airline codes. The European Union and the European Civil Aviation Conference urge us to conform our rules on display bias with the European rules, at least by specifying in several respects how flights must be ranked. Frontier urges us to prohibit systems from giving connections between code-share partners a preference over interline connections. American and America West seek a rule requiring change-of-gauge flights to be displayed as connecting flights. Air France and Lufthansa contend that systems should be required to use elapsed time as a factor in ranking airline services. Galileo, Amadeus, Delta, Continental, and America West oppose proposals for a rule requiring display criteria to be based on consumer preferences.

In addition, we will also address an issue raised in an enforcement proceeding instituted against American and Sabre in Docket OST–95–430. The case resulted from American's distribution to some Sabre subscribers of software that would rearrange the displays of airline services in favor of American. The program enabled the travel agency to create various displays, including one that would show only American flights.

The major issues requiring discussion are whether we should continue to prohibit bias and whether we should prohibit the systems from screen-padding, prohibit airlines from providing travel agencies with programs that would bias the displays, and prohibit travel agencies from biasing the displays used by their employee travel agents.

(b) Maintaining the Prohibition against Display Bias

We believe there may be a significant risk that systems, whether or not owned by an airline, would engage in display bias if not prohibited from doing so. Some commenters have suggested that airlines could obtain preferential treatment from a system by paying it to discriminate against competitors. Northwest Comments on Proposed Extension at 7; Alaska Supp. Comments at 3–4; ASTA Comments at 8–9; *see also* Marshall A. Fein Supp. Comments (description of one system's bias against a disfavored car rental company).

In our last overall rulemaking we considered in detail whether display bias provided countervailing consumer and competitive benefits and concluded that it did not. 57 FR 43785–43787. We tentatively believe that reasoning remains valid, and we accordingly propose to readopt the prohibition against display bias. Nevertheless, we will consider carefully comments that oppose the readoption of this prohibition.

In that connection, we are not proposing to adopt the suggestions from the European Union and the European Civil Aviation Conference that we make our rules more like theirs, in particular, that we require nonstop flights to be listed first and that other flights be ranked on the basis of elapsed time. We continue to believe that we should not direct how systems must edit and rank airline service options. We do not believe that there is a single best algorithm for displaying airline services (an algorithm is the set of rules for constructing a display). 56 FR 12609. We note as well that the systems have typically offered users several displays of airline services. *See, e.g.*, 61 FR 42210. Travel agents and consumers should benefit from the ability to choose between different displays. We invite comments, however, on whether there is greater merit in those proposals than we discern.

We have adopted a policy statement requiring airlines and travel agents to give adequate notice when flights involve change-of-gauge service. 14 CFR Part 258. We are not proposing additional restrictions on the display of such service.

(c) Screen Padding

The schedule displays offered by the systems, like the Official Airline Guide's schedule listings, identify airline services with two-character codes (the codes for United and Frontier, for example, are UA and F9). When airlines code-share, their nonstop and connecting flights are listed under each partner's code, not just under the code of the airline operating the flight. The Board endorsed code-sharing by prohibiting systems from discriminating against an airline because it was using its code on a flight operated by another airline, 14 CFR Part 256 (the Board acted because United's Apollo system threatened to exclude airlines operating under another airline's code). 49 FR 12675 (March 30, 1984). We have found that code sharing usually benefits consumers by creating more integrated services. 57 FR 43805.

If a system chose to list connecting flights operated under a code-share agreement under all possible combinations of codes, a single connection could occupy a number of lines in the display. A system would, for example, list a Northwest flight connecting with a KLM flight four times: as a Northwest to Northwest connection, a KLM to KLM connection, a Northwest to KLM connection, and a KLM to Northwest connection. If a system listed flights operated under a code-sharing arrangement under all possible combinations, a few such flights would take up substantial space on the display and often move flights with the next highest display ranking into a later screen.

Our rules allow systems to limit the number of listings given code-share services, as long as the service is listed at least once under each partner's code. A system thus would comply with our rules if it listed the Northwest and KLM connecting services as a Northwest to Northwest connection and a KLM to KLM connection. Our rules do not bar a system from displaying all of the possible code combinations for such a flight.

Sabre, American, Amadeus, Continental, Frontier, and Air France contend that the rules should limit the number of times that a code-share flight is displayed. The parties disagree over what the best solution would be, however.

We tentatively believe that limiting the number of times that code-share services are displayed might be beneficial. When code-share services occupy much of the display, travel agents will have more difficulty in finding alternative flights that their customers may prefer, and the airlines competing with the code-sharing airlines will obtain fewer bookings than they would otherwise. The multiple listing of the same connecting service under different codes can push the flights offered by competitors to later screens. This may increase the bookings made on the code-share flights, even in cases where the code-share relationship involves no improvement in service. *See, e.g.*, American Comments at 12–14.

On the other hand, 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.

The European Union's CRS rules allow a code-share flight to be displayed no more than twice, even if the codes of three or more airlines are used on the flight. All four of the systems follow the European rule within the European Union, and some do so as well in other countries. Northwest Reply at 6–7.

American proposes 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. American Comments at 12–14. Amadeus suggests that we adopt the European rule. Amadeus Reply at 37. Continental suggests that we instead allow one listing of an international nonstop flight or set of connections for each code-share partner. Continental Reply at 15–16.

We will consider all of these options further, after reviewing comments received in this proceeding. We note, however, that Continental asserts that American's proposal is not technically feasible. Continental Reply at 15. Amadeus alleges that our adoption of the European rule would harmonize our regulations with theirs to some extent. Amadeus Reply at 37. It would also reduce the systems' programming expenses. On the other hand, as Continental points out, the European rule could keep the codes of some code-sharing partners from being displayed on a flight. Continental Reply at 16.

Since code-sharing usually benefits consumers, we are not proposing to ban systems from giving any preference to connections between flights operated by two airlines under a common code over interline connections. We are therefore denying Frontier's request for such a rule. Frontier Comments at 4–7. Consumers using code-share connections typically obtain smoother service than they would by using interline connections. 57 FR 43805. We already require systems to offer a display that does not give on-line connections a preference over interline connections, in part due to Frontier's earlier dissatisfaction with code-sharing. 62 FR 63843–63844. We presently are not aware of a substantial reason justifying further regulation on that issue.

(d) Biasing Software Provided by Airlines

As noted above, the Enforcement Office filed a complaint against American and Sabre based on American's distribution to some travel agencies using Sabre 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. At that time American controlled Sabre. In a ruling on cross-motions for summary judgment, an Administrative Law Judge held that American had not violated our rules or section 411. He suggested that we might wish to reexamine the issue.

We have not issued a final decision on the petitions for review filed by the Enforcement Office and Northwest, and those proceedings remain open. If possible, the development of a general rule in this proceeding may be more effective than addressing the issue in the context of the American case.

We prohibit the systems from biasing their displays because bias causes consumer harm and hinders rival airlines from competing on the basis of fares and service quality. In our view, there is little difference between the bias incorporated in system displays and software distributed by the owner airline that enables travel agencies to create displays biased in favor of that airline. The travel agency owner in theory can choose whether or not to use the program offered by an airline, but the relationship between the travel agency and the airline, which is likely to be the airline most important to the agency and its customers, makes it doubtful that the agency's choice will be entirely voluntary. In the last rulemaking, we prohibited the systems from offering secondary displays biased in favor of the owner airline, even though the travel agency could choose between using the biased secondary display and the neutral display required by the rules. 56 FR 12611.

As a result, even though we do not presently plan to prohibit travel agencies from creating biased displays on their own initiative, we are proposing to prohibit any airline from providing software to agencies that would bias the display in favor of that airline. While the major threat might arise from one of the major airlines that owns or markets a system and is likely to dominate a travel agency's regional airline market, we have not yet heard a persuasive reason why any airline should be able to distribute software that enables the agency to bias the displays. This proposal, moreover, would be consistent with our proposal to bar airlines from buying bias from a system. Airline-created screen bias can be just as deceptive to consumers and harmful to airline competition whether it is built in to a system's display or created by software distributed by the airline.

(e) Travel Agency Displays

Our rules do not regulate the displays made by travel agencies. Travel agencies can use the data provided by a system to create their own displays ordered according to criteria chosen by them without violating the rules, including displays biased in favor of an agency's preferred airlines. We refused in our last major rulemaking to bar travel agencies from creating biased displays on the grounds that the agencies' competition for customers would deter them from giving misleading or inaccurate information and that there was no evidence that travel agencies often provided misleading advice. 57 FR 43809.

The Consumers Union asks us to prohibit the use of biased displays by

travel agencies but does not cite evidence that such displays exist and cause consumer harm. Consumer Union Supp. Comments at 6, 15. Lufthansa alleges that travel agencies commonly negotiate preferred supplier arrangements with some airlines and then use in-house software to bias the displays in favor of those airlines. Lufthansa Supp. Comments at 3. Midwest Express claims that American Express provides biased displays to its travel agents that downgrade the flights offered by Midwest Express and other airlines that are not among American Express' preferred airlines and that American Express will not book a non-preferred airline unless the customer specifically asks to fly on that airline. Midwest Express Comments at 26.

After considering the issues, we are not at this time proposing any rule regulating travel agency displays (or, as discussed below, any rule regulating the displays offered by on-line travel agencies). We are well aware that individual airlines try to encourage travel agencies to give them a larger share of their bookings, usually by offering an override commission program that enables the agency to obtain higher commissions if the airline's share of the agency's bookings exceeds a specified percentage. The major airlines' elimination of base commissions will make incentive commissions more important to travel agencies. Nonetheless, despite the airlines' efforts, and the interests of travel agencies in obtaining override commissions, we presently are not aware of a compelling need to regulate travel agency displays. The travel agency business is intensely competitive. Travel agencies that provide poor or misleading advice to their travellers will lose customers. The competitive pressures on travel agencies should offset incentives to give customers misleading advice. As one travel agency states, ''Travel agencies are in the business of building a base of repeat customers—and that requires looking after the best interests of those customers.'' Balboa Travel Management Supp. Comments at 3. The risk of incurring consumer ill-will and lost revenues should keep travel agencies from giving consumers bad information. To the extent that travel agencies bias their displays, they presumably do so to implement their preferred carrier agreements. 57 FR 43809. While those agreements typically benefit travel agencies by enabling them to obtain override commissions, they may also enable the agency to provide better service on the preferred airlines for their customers. In some such cases displays that give preferred airlines a better display position may also benefit the agency's customers.

The Department's Inspector General conducted a study of travel agency override commissions. Office of the Inspector General, U.S. Dept. of Transportation, ''Report on Travel Agent Commission Overrides'' (March 2, 1999). Although the report expressed a concern that travel agencies may recommend airline services that will increase their commission payments rather than the services that best meet the needs of their customers, it found no proof that override commissions had caused travel agencies to offer misleading or incomplete advice. *Id.* at 10.

*7. Equal Functionality*

A number of parties in our last overall rulemaking had complained that each system's architecture was biased in favor of the owner airline in various respects. The availability information provided on the owner airline was likely to be more up-to-date and accurate, each system's functionality for obtaining information and making bookings worked more easily and reliably when they involved the owner airline, and each system had default features that encouraged travel agents to book the owner airline. We were unwilling to adopt the more costly proposals for ending architectural bias, but the significance of the problem caused us to adopt rules requiring systems to provide more equal functionality to all airlines participating at the same level. We required equal access to enhancements and equal treatment on the loading of information, and we barred systems from using default features that favored the airline owning the system. 57 FR 43810–43816.

These rules appear to have been quite effective, for we have received no further complaints that a system is allegedly architecturally biased in favor of its owner airlines. Amadeus supports the retention of these rules, Amadeus Comments at 28–29, and no one contends that they are unduly burdensome or unnecessary. We therefore propose to readopt these rules without change.

*8. Booking Fees*

The booking fees charged airlines for CRS participation have long been a source of airline complaints. In its rulemaking the Board recognized that discriminatory and excessive fees could prejudice airline competition. The Board accordingly adopted a rule prohibiting each system from charging unreasonably discriminatory booking fees, section 255.6(a). The Board declined to regulate the level of booking fees. 49 FR 11664; 49 FR 32552. In our last major rulemaking we readopted the rule prohibiting discriminatory fees and required systems to provide sufficient supporting information on their booking fee bills so that airlines could audit the bills' accuracy. Like the Board, we did not adopt a rule limiting the level of booking fees, for none of the proposed rules regulating fee levels appeared to be practicable. 57 FR 43816–43818.

We found in earlier proceedings that the price and terms for the systems' services provided airlines have not been significantly disciplined by competition. In contrast, competition disciplines the fees paid by subscribers, so the systems obtain the great majority of their revenues from the fees paid by airlines and other travel supplier participants. Since the systems have not needed to compete for airline participants, their booking fees likely exceed their costs of providing CRS services to airlines. 56 FR 12595–12596.

Many airlines view excessive booking fees as the most important unresolved problem that we should address, both because the fees are so high and because airlines are charged fees for allegedly illegitimate and valueless transactions. Several airlines—US Airways, Alaska, Frontier, Varig, KLM, and America West—urge us to adopt a rule requiring fees to be reasonably related to costs. Midwest Express argues that we must limit fee levels in some way. America West has filed a petition asking us to roll back the systems' recent fee increases and to block them from increasing fees by more than half of the overall rate of inflation.

All four of the systems—Sabre, Galileo, Amadeus, and Worldspan—oppose limits on booking fees.

In their comments United and KLM suggested that market forces would discipline fees if we weakened the rule barring discriminatory fees and, as discussed above, the mandatory participation requirement for system owners. American agrees that eliminating the mandatory participation rule would help discipline fees. Worldspan argued to OMB that the rules regulating fees prevent systems from responding to market demands. America West, however, contends that eliminating the prohibition against discriminatory fees would help only the large airlines with bargaining leverage.

We agree that high booking fees may be imposing burdensome costs on airlines and, if so, higher fares for consumers. As discussed below, however, we presently are unsure

whether the various rules proposed for limiting booking fees would be practicable. Rather than focus on proposals that would regulate the level of booking fees, we would prefer to develop rules that would give airlines some opportunity to bypass the systems or to avoid participation in one or more of them or that may give airlines some bargaining flexibility. We are focusing on the latter type of proposals in this proceeding, such as rules giving travel agencies a greater ability to access alternative systems and databases, including the airlines' internal reservations systems.

We will first discuss our proposal to eliminate the prohibition against discriminatory fees. We will then discuss the proposals to limit booking fees: Proposals requiring booking fees to be reasonable or related to costs and that future fee increases be limited by the overall rate of inflation. We will consider any other proposals to limit booking fees that would be effective and practicable. This section ends with a discussion of proposals for excluding certain types of transactions from booking fee liability.

(a) Ending the Prohibition against Discriminatory Booking Fees

The rule prohibiting discriminatory booking fees has kept airlines owning systems from imposing higher booking fees on their competitors than on non-competitors. 49 FR 11651.

United and KLM urged us to terminate the rule barring discriminatory fees. United Comments at 25–26. American, Worldspan, and Orbitz argued to OMB that the prohibition against discriminatory fees should be ended.

United contends that airlines like itself would have some bargaining leverage with the systems on fees. United Comments at 24–26. We wish to consider this issue further, just as we are proposing to end the mandatory participation requirement for airlines with a significant CRS ownership interest. Ending the rule barring discriminatory booking fees in conjunction with eliminating the mandatory participation rule should give some airlines like United some flexibility in negotiating for better terms from the systems. If otherwise warranted by the features of the market, systems could respond to airline demands for lower fees or better service.

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. The rule barring discriminatory fees may limit the ability of individual airlines to negotiate for better terms. If so, that would limit the operation of market forces in the CRS business. We are therefore proposing to eliminate the prohibition against discriminatory fees. We note as well that Worldspan has told OMB that the existing rule may interfere with Worldspan's ability to develop a new pricing model for its services and keeps systems from offering lower prices to more efficient, lower-cost new-entrant airlines.

As with our proposal to end the mandatory participation requirement, commenters opposing the continuation of the rule should address how ending the prohibition would provide public benefits and would not injure airline competition. A supplier's agreement to charge one firm prices that are lower than those charged the firm's competitors does not normally constitute a violation of antitrust principles, but commenters should discuss whether the characteristics of the airline industry may undermine the validity of that rule. Commenters should address whether the elimination or weakening of the bar against discriminatory booking fees would create a risk of anti-competitive conduct. Commenters should also discuss whether such a change in the rules would be consistent with the United States' obligations to prevent discriminatory conduct against foreign airlines by systems operating in the United States.

An alternative rule proposed by American to OMB and by the Justice Department would bar all booking fees. Such a ''zero fee'' rule would effectively require the systems to obtain their revenues from fees paid by travel agencies. As shown, the systems compete for travel agency subscribers but have not competed for airline participants, since most airlines have been compelled by their marketing needs to participate in each system, even if the terms for participation are unattractive and non-negotiable. Because travel agencies can choose between systems, the systems would compete on price. A zero fee rule thus would cause the price for CRS services to be set by competitive market forces. Such a rule, however, could be disruptive, since the systems now obtain the great majority of their revenues from airlines, not from travel agencies. In addition, a zero fee rule would enable airlines to obtain CRS services without payment, except insofar as they increased travel agency compensation to offset the agencies' increased expenses.

(b) Proposals Requiring Reasonable Fees, Fees Based on Costs, or Fees Limited by Overall Inflation Rates

A number of airlines seek rules that would limit booking fees by requiring them to be reasonable or related to costs, or by barring fee increases exceeding the overall rate of inflation. We have tentatively determined not to propose such a rule, since we are not yet persuaded that any of these proposals would be practicable.

We assume, for purposes of this discussion, that the systems' booking fees exceed their costs of providing services to airlines by a significant margin. We have seen no indication that market forces discipline the price or terms for CRS services provided airlines. Nonetheless, a rule requiring fees to be reasonable or related to costs would be so difficult to administer that it would be impracticable, and it would have other undesirable effects.

We would not adopt a rule requiring fees to be reasonable or related to costs unless we were prepared to enforce it. If we did not enforce it, the systems probably would continue their current booking fee practices. A rule regulating booking fee levels would not lead to lower fees unless we held proceedings to determine whether the existing fees complied with the rule. Determining whether a system's fees were reasonable or based on costs would presumably require a hearing before an administrative law judge, the procedure typically followed by other agencies with ratemaking authority. Such a proceeding would be time-consuming. Since each system has different costs and fee structures, a separate proceeding would be required for each system. Moreover, the systems offer a number of different levels of participation and features, each of which has its own price. This variety of service levels and features would make a CRS rate case even more complex.

In addition, determining whether a system's fees were reasonable or related to its costs would present very difficult questions on the allocation of system costs. A system has at least three kinds of users—the airline or airlines using the system as an internal reservations system, participating airlines and other travel suppliers, and travel agencies and other persons who obtain information and make bookings through the system. Allocating costs among these types of users would be almost impossible. Furthermore, since the economies of scale in the CRS business mean that the smaller systems have the highest costs, rates set by us would allow the smaller systems to charge higher fees than the

largest systems, an anomalous result. For these reasons, when we considered proposals to require reasonable fees or fees based on costs before, we concluded that any such rule would be impracticable. 57 FR 43817–43818; 56 FR 12617–12618.

A rule requiring reasonable fees or cost-based fees would effectively require us to engage in public-utility-type ratemaking. Public-utility ratemaking is disadvantageous because it does not encourage regulated firms to operate efficiently and is burdensome for them and their customers. It also encourages them to pad their costs and investment base. 57 FR 43817; 56 FR 12617.

In an effort to avoid the difficulties presented by rules requiring reasonable or cost-based fees, America West has proposed a rule limiting increases in booking fees after 1997 to half of the overall inflation rate. America West Reply at 25–26. We doubt that we could impose such a restriction on the systems. We have made no finding that each system's booking fees exceed the system's costs of providing services to airlines. We agree that the decline in many computer-related costs suggests that the systems' costs of serving the airlines could be increasing at a rate lower than the general inflation rate. We have no proof, however, that that is true. *See* Worldspan Answer to Am. West Motion to Expedite at 3–4. In these circumstances, the record in this proceeding seems inadequate for imposing limits on booking fees of the kind sought by America West. A rule limiting fee increases to half of the rate of inflation could also be difficult to administer, since systems could create new features and services subject to new fee levels that would not be covered by the rule.

For similar reasons, we are not planning to propose a rule that would require systems to unbundle different services and features, as suggested by Alaska. Alaska complained that the systems bundle services together in a way that forces airlines to pay higher fees. The systems allegedly deny E-ticketing capability to airlines unless they participate at a premium level of service, which forces them to buy services they do not want in order to obtain E-ticketing. Alaska Comments at 17. Determining which services and features could or could not be bundled would involve many of the same difficulties as a rule requiring reasonable or cost-based fees. We are therefore not accepting Alaska's proposal on this issue.

Thus, we are unwilling to regulate the level of booking fees, in large part due to the practical problems that would result from a requirement of reasonable or cost-based fees. We think that the better solution for supracompetitive booking fees would be rules that would enable airlines and other firms to bypass the systems and thereby end the systems' control of the electronic communications between each travel agency and the airlines. While these rules would not lead to any immediate reduction in booking fees, they would likely lead to lower fees over time.

(c) Excluding Transactions From Booking Fee Liability

The rules allow each system to establish its own fee structure as long as its fees are non-discriminatory. Most of the systems charge airlines fees for several types of transactions besides bookings, such as changes to bookings and cancellations of bookings. In our last overall rulemaking we concluded that we would not bar systems from imposing charges for transactions besides bookings. 56 FR at 12619; 57 FR 43818. A fee structure based on charges for different types of transactions could well be economically rational.

When we began this rulemaking, many of the airline parties complained that they had to pay fees for passive bookings that allegedly did not benefit them and that were fraudulently used by some travel agencies to meet their productivity pricing quotas. Passive bookings are bookings made by a travel agent through a system that do not involve sending a message to the airline's internal reservations system. Travel agents often make passive bookings in order to serve their customers. For example, a travel agent will make a passive booking to issue a ticket for customers who made a booking directly with an airline. Travel agents also use the passive booking functionality to serve passengers booked as a group. ASTA Comments at 25–26; Galileo Comments at 31–32. The systems have developed functions that enable travel agents to perform many of these tasks without making a passive booking, *see, e.g.*, Amadeus Reply at 32–33, but travel agents can choose to continue using the passive booking function rather than one of these new features. TWA Reply at 4–5.

While travel agencies assert that passive transactions are required for legitimate business reasons, a number of airlines allege that some travel agencies (but not most) use the passive booking capability to make fraudulent transactions that increase the airlines' booking fee expenses. These travel agencies allegedly are usually trying to meet their minimum booking quotas under their productivity pricing agreements and thereby avoid having to pay the non-discounted charges that they would otherwise owe to the system. Fees for passive bookings allegedly make up a significant proportion of airline booking fee expenses. Aloha and Qantas assert that non-ticketed passive bookings and other allegedly illegitimate or unnecessary bookings accounted for eight to ten percent of their total bookings. Aloha Comments at 2–3; Qantas Comments at 4. Alitalia asserts that eleven percent of its bookings consisted of passive bookings. Alitalia Comments at 4. Amadeus states that a European study indicated that passive bookings constituted 17 percent of Galileo's total bookings and 42 percent of Sabre's total bookings (but a much lower percentage of Amadeus' bookings). Amadeus Comments at 33.

The record demonstrates that some travel agents sometimes rely on the passive booking function to satisfy their productivity pricing formulas, not just to implement transactions necessary for serving their customers. One travel agency stated that her agency's contract with a system ''provides us with that [passive segment] capability so that we can meet the productivity requirements of the [subscriber] contract.'' Travel Agents International Comment, cited by, *e.g.*, Alaska Comments at 8. When American Trans Air tried to debit travel agencies for unacceptable bookings, including most passive bookings, travel agencies told it ''that they believed that they were absolutely entitled to make non-productive CRS bookings in order to reach their productivity goals.'' American Trans Air Comments at 5. *See also* Varig Reply at 24, n.45. A travel agency group stated, ''[T]here are some unnecessary transactions being created by travel agencies merely to meet productivity-based contracts, which is not ethically right.'' Midwest Agents Selling Travel Comments at 3.

In the initial round of comments in this rulemaking, airlines proposed two rules that would reduce or eliminate the fee liability generated by passive bookings: a rule barring systems from charging booking fees for passive bookings unless they resulted in the issuance of a ticket or actual travel and a rule allowing each airline to deny travel agencies the ability to make passive bookings on itself. A large number of airlines, including Delta, Alaska, American Trans Air, U.S. Airways, Midwest Express, America West, Frontier, British Airways, Lufthansa, Qantas, Varig, and the Asia Pacific airline group, sought rules proscribing fees for all passive transactions or allowing fees only for

passive transactions that resulted in actual travel. As an alternative, several airlines, including Lufthansa, Qantas, and America West, suggested that each participating airline should have the right to deny system users the ability to make passive bookings on its flights.

Other parties opposed these suggestions. Sabre argued that the systems incur costs from passive bookings and that airlines themselves should discipline travel agents who commit booking abuses. Amadeus contended that the systems are solving passive booking problems; some systems, for example, have stopped charging fees for such transactions. United asserted that a rule limiting fees for passive bookings would accomplish little, since the systems would likely increase other fees to offset the lost revenues. The Large Agency Coalition would support a prohibition against charging booking fees for passive bookings but contends that airlines should not be able to keep system users from making passive bookings. ASTA also opposes proposals that would deny travel agents the ability to use the passive booking function.

The initial round of comments provided a basis for proposing rules on this issue. However, changes made by the systems as a result of the controversy over passive bookings may have made the issue moot. Midwest Express, which had supported the proposals to limit fees for passive bookings, states that the systems' changes have ended the need for a rule. Midwest Express Supp. Comments at 2. At least two of the systems, Worldspan and Galileo, have stopped charging fees for non-ticketed passive segments. ASTA Response to America West Petition at 2–3. Although America West initially filed a petition seeking a rule limiting fees for passive bookings, its responses to our supplemental advance notice of proposed rulemaking did not mention the issue.

The issue of booking fees for passive bookings thus may not need to be addressed in this rulemaking now (productivity pricing, on the other hand, seems to require regulatory action, as discussed below). If a rule were necessary, we would likely request comments on the complaining airlines' rule proposals. Since passive bookings primarily benefit travel agents, not airlines, charging airlines fees for such transactions seems unfair. More importantly, however, the systems' productivity pricing fee structures encouraged a small number of travel agencies to abuse the passive booking function in order to meet the minimum monthly booking quotas established by their CRS contracts. Since the systems have chosen to base their subscriber contracts on a pricing structure that encourages fraudulent transactions, they should bear any costs created by travel agent abuse of that function. Alternatively, the airlines should be able to deny travel agencies the ability to make passive bookings.

We understand the systems' arguments that travel agents operate as agents of the airlines and that the airlines should discipline their own agents if they engage in abusive transactions. Galileo Comments at 34–40; Amadeus Comments at 34–35. We are not convinced, however, that that would justify allowing the systems to continue charges for passive bookings when their subscriber contracts encourage travel agencies to make excessive passive bookings. The airlines claim that they cannot effectively discipline individual travel agencies, in part due to their number, and in part because some are non-IATA agents who have no formal contractual relationship with the airline. Delta Comments at 33; TWA Comments at 14; Alaska Comments at 25; Qantas Comments at 19. Their inability to do so may additionally result in part from a reluctance to antagonize the firms that they rely upon to distribute their services. America West Petition at 23–25. However, while the airlines' argument does not seem compelling, the systems' choice of a pricing structure that encourages more transactions appears to be the source of the problem. In addition, the systems have refused to allow airlines to deny travel agencies the ability to make passive bookings. If travel agencies are operating as the airlines' agents, however, it appears that each airline should have the right to determine the type of transactions in which they may engage.

We recognize that the passive booking functionality enables travel agencies to better serve their customers. We would be reluctant to create rules that could end system functionality needed by travel agencies. On the other hand, an airline participating in a system should have some control over the services for which it will pay. Any further proceeding on this issue would take into account the travel agencies' needs and possible alternative remedies that would avoid denying them access to important functionality.

United has argued that restricting or prohibiting fees for some types of transactions will not benefit the airlines, since the systems will only increase other airline fees to make up for the lost revenues. United Reply at 17. United's argument has some force. Some systems apparently did increase other airline fees when they stopped charging fees for non-ticketed passive bookings. America West Reply at 17–18. Nonetheless, since fees for passive bookings impose some costs on airlines that appear to be unjustifiable, a rule would likely be appropriate if systems were charging airlines for non-ticketed passive bookings and using pricing structures that encouraged some travel agents to misuse the passive booking function.

(d) Booking Fee Bills

We adopted a rule requiring systems to provide participating airlines with detailed billing information that would enable the airlines to audit the accuracy of their bills. We allowed systems to charge airlines for providing the detailed information on magnetic media. 57 FR at 43818–43819.

Some participating airlines, however, remain dissatisfied with the billing procedures and the adequacy of the information supporting the systems' bills. Qantas thus contends that airlines should not have to pay for the information needed to audit fee bills. Qantas Comments at 20. Continental and Lanyon, a firm that conducts audits for airlines, argue that the bills should include some additional information, such as a statement of which bookings were made over the Internet. Continental Comments at 24; Lanyon Reply at 9.

We are reluctant at this time to propose changes to the rule, since these proposals have not been supported by a significant number of other parties. Qantas admits that the amount of the fees ''is not substantial in comparison to total monthly booking fees,'' but asks us to bar fees for billing data on the ground that requiring customers to pay for billing data is ''highly inequitable.'' Qantas Comments at 20. The rule sought by Qantas would not provide substantial benefits for participating airlines and could easily be cancelled out by booking fee increases. Similarly, Continental and Lanyon have not shown that the additional information sought by them would be essential for an airline's auditing of the bills.

*9. Marketing and Booking Data*

The data that can be derived from the bookings made through each system are invaluable for marketing purposes, since the system can tell how many bookings are being made by individual travel agencies on individual flights operated by an airline in each of its markets. Delta thus can see, for example, how many passengers are being booked by each Atlanta travel agency on each flight operated by its rival at that hub,

AirTran, and in which fare category, and will often obtain this information before the agency customers even begin their trip.

Our rule, section 255.10, currently requires each system to make available marketing and booking data that it chooses to generate from bookings made by system users. A system could choose to generate no data. The rule 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. Each system could sell the data to anyone it pleased under any terms if our rules did not exist.

As a result of the rule, each system allows participating airlines to buy detailed booking and marketing data generated from its bookings (the data are often called MIDT, Marketing Information Data Tapes). Each system's data show how many bookings are made by each travel agency using that system on each airline in individual markets, the fare basis used for each booking, and the flight booked by each passenger. *See, e.g.*, Aloha *et al.* Comments at 3–4. The data tapes usually do not include the passenger's name. Galileo Supp. Reply at 9, n. 14; Sabre Supp. Reply at 42. *But see* Aloha *et al.* Reply at 3. Sabre states that its tapes do not identify corporate purchasers. Sabre Supp. Reply at 43. The systems make the data available almost on a realtime basis.

Airlines use the data for marketing research and route development purposes and to make decisions on pricing and revenue management. They also can use the data 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. While most airlines purchasing the data are the largest airlines, some smaller airlines like Alaska also buy the data. Galileo states that about forty-five airlines buy its data tapes. Galileo Supp. Reply at 11. The systems generate significant revenues from selling the data.

A number of parties are requesting us to change the rule on marketing and booking data. ACAA, a trade association that represents low-fare airlines, demands that the Department bar the systems from making the data available to airlines without the consent of the airline booked by the travel agency.

ASTA, ARTA, AAA, American Express and the Large Agency Coalition contend that systems should be prohibited from releasing the data to any airline. The Large Agency Coalition seeks a ban on the release of the data since airlines use it for implementing their override commission programs. The National Business Travel Association contends that the rule reduces a customer's bargaining leverage, since the data enable an airline to know all about the firm's travel patterns.

Several smaller airlines complain that the costs of purchasing and processing the data are so high that they cannot afford to buy the data. America West, Midwest Express, Aloha, Virgin Atlantic, Varig, and the Asia Pacific airline group contend that we should limit the fees charged for the data. Midwest Express estimated the annual cost of buying and processing the data from the four systems at $1.5 million. Midwest Express Comments at 28.

Several parties contend that airlines use the data to ''poach'' customers already booked on another airline. Midwest Express makes such a complaint, Midwest Express Comments at 29, as do ASTA and NBTA. ASTA Comments on Proposed Extension at 4.

On the other hand, Sabre, American, Galileo, United, U.S. Airways, Amadeus, Worldspan, Delta, Northwest, America West, and British Airways urge us to maintain the rule. The systems assert that they should be entitled to continue selling the data, since they have invested substantial sums in compiling the information and obtain significant revenues from selling the data. The systems also note that they now sell the data in smaller packages to make the data affordable for smaller airlines. *See, e.g.*, Galileo Supp. Reply at 10. The large airlines assert that access to the data is pro-competitive, because it enables airlines to learn where they need to offer more attractive fares and services. Delta Supp. Comments at 33–34. *See also* Aloha *et al.* Comments. The large airlines have also made large investments in developing the ability to process the data.

The Department's Inspector General has also expressed an interest in the issue. His report on override commissions recommended that travel agencies be required to advise customers of their override commission arrangements. Office of the Inspector General, U.S. Dept. of Transportation, ''Report on Travel Agent Commission Overrides'' (March 2, 1999) at 4. Rather than propose such a rule, we stated that we would consider ending the airlines' access to the booking and marketing data used to implement override commission programs. June 25, 1999, Letter from A. Bradley Mims to Lawrence H. Weintrob.

Our rule on marketing and booking data has thus generated two issues: whether the systems' fees for the data should be limited, and whether the type of data released by the systems should be restricted.

On the fee issue, we are unwilling to propose a rule regulating the systems' charges for the data tapes. Regulating prices would be contrary to our goal of limiting our involvement in this area except on issues when there is a clear need for rules. The systems obviously have an incentive to provide data in ways that would invite more airlines to buy the tapes. The systems seem to be reshaping the nature of the data tapes to increase their sales, as shown by their efforts to provide data in smaller packages that will be attractive to smaller airlines that do not have worldwide operations. Sabre Reply at 30; Galileo Supp. Reply at 10.

However, we believe that we should restrict the type of data being sold by the systems. As discussed below, the availability of the detailed data now being sold appears to undermine airline competition, at least in domestic markets. We recognize that airlines can and often do use the data for legitimate purposes and that markets usually operate better when firms have more information. Nonetheless the record indicates that the availability of the data has adversely affected airline competition and interfered with the travel agencies' ability to book the services that best meet their customers' needs.

Commenters have shown that airlines use the data to coerce travel agencies into reducing or ending their bookings on competing airlines, and the airlines' access to the data likely limits competition in other respects. The data tapes tell the dominant airline which travel agencies have been selling tickets on competing airlines and so enable it to target travel agencies booking customers with rival airlines. Woodside Supp. Comments at 9. The Savannah Airport Commission thus states,

> [S]ince the dominant area carrier has access to your travel records and bookings (via the CRS) that air carrier can and does penalize the agency for booking travel on rival carriers. The carrier may deny this practice, but it is happening and will

continue to happen until some type of safeguards can be implemented.

*See also* Mon Valley Travel Comments. American Express similarly pointed out that an airline's access to the data can reduce competition:

> An airline can thus obtain up to the minute analysis of competitors' sales, market share and customer information, even on a pre-flight basis. A carrier, so disposed, is able to use this real time (and advance) data for predatory pricing, blocking new entrants from the marketplace, signaling and other anticompetitive activity. What began as a tool to promote competition has become a weapon to eliminate it.

Letter from American Express dated April 12, 2000.

Officials from Legend, the start-up airline based at Dallas' Love Field, informed our staff that American was able to use the data to target travel agencies selling tickets on Legend and thereby undermine Legend's ability to obtain travel agency bookings. *See also* Office of the Inspector General, U.S. Dept. of Transportation, ''Report on Travel Agent Commission Overrides'' (March 2, 1999) at 7 (example of new airline losing bookings after large airlines had advised travel agencies against booking that airline).

A hubbing airline's dominance of the local airline market may give it power to force travel agencies to comply with its wishes. Travel agents in that city may book their customers most often with that airline, and their ability to obtain marketing benefits from that airline, such as the ability to book important customers on oversold flights and to sell its corporate discount fares, may determine whether or not their business will be successful. Large Agency Coalition Comments at 9; Continental Reply to Amadeus Petition at 3–4; *cf. Airline Marketing Practices* at 24–26. As a result, travel agencies have been unable to easily resist demands by the dominant airline that they stop booking customers with competing airlines. The larger airlines should henceforth have a greater ability to influence travel agencies, since the agencies' only compensation from those airlines will take the form of incentive commissions due to the airlines' elimination of base commissions. *See also* ASTA Comments on Proposed Extension at 2.

The Transportation Research Board expressed concern that the large airlines' access to data on bookings made by travel agencies enabled them to influence agency bookings in ways that could not be matched by smaller airlines. Transportation Research Board, *Entry and Competition in the U.S. Airline Industry* at 129.

The National Business Travel Association similarly complains that the airlines' access to detailed fare information undermines the ability of airline customers to obtain lower fares:

> In the current aviation market, corporations deal with overpriced airfares and single airline dominated markets. The current CRS regulation opens the door for carriers to eliminate the one bargaining tool that corporations still own, and that is data—travel patterns, including destinations, flight numbers, airline flown and class of service.

NBTA Supp. Comments.

Under general economic theory, moreover, the airlines' ability to obtain detailed realtime data on their competitors' sales and fares would not promote competition. In a somewhat different context, the question of the competitive impact of Orbitz and its most-favored-nation clause, Professor Alfred Kahn explained why keeping fares and sales secret from competitors can further competition in the airline industry:

> [T]here is the familiar fact that in an oligopolistic industry, the negotiation of special, preferably secret deals with large buyers or distributors in a position to threaten to supply their own needs or take their business elsewhere is a particularly effective form of competition, reflecting an exercise of countervailing power on the buying side of the market, in an oligopoly whose members will typically be reluctant to cut prices openly and across the board; and that the prohibition of any such special deals or a requirement of their full disclosure and equal availability, in advance, to all comers, will discourage it.

Statement of Alfred Kahn at 20, attached to American Antitrust Institute Supp. Comments.

Markets do not always function better when participants have more information. One group of competitors violated the antitrust laws by informally agreeing to exchange information on the prices charged specific customers, since the effect was to stabilize prices. *United States* v. *Container Corp.,* 393 U.S. 333 (1969). The Board concluded that a requirement that cargo rate changes be filed in advance inhibited price competition. *See National Small Shipments Traffic Conference* v. *CAB,* 618 F.2d 819, 829–830 (D.C. Cir. 1980). And in other circumstances airlines have used data on each other's fares as a vehicle to reduce competition. *United States* v. *Airline Tariff Publishing Co.,* 836 F. Supp. 9 (D.D.C. 1993); and 59 FR 15225 (March 31, 1994) (Justice Department suit on airlines' use of fare information to negotiate fares).

As discussed, the network airlines' dominance at their hubs enables them to pressure travel agencies into reducing or stopping their bookings on competing airlines. Another feature of the airline industry makes it all the more important to block the systems' sale of the data tapes insofar as the data can be used against competing airlines. The competitive advantages created by a hub airline's more comprehensive route network and more frequent flights make it difficult for other airlines to compete at that airline's hub, unless they are serving the city from their own hubs. We have found in the past that airlines will be reluctant to enter another airline's hub. The only airlines likely to do so are the new entrant low-fare airlines, since their low fares can offset the service advantages offered by the hubbing airline. Findings and Conclusions on the Economic, Policy, and Legal Issues, *Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry* (January 17, 2001) at 22–26, 29. Since competing with the incumbent airline will be tough at best for the entrant, we think it is important that the entrant not suffer the further disadvantage of having the incumbent airline know in advance how many seats are being sold on each of its flights by individual travel agencies. Ensuring vigorous airline competition in domestic markets mandates giving low-fare airlines an opportunity to compete. They will not have such an opportunity if the dominant airlines in their markets can track their travel agency sales in great detail on a realtime basis and use that information to undermine their ability to sell tickets.

To protect competition from the possible misuse of the data tapes by dominant airlines, the type of data sold by the systems should be limited to information which would serve legitimate marketing needs. We appreciate the potential value of the marketing and booking data for legitimate marketing purposes. *See, e.g.*, Aloha *et al.* Comments at 4–6. Our goal is to allow the systems to sell as much data as possible while minimizing the potential harm to airline competition and to enable travel agencies to protect potentially proprietary business data. However, at least in domestic markets, an airline's knowledge of its own bookings should suffice to tell it whether its marketing initiatives are successful (or whether new initiatives should be tried). The availability of much other domestic data from other sources also makes the CRS data less necessary for marketing purposes.

In considering whether to restrict the sale of data, we recognize that the airlines purchasing the data have made significant investments in developing

the ability to process and analyze the marketing and booking information, that the systems have made significant investments of their own, and that the systems would lose large amounts of revenue if they were barred from selling any data.

Limiting the availability of data generated from system bookings would also make it harder for airlines to implement override commission programs based on the airline's relative share of overall travel agency bookings (or bookings for specific route or markets). Large Agency Coalition Reply at 9. We are not finding that override commission programs are anticompetitive. Firms commonly may reward distributors for producing higher sales. We believe, however, that airlines use override commission programs to take advantage of a dominant position in local airline markets to deter travel agencies in those areas from booking competitors. *See also* General Accounting Office, ''Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets'' (October 1996) at 15–18. While we are primarily basing our proposed restrictions on the availability of the marketing and booking data on other competitive grounds, the proposed changes could additionally promote competition by weakening the ability of the largest airlines to use incentive commission programs that leverage an existing dominant market share to obtain a larger market share.

The potential use of the data by dominant airlines to deter travel agency bookings on competitors has become more problematic due to the airlines' elimination of base commissions, a development that will make travel agencies more dependent on incentive commissions. When a travel agency's only airline compensation depends on its ability to meet marketing targets set by the airline, the travel agency may consider itself unable to book customers on other airlines that offer comparable or better fares and service. NBTA Second Comments on Proposed Extension; ASTA Comments on Proposed Extension.

We therefore wish to consider several proposals that would restrict the type of data sold to the airlines and thereby achieve our goals. These possible restrictions could prevent most potential competitive abuses while enabling the systems to sell, and airlines to buy, much of the data now being sold. The following are the major proposals we ask the parties to address:

- A ban on the release of data on bookings made by individual travel agencies. The systems could then sell aggregate data for specified geographic areas or markets that would show sales by airline for each route but would not reveal how many tickets were sold on any airline by any individual travel agency. Such a restriction would seem to satisfy the travel agencies' interest in protecting their business data and should prevent larger airlines from using the data to coerce travel agencies into ending their bookings on competitors. Each airline would, of course, know how many bookings it received from each travel agency on a route-by-route basis. This proposed restriction would only deny airlines access to data on bookings made on competing airlines by individual travel agencies. Such a rule would be consistent with Sabre's recently-announced plans to sell each individual travel agency data on its own bookings and the aggregate data on the bookings made by its peers, but not data for individual competitor agencies. *Travel Distribution Report* (May 20, 2002) at 75.
- A ban on the release of data on bookings for airlines that have not consented to the release of data on their bookings. Any such restriction presumably would allow each airline to obtain marketing and booking data from a system only if it had consented to the system's release of data derived from its bookings to other airlines willing to purchase the data. This kind of restriction would protect airlines that did not wish their competitors to know how successful their marketing efforts were with individual travel agencies.

We will, of course, consider other possible restrictions proposed by commenters as supplements or alternatives to these two. Another possible rule would bar the release of data until some period of time had elapsed after the booking, so that no airline could immediately learn from the data how many bookings on its competitors were being made by each travel agency. The delay in the data's availability might prevent misuse while not denying airlines access to the same range of data now being offered by the systems. We could also bar the release of information that would enable anyone to identify the passenger or business buying the ticket. Such a requirement would both protect the privacy interests of the travel agency customers and promote competition.

The complaints about the potential abuse of the airlines' access to data focus on the impact of the use of the data on domestic markets. We will consider limiting any restrictions to data generated from bookings for domestic travel. The airlines serving international markets are generally large airlines, not new entrants. Although travel agencies presumably object to the release of any data, whether for international or domestic travel, the only airlines that have complained that the availability of marketing and booking data has led to abuses are the smaller U.S. airlines. In addition, we believe that airlines can obtain industry data on bookings for domestic travel from other sources, such as our O&D reports, while few if any sources may exist for comparable data on bookings for international travel.

To decide whether restrictions on the availability of the marketing and booking data should be adopted, we request additional information on the costs and benefits of each of the possible alternatives. We ask the parties to provide more detailed information on, among other things, the ways in which the airlines that buy the systems' data tapes are now using the data and the availability of comparable information from other sources.

We note as well that the Board originally required each system to make its data available to all airlines, if it chose to make the data available at all, on the ground that the Board could not practicably keep the owner airline from gaining access to the data. 49 FR 11658. The Board's concern should now be less valid, since two of the systems are no longer controlled by airlines and the other two each have several airline owners.

We propose to impose the restrictions by barring airlines from buying or otherwise obtaining the data, since our authority to bar systems from selling the data is unclear. Section 411 should allow us to prohibit airlines from buying the detailed realtime data now sold by the systems, since dominant airlines can and do use the data to pressure travel agencies into stopping bookings on competing airlines.

*10. Travel Agency Contracts*

(a) Background

Practices that limit competition between the systems have been a concern because they have affected airline competition. The Board thus included provisions designed to prevent anticompetitive practices affecting competition between the systems in its original CRS rules on two rationales: (i) An airline would be handicapped in entering new markets if its affiliated system could not obtain travel agency customers in the region, and (ii) practices that restrict competition between systems entrench the systems' existing market power and keep airlines

from finding alternative ways of conducting the functions provided by the systems. 49 FR 1664–11665. The Board therefore sought to ensure that travel agencies had a reasonable opportunity to switch systems or use multiple systems. The Board's rules accordingly prohibited 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 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.

When we reexamined the rules, we readopted and modestly strengthened the Board's provisions. Our 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, we allowed systems to continue offering five-year contracts, and we did not prohibit productivity pricing. We additionally did not bar the tying of access to an airline's marketing benefits to the travel agency's use of the system affiliated with that airline. 57 FR 43822–43828, discussing section 255.8.

(b) Recent Subscriber Contract Practices

As discussed above, the systems compete vigorously for travel agency subscribers. Many travel agencies, unlike airlines, can choose between systems, and the systems' competition for travel agency customers usually disciplines the price and quality of services offered travel agencies. A number of travel agencies in fact obtain system services without charge or even receive cash bonuses for choosing one system rather than another. Many travel agencies, of course, do not get incentive payments; profit margins in the travel agency business have traditionally been thin; and many travel agencies believe that the systems' fees and contractual requirements threaten the agencies' ability to operate profitably. In addition, travel agencies in a city dominated by an airline that owns or markets a system may feel compelled to use that airline's affiliated system, especially when the airline denies access to its corporate discount fares and marketing benefits to travel agencies using a competing system. *Airline Marketing Practices* at 24–26; Large Agency Coalition Comments at 9–10.

Despite the systems' competition for travel agency customers, each system's subscriber contracts typically contain provisions deterring its subscribers from using another system or an alternative electronic means of obtaining airline information and making bookings. The systems continue to use contract terms that limit the travel agencies' ability to switch systems or use multiple systems. Although our rules currently require systems to offer agencies a three-year contract as well as a five-year contract, systems have generally made the terms of the shorter contract so unattractive that most travel agencies have chosen the five-year contract. ASTA Comments at 10–12; Delta Comments at 16–17. In addition, as discussed above, productivity pricing deters travel agencies from using multiple systems or direct connections with an airline's internal reservations system.

Furthermore, when a travel agency terminates its CRS contract before the end of the contract's term, the system will commonly demand that its damages include the booking fees that the system would have obtained if the travel agency had continued using the system during the remainder of the life of the contract. Delta Comments at 18–20; ASTA Comments at 24–25. Some systems impose other financial penalties that deter agencies from switching to another system. AAA Comments at 3–4. Systems have demanded such damages even though we stated in our last rulemaking that our rules assuring travel agencies the ability to use more than one system prevented a system from reasonably expecting a travel agency to use its system for all or most of its bookings during the contract term. 57 FR 43827–43828.

The damages claimed by the systems are commonly so large that they deter travel agencies from terminating a contract before the end of its term. Delta Comments at 19.

Most travel agencies have had contracts that contain these kinds of restrictions. A 1996 survey by the American Society of Travel Agents indicates that 83 percent of all travel agency contracts had a five-year term and that 86 percent of all contracts used productivity pricing. ASTA Comments at 10, 12. The systems, however, have recently begun offering the smaller travel agencies the option of choosing contracts that do not have minimum booking requirements and have shorter terms. *Travel Distribution Report* (April 8, 2002) at 2.

The contractual provisions raise competitive issues, even though the travel agencies have accepted the contracts containing such provisions. The provisions limit competition, maintain the systems' market power, and keep airlines from bypassing the systems in communicating electronically with travel agencies. They also inhibit innovation, by discouraging firms from developing new services and products that travel agents could use as alternatives to the systems.

(c) The Parties' Positions

Many of the parties seek rules that would further prevent systems from imposing allegedly unfair or anticompetitive contract terms on travel agencies. ASTA and Northwest urge the Department to reduce the maximum length of subscriber contracts and to prohibit systems from collecting certain types of damages—lost booking fees—if an agency ends its contract before the contract's expiration date. Amadeus asserts that the maximum length of a subscriber contract should be one year, and Delta suggests that the Department adopt the European rule, which allows travel agencies to cancel an agreement on three months notice at any time after the agreement has been in effect for a year. ASTA seeks a rule requiring systems to offer contracts with one-year, two-year, and three-year terms and barring any contracts with a term longer than three years. The maximum length of subscriber contracts must be shortened, according to ASTA, because agencies need greater flexibility so they can adjust to the rapid changes in distribution, such as the growth of the Internet. ARTA asserts that the rules should reduce the maximum length of subscriber contracts, and AAA wants limits placed on the damages recoverable by a system if an agency breaches its contract. America West thinks that the maximum term of travel agency contracts should be three years, since a shorter maximum term would assertedly cause the systems to increase their booking fees.

Sabre, Galileo, and the Large Agency Coalition contend that no changes should be made in the subscriber contract rules.

After United imposed a cap on commissions for international tickets sold by travel agents, ARTA filed an emergency petition asking us to consider its proposal that travel agencies be given the right to renegotiate their contracts if the airline owning the system used by the agency changes its business practices in ways that make it difficult for the agencies to satisfy their CRS contract obligations. Docket OST 98–4775. Worldspan and Amadeus have opposed ARTA's proposal.

ASTA's response to our proposal to extend the sunset date for the current

rules asked us to immediately end the systems' productivity pricing provisions that allegedly penalize travel agencies for making bookings on the Internet, even when the airlines offer lower fares through websites than they offer through the systems used by travel agents.

(d) Our Overall Concerns and Policy Approach

In determining which rules, if any, should be adopted, our primary goal will be to prevent practices in the CRS business that would substantially reduce competition in the airline and airline distribution businesses, particularly practices that deny travel agencies and airlines the ability to use alternatives to a travel agency's principal system. To achieve this goal we are proposing to revise the rules regulating the systems' relationships with subscribers.

Our proposed revisions should both protect competition in the airline and airline distribution businesses and protect travel agencies against system contract terms that many regard as unfair and unreasonable. We are not, however, proposing now to accept all of the travel agency parties' proposals for new rules. The subscriber contract issues concern the travel agency parties, because the systems' contract terms affect the profitability of each agency and its ability to serve its customers. We recognize that travel agents provide the public with valuable information and strengthen the ability of airlines to compete on the basis of service and fares. System practices have a significant impact on the travel agencies' costs and their ability to stay in business. Our task in this proceeding, however, is not to develop regulations that will shape the travel distribution system. Congress has deregulated the airline industry. Congress has given us the authority to prohibit unfair methods of competition in the airline industry and the marketing of airline services. That authority, as shown, allows us to prohibit practices that violate the antitrust laws or antitrust principles but does not generally empower us to proscribe business practices because they seem unfair. 57 FR 43828. *Cf. E.I. Du Pont de Nemours & Co.* v. *FTC*, 729 F.2d 128 (2nd Cir. 1984). As a result, in considering proposals to readopt or change the subscriber contract rules—as well as most of the other rules—we are focusing on whether the practices at issue seem to violate antitrust principles.

In addition, we must consider whether proposed rules could be practicably enforced. In the past the systems' incentives to restrict travel agency choice and usage of multiple systems have been great enough that the systems would seek to evade any rules limiting their contract practices and could often do so. 57 FR 43825. We do not wish to adopt rules that could be routinely evaded.

The systems continue to use contract terms that limit the ability of most travel agencies to use multiple systems and other means of obtaining airline information and booking airline seats. We believe that these considerations support the readoption of the rules on the relationships between systems and subscribers. The existing rules prohibit such practices as minimum use clauses, parity clauses, and contracts with a term of more than five years.

Since we last reexamined the rules, moreover, several of the large airlines that own or market a system have been increasingly using their clout as the dominant airline in a metropolitan area to compel travel agencies in that area to use their affiliated system. These airlines, for example, deny travel agencies using a competing system the ability to book corporate discount fares. The largest travel agencies argued in our last overall rulemaking that they should be given the right to exempt themselves from our rules on subscriber contracts. *See* 57 FR 43824. It is telling that these travel agencies now contend that rules are needed to protect them against airline abuses of market power. American Express Comments; AAA Supp. Comments.

We wish to consider the various proposals for shortening the maximum length of subscriber contracts. We are proposing to readopt the other existing rules on the systems' relationships with subscribers. We therefore propose to continue the prohibitions against roll-over clauses and minimum use requirements.

Resolving which subscriber contract rules should be adopted will require more detailed information on the current relationships between travel agencies and the systems and on the systems' business practices. The commenters should address how our proposed rules and those advanced by parties will affect system and travel agency operations. In the past each travel agency office normally relied entirely or predominantly on one system. We ask the parties how much this is still true. Although a growing number of travel agencies have three-year contracts, the record suggests that a large majority of agencies have five-year contracts and that the systems discourage travel agencies from choosing a three-year contract. We would like the parties to provide current data on this matter.

Some parties have suggested that the typical five-year contract term and the accompanying provisions requiring the subscriber to pay damages if the contract is terminated early do not keep travel agencies from switching systems before the end of the five-year term. Other commenters disagee. We ask the commenters to provide information on this issue.

While we believe that rules governing subscriber contracts appear necessary to promote competition between the systems and between the systems and firms offering comparable services, one of the bases for our existing rules on system-subscriber relationships and their effectiveness may have disappeared due to the changes in the systems' ownership. We adopted the rules in part to promote airline competition by making it easier for airlines that owned a system to obtain a significant number of subscribers for that system in markets that the airline wished to enter. We believed that an airline would be reluctant to enter new cities if its affiliated system could not increase the number of subscribers there. 57 FR 43824. Two of the systems no longer have airline owners, and the systems provide all participating airlines with more equal functionality and reliability of information. These ownership changes seem to have made it less necessary for an airline entering a new market to obtain subscribers for its system as a basis for effective competition in the airline market.

(e) Shortening the Maximum Term of Travel Agency Contracts

The current rules fix the maximum term of a subscriber contract at five years but require systems to offer travel agencies a three-year contract if they offer a five-year contract. Section 255.8(a). In our last overall rulemaking, we did not adopt rule proposals that would have shortened the maximum length for subscriber contracts.

Most agencies have chosen five-year contracts, primarily because the systems offer more attractive pricing on those contracts than they do on three-year contracts. In addition, systems often require a travel agency to sign a new contract whenever it adds terminals, which means that travel agencies can operate under a series of long-term contracts that never expire at the same time.

The parties disagree over whether and how our rule should be changed. We are presently considering the following proposals on this issue: readopting our current rule, fixing the maximum term

at three years, and adopting the European Union rule. We will choose the option that best satisfies the legitimate business needs of the systems and travel agencies while preventing efforts to deny travel agencies the ability at reasonable intervals to switch systems. Commenters who support or oppose each proposal should provide a detailed analysis showing the benefits and costs likely to result from that proposal.

No clear answer exists on whether we should shorten the maximum permissible length of subscriber contracts, for longer-term contracts offer advantages and disadvantages. On the one hand, long-term contracts can harm travel agencies. If an agency becomes dissatisfied with a system's service, it cannot immediately switch to another system. Long-term contracts also handicap travel agencies if the airline sponsoring a system stops hubbing at a subscriber's city, or if a different airline affiliated with a CRS starts a hub in the agency's city, since agencies prefer to use the system owned by an airline with a substantial market presence. Long-term contracts can provide economic benefits ''as an efficient means for the parties to reduce uncertainty and spread risks'' and to reduce ''contract negotiation costs.'' 56 FR 12622. In the past, however, travel agencies have not enjoyed the benefit of stability in price and service. 57 FR 43824; ARTA Comments at 7. Systems seem to use long-term contracts, moreover, to block entry by competitors. 56 FR 12622.

A five-year contract for CRS services additionally may be unduly long due to the rapid changes in technology. Travel agencies should not be locked into a long-term contract with one system if other systems or alternative services would meet the agencies' needs more effectively and less expensively.

On the other hand, long-term contracts do reduce the parties' negotiations expenses. Sabre Reply at 40. Systems will be more likely to give travel agencies free equipment and services and other bonuses for signing a new contract if the contract will obligate the travel agency to use the system for a significant length of time. Large Agency Coalition Reply at 8. Maintaining the systems' willingness to provide such benefits, however, is not necessarily a proper public policy goal, for the systems offset the cost of those benefits by charging their captive customers, the airlines, supracompetitive booking fees.

In determining whether to revise our rules, we would like to take into consideration the industry's experience with the European Union's rule on subscriber contracts. That rule allows each subscriber to terminate its CRS contract without penalty on a few months notice after the contract has been in force for at least one year. The parties commenting on our subscriber contract proposals should discuss how effective the European rule has been and how it has affected the travel agencies' ability to switch systems, the systems' ability to operate profitably, and the level of booking fees charged airlines.

We must balance potentially conflicting goals in this area. Enabling travel agencies to use multiple systems and databases and to switch systems promotes competition. When travel agencies can choose among suppliers, they are likely to obtain better prices and service. As shown, however, the systems already compete for travel agency customers. As a result, proposals to give agencies greater freedom to switch systems or use multiple systems have a potential downside—if the systems compete more for travel agency customers, they will offer travel agencies larger bonuses and other benefits than they do now. The systems will attempt to offset the higher costs of marketing their services to travel agencies by charging higher fees to airlines, since they will still have market power over airlines. *Cf.* 56 FR 12629. While in the last rulemaking we found that our revised rules would not likely lead to higher booking fees, 57 FR 43825, we now believe that the additional proposals may do so, especially given the systems' aggressive competition for travel agency customers. *See also* Delta Comments at 5–6; KLM Comments at 12.

We are unwilling to consider ARTA's proposal that a travel agency have the right to terminate its contract for system services when an airline affiliated with the system materially changes the agency's business conditions, for example, by cutting the agency's commission rates. Despite the ties between the systems and their current or former airline owners, the systems and airlines operate independently in most respects. The systems are not responsible for airline decisions on commission levels and should not lose their contract rights because one or more airlines have changed their distribution practices. Travel agencies should seek contract terms giving them some protection if airline decisions on commission levels or other events require them to change the size and scope of their operations.

(f) Contract Clauses Fixing Damages

The systems' travel agency contracts usually impose liquidated damages obligations on any travel agency that terminates the contract before the end of its term. These provisions have been controversial, because they deter travel agencies from switching systems and make the travel agency liable for the booking fees lost by the system when the agency no longer uses it. On the other hand, systems understandably wish to include contract provisions for enforcing travel agency agreements to use a system for the specified term. *See, e.g.*, Sabre Reply at 45–46. Systems do not always rely on liquidated damages clauses to achieve this result. The contracts used by one system make the agency's cost of terminating the contract the same no matter how many months remain before the contract's expiration, AAA Comments at 3–4, whereas the agency's cost for an early termination would decline over the term of the contract if the system were relying on a contractual damages provision to deter breaches.

Several parties have asked us to prohibit contract clauses that allegedly create an excessive liability for damages if the subscriber terminates the contract before the end of its term.

We are proposing a rule limiting a subscriber's damages obligations if it terminates its CRS contract before the end of its term. Our proposed rules are intended to give travel agencies a real ability to use more than one system and to use electronic means for bypassing the systems. We are thereby building on the policy followed by us in our last rulemaking. 57 FR 43827–43828. A system accordingly could not reasonably expect a subscriber to use that system for all or most of its bookings during the term of the contract. We therefore propose to bar systems from demanding liquidated damages that would reflect booking fees allegedly lost by the system due to the subscriber's use of a different system. This limitation on one type of damages should be consistent with a potential decision to allow contracts that may last several years. We are aware that systems may use other contract provisions to enforce a subscriber's contractual obligation to purchase system services over a period of several years, but we wish to eliminate a type of damage clause that seems designed to compel an agency to rely primarily on one system for its bookings.

(g) Travel Agency Equipment Additions

If a travel agency is obtaining CRS services under an existing contract and wishes to obtain additional terminals from the system, the system will commonly require the agency to sign a new contract for the new equipment. As

a result, travel agencies using system-owned equipment often operate under a series of long-term contracts that never expire at the same time. This could undermine our rules limiting the maximum term of travel agency contracts.

Worldspan and the Large Agency Coalition ask us to end this practice. The Large Agency Coalition suggests that we adopt a rule requiring that new equipment be covered by the same term as the agency's existing contract. Worldspan Comments at 10; Large Agency Coalition Reply at 4. Sabre opposes rules in this area. Sabre Reply at 42–43.

We considered similar requests in the last major CRS rulemaking. At that time we decided that a rule barring systems from requiring a new contract as a condition of providing additional equipment would not be economically rational. If a travel agency requested additional equipment near the end of the contract term, the system might refuse to provide the equipment. Alternatively, the system could impose a high price for providing the additional terminals. In addition, we thought that such a rule would likely be difficult to enforce. 57 FR 43825–43826.

We will reconsider our earlier analysis in this proceeding. The parties should discuss whether a system's insistence on obtaining a new multi-year contract for additional equipment significantly interferes with the travel agencies' ability to switch systems or use multiple systems. However, since our rules give a travel agency the right to buy its equipment, the commenters should also discuss whether an agency's ability to purchase additional equipment itself rather than accept the system's proposal, when it knows that doing so will extend the life of the agency's contractual obligations to the system, makes a rule on this issue unnecessary.

*11. Productivity Pricing*

To reduce the systems' market power over airlines we wish to consider propoals that may better enable travel agencies and airlines to use alternatives to the systems. As long as the systems have market power, they will continue to charge supracompetitive booking fees that necessarily increase airline costs and the fares paid by passengers. We therefore wish to keep the systems from using contractual practices that deny travel agencies a reasonable opportunity to switch systems or use multiple systems and databases. Accordingly, we presently propose to restrict or potentially prohibit ''productivity pricing.'' Doing so is consistent with our existing general rule, section 255.8(b), which states, ''No system may directly or indirectly impede a subscriber from obtaining or using any other system.''

The productivity pricing structure gives a travel agency large discounts from the ''standard'' charges for system services and equipment if the agency meets a specified minimum booking level for each terminal (Midwest Express included an example of such a contract as Exhibit 9 to its comments). Large Agency Coalition Comments at 6. The systems fund the bonuses paid subscribers with the profits they obtain from supracompetitive booking fees. Those profits enable them to offer travel agencies inducements to make most or almost all of their bookings through the agency's principal system. Systems originally used productivity pricing formulas when subscribers used equipment provided by the system. 57 FR 43826–43827. We believe, however, that the systems' subscriber contracts have often included productivity pricing provisions, or very similar provisions, even if the travel agency will use third party equipment. The systems, however, have recently begun offering the smaller travel agencies, but not larger travel agencies, the option of choosing contracts imposing no minimum booking requirements. *Travel Distribution Report* (April 8, 2002) at 2.

Productivity pricing has been widespread. A 1996 survey by the American Society of Travel Agents indicated that 86 percent of travel agency contracts used productivity pricing. ASTA Comments at 12. By 2001, however, a smaller share—66 percent—of new CRS contracts used productivity pricing. *Travel Distribution Report* (October 18, 2001) at 1.

Productivity pricing on its face operates as a way of rewarding travel agencies that make greater use of the equipment provided by a system. In practice, however, as explained below, it operates as the equivalent of the minimum use clauses that we prohibited when we last reexamined our rules. The minimum use clauses had treated a travel agency's failure to meet its minimum booking quota as a breach of contract. In that rulemaking we reasoned that minimum use clauses seemed ''designed to protect the [system's] subscriber base from competition rather than to ensure that the [system] receives adequate compensation for the services and equipment provided the subscriber.'' 57 FR 43826. While most of the parties commenting on the issue supported our proposal to bar minimum use clauses, those parties supported productivity pricing, which assertedly served legitimate goals and did not deter travel agencies from using multiple systems. We then reasoned that productivity pricing ''encourages the agency to make more efficient use of its CRS equipment (and to avoid obtaining more equipment than reasonably needed for its business).'' We accordingly did not proscribe productivity pricing. 57 FR 43826–43827.

The industry's experience with the systems' use of productivity pricing since that rulemaking has caused us to reexamine that reasoning. It now appears that the systems have not been using productivity pricing to encourage more efficient use of their equipment. They have instead apparently been using it to encourage travel agencies to use one system for all or almost all of their bookings. As discussed above, systems have used productivity pricing or equivalent pricing formulas even when the travel agency is not using equipment owned by the system.

We believe that productivity pricing may unreasonably restrict travel agency use of multiple systems and databases since the systems use it as they once used minimum use clauses. They set the booking quota high enough that the agency as a practical matter cannot afford to make substantial use of another system or database. As alleged by one travel agency group, all four systems ''have instituted de facto minimum use clauses by making the cost of non-use so prohibitive that the agency cannot possibly afford to switch systems or add a second system in mid-contract.'' Large Agency Coalition Comments at 6.

We would not be concerned with productivity pricing and similar contract terms in subscriber contracts if the only parties affected by these terms were the systems and travel agency subscribers. Productivity pricing, however, may harm consumers both directly and indirectly. It may keep travel agents from booking the best fares for their customers, and it increases airline costs by preventing airlines from using alternative electronic means of communicating with travel agencies.

Productivity pricing may keep travel agents from serving their customers properly by deterring travel agents from using the Internet to book E-fares, which are normally not available through the systems used by travel agents. When travel agents book E-fares through the Internet, they run the risk of failing to satisfy the minimum monthly booking quota set by the productivity pricing provisions. ''Web air fares unlevel the playing field,'' *Chicago Tribune* (February 16, 2002); ''Travel Agents Cry Foul over Internet Fare Deals,'' *Los Angeles Times* (February 16, 2002); All

About Travel Supp. Comments. The potential loss of the lower CRS rates may well deter travel agents from booking E-fares when doing so would be in the best interests of their customers. ASTA thus alleges that productivity pricing clauses ''have served mainly as a deterrent to the agency's looking to non-CRS sources, such as the Internet, to make bookings that more nearly conform to their clients' needs.'' ASTA Comments on Proposed Extension at 3.

Insofar as the terms deter travel agencies from using alternative means for obtaining airline information and booking airline seats, they affect the airlines, which lose opportunities to encourage travel agencies to bypass a system by, for example, making bookings directly with airlines through airline websites over the Internet or by a direct link to an airline's internal reservations system. Market forces have not disciplined the price and terms of services offered airlines by the systems, primarily because most airlines have had no readily available alternative means of electronically providing information and booking capabilities to travel agents. An airline could create direct links between individual travel agencies and its internal reservations system, but the cost of doing so apparently has made this an unattractive alternative in most cases. The Internet, however, has made direct bookings much less costly, since a travel agent with Internet access can book seats through airline websites or the special websites created by some airlines for travel agency use. Productivity pricing appears to deter travel agents from using such options for bypassing the systems and so would undermine the policies followed by us in past CRS rulemakings. *See* 56 FR 12622; 57 FR 43823, 43826.

Our present belief that productivity pricing clauses reduce competition for the systems is consistent with the parties' comments. Alaska thus states that productivity pricing prevented Alaska from getting travel agencies to use an alternative to the systems, Alaska Comments at 9–10:

> [P]roductivity pricing provisions have a strong tendency to lock travel agents into the use of a single CRS and to inhibit their use of alternative channels, including other CRSs and direct links to carriers. Alaska's own attempt to establish direct computer links with major agencies in the Pacific Northwest demonstrated that travel agents were extremely loathe to use those links because they would not receive additional productivity credits from their principal CRS and would therefore pay more to (or receive less from) their CRS vendor each month.

Several airlines have made proposals that would bar or restrict productivity pricing. Delta, Aloha, Alaska, American Trans Air, and Qantas contend that we should prohibit it. Continental suggests that we should bar cash payments and bonuses that exceed the cost of the equipment covered by the productivity pricing agreement. Continental Comments at 24–25.

Sabre, Worldspan, and Galileo, on the other hand, oppose any prohibition of productivity pricing. The Large Agency Coalition proposes that productivity pricing be barred only insofar as travel agencies must pay penalties for failing to meet their booking quota.

We ask the parties to comment on proposals that will prohibit or limit the use of productivity pricing. Since the systems are apparently using productivity pricing as a means to keep travel agencies from using a second system or another alternative to the system initially chosen, productivity pricing would operate as an unreasonable restriction on competition. In particular, it would protect each system's market power.

Productivity pricing would enable the travel agency to obtain credit if it efficiently uses the equipment provided by the system. Continental has therefore proposed that we allow systems to offer travel agencies discounts equal to the cost of the equipment if they meet a monthly booking quota. We will consider that proposal, since we prefer to limit contract terms only when necessary to keep the systems from unreasonably restricting competition. Such a proposal would enable travel agencies to obtain equipment at discounted prices while not encouraging them to use one system for all or almost all of their bookings.

Productivity pricing in the traditional sense was tied to the agency's use of equipment provided by a system and so technically may not exist as to subscribers using their own equipment. Travel agencies using their own equipment often operate under comparable contractual provisions rewarding them if they make the majority of their bookings on their primary system. Varig Comments at 7–9. The systems could develop other ways to give travel agencies financial incentives to make all or almost all of its bookings through one system, and one system has advised us that some other systems are doing so.

Therefore, our current proposal covers more than productivity pricing. Providing financial incentives to travel agencies to use one system for all or most of its bookings would appear to frustrate our goal of giving travel agencies more leeway to use multiple systems and databases, including the Internet.

*12. The Tying of Marketing Benefits With System Subscriptions*

Airlines that have CRS ownership interests or a marketing relationship sometimes tie a travel agency's access to override commissions and marketing benefits, such as the ability to waive advance-purchase restrictions on discount fares, with the agency's choice of the system owned by the airline. Our rules prohibit the tying of override commissions with the agency's use of the airline's system, section 255.8(d). In our last proceeding we did not extend this rule to marketing benefits, even though that would promote competition on the merits, since we doubted that a broader rule would be enforceable. 57 FR 43828.

Sabre, System One, Continental, America West, and the Large Agency Coalition contend that the Department should prohibit the tying of the travel agency's use of an airline's system with the agency's ability to obtain marketing benefits. These parties have cited cases where an airline affiliated with a system took such action. Sabre Comments at 33–34; Galileo Comments, Exhibit B.

Delta opposes any such rule, largely on the ground that any prohibition could not be practicably enforced. United contends that the Department should eliminate all rules limiting an airline's ability to tie commissions and benefits with the use of its system. United Comments at 27–29.

We are concerned about the use of an airline's dominant position in a local airline market to distort CRS competition in the same area. For that reason we are requesting comments on whether we should ban airlines from denying travel agencies access to their corporate discount fares when the agency does not use the system affiliated with the airline offering the fare. We think, as we did during our last overall rulemaking, that this practice unreasonably restricts competition in the CRS business. However, we continue to be concerned that a rule proscribing such tying could not be effectively enforced. Some commenters state that the current rule prohibiting the tying of commissions with use of a particular system has been ineffective, since the airlines owning or marketing a system often violate the rule. Sabre Comments at 33; Large Agency Coalition Comments at 7, n.2.

We wish to explore whether an effective rule prohibiting tying practices would be possible. As Sabre pointed out, Canada's rules had addressed the

issue of the tying of marketing benefits by requiring each airline affiliated with a system to tell travel agencies that their commissions are not tied to their use of a particular system and to annually certify that the airline had not tied the agency's commissions to its use of the system affiliated with the airline. Sabre Comments at 33 and Attachment I. *See also* Large Agency Coalition Reply at 3.

We ask the parties to comment on whether the Canadian rule was effective and whether it (or other proposals) would make a prohibition against tying effective.

United's claim that a firm should be free to encourage businesses to buy products and services from a company that it owns is usually true. The cited principle is invalid when, as can happen in the airline industry, a firm with market power compels businesses to become customers of its affiliated company when they would rather buy the goods or services from independent companies.

United has also suggested that an airline that owns or markets a system should be able to offer a travel agency higher commissions or other benefits if the agency agrees to use a system that charges airlines lower fees or provides better service. United Reply at 17. The parties should comment on whether any rule should contain an exception allowing an airline to do that and whether an exception of that kind could be written that would not encourage airlines affiliated with a system to use their dominance in regional airline markets as a means of compelling travel agencies in those areas to choose their affiliated system.

*13. Regulation of the Internet-Based Airline Distribution Systems*

In our last review of the CRS rules, we considered only the need for the rules adopted by the Board and other proposed rules that would govern CRS operations and the systems' relationships with the airlines and travel agencies. At that time, ''brick-and-mortar'' travel agencies sold about eighty percent of all airline tickets, and consumers bought most of the remainder directly from the airlines. Few travellers bought tickets on-line. 57 FR 43794–43795. Since then the Internet has become a significant avenue of airline distribution. Many consumers research airline services and buy tickets on the Internet, either directly from an airline or through one of the on-line travel agencies or a website operated by one of the ''brick-and-mortar'' travel agencies, like American Express. As discussed above, some U.S. airlines already obtain more than thirty percent of their bookings from the Internet, and over ten percent of all airline tickets are now bought on-line.

Our rules cover system operations insofar as the systems are providing travel agencies with information and booking capabilities on airline services but do not cover travel agency operations, either on-line or ''brick-and-mortar,'' or sales made directly by a system to consumers. Given the growing importance of the Internet's role in airline distribution, and the possible analogies between Internet practices and the system practices that have been examined in past CRS rulemakings, we stated that we would consider in this rulemaking whether some of the CRS rules (or similar rules) should be applied to websites used by consumers for buying tickets. 65 FR 45557.

Insofar as this proceeding is concerned, the Internet's role in airline distribution presents several major issues. Various parties have asked us to consider the following:

- Whether rules are necessary to prevent consumers from being harmed by websites offering potentially inaccurate or biased information.
- Whether we should adopt rules governing websites like Orbitz and Hotwire that are owned by several airlines.
- Whether on-line travel agencies should be entitled to protection from allegedly discriminatory treatment on such matters as commission rates.
- Whether we should require airlines to allow all travel agencies to sell the discount fares offered on airline websites.
- Whether we should bar systems from requiring airlines to make their services saleable by all system users selling tickets over the Internet.

On the other hand, few parties seek rules regulating individual airline websites.

After considering the parties' arguments, we have tentatively determined that we need not now propose rules that would substantially regulate the Internet's use in airline distribution, as explained below. We appreciate the importance of preventing deceptive practices and anticompetitive conduct that could cause serious harm to consumers and airline competition. However, rather than propose rules on the basis of a relatively short experience, we prefer 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. Our experience with the Internet thus far does not confirm that broad regulations are necessary.

We intend to continue watching the Internet distribution practices of airlines and on-line travel agencies and will take action if that becomes necessary. Even if our rules do not specifically regulate on-line displays, on-line travel agencies must comply with section 411, which prohibits unfair and deceptive practices, and our rules, which require travel agencies to provide accurate information on airline services. 14 C.F.R. 399.80. We are ready to take enforcement action against any travel agency (or airline) that provides deceptive information on airline services, 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).

We invite commenters who disagree with our tentative proposal on this issue 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.

We will, however, propose a policy statement on one Internet-related issue here, the requirements for disclosure of travel agency service fees. Orbitz' decision to charge consumers a fee for making a booking through its website has raised the question of how such a travel agency fee should be displayed in light of our longstanding policy that any fare advertisement must state the full amount that a consumer must pay for the air transportation.

(a) Regulation of Internet Displays of Airline Services

Some parties have expressed a concern that on-line travel agencies may bias their displays in favor of preferred airlines if we do not adopt rules prohibiting them from doing so. Assertedly some on-line travel agencies may find it profitable to sell display bias to individual airlines with the result that the Internet sites will mislead the consumers using them. *See, e.g.*, American Comments at 11.

As a result of this concern, as well as related concerns that on-line travel agencies may operate in other ways that would prejudice airline competition and mislead consumers, a number of parties are urging us to regulate Internet operations in some respects. These parties include Sabre, American, Worldspan, Amadeus, Continental, Alaska, America West, Midwest Express, the European Union and the European Civil Aviation Conference, Qantas, the Asia Pacific Airline Group, ASTA, ARTA, and the Consumers Union. The Consumers Union submitted

a survey of on-line agency websites that it believes indicates that such websites provide incomplete and misleading information. Sabre and others also contend that airlines controlling websites can use them to distort competition. Alaska and others assert that the rules should prevent unfair practices that would allow one firm to dominate travel distribution on the Internet. Some systems contend that they will be competitively handicapped if their operations are subject to the Department's rules while Internet firms are not regulated.

Galileo, United, Delta, Continental, British Airways, Microsoft, Preview Travel, Biztravel.Com., and OAG Worldwide oppose including Internet sites within the scope of the CRS rules. They generally claim that there is no need to regulate Internet sites and no evidence of harm thus far.

American and Northwest contend that websites should be regulated only to the extent of requiring them to give notice of any bias. U.S. Airways and America West suggest that our rules require disclosure if an on-line agency omits some airlines from displays as may happen, for example, if those airlines do not participate in the system used by the on-line agency.

Expedia contends that only websites owned by airlines require regulation, for independent websites have neither the incentive nor the ability to reduce airline competition. Orbitz and OAG Worldwide allege that consumers will avoid biased sites, so no rules are needed. In arguing that rules are unnecessary, Delta and others assert that Northwest was able to compel Lowestfare.com to change practices that allegedly discriminated against Northwest and other non-favored airlines.

Amadeus, in contrast, asserts that consumers are ill-equipped to detect bias and that they could not practicably avoid biased sites if all sites were biased.

Orbitz' entry into the on-line travel agency business has affected the positions taken by some of the parties. In particular, several of the airlines owning Orbitz initially argued that rules were necessary to prevent on-line travel agencies from biasing their displays. After they created Orbitz, they reversed their position and now argue that we should not adopt such rules. *See* Sabre Supp. Reply at 15–18.

After considering the parties' arguments on this issue, we are tentatively proposing not to adopt regulations governing on-line displays of airline services, as stated above. Many of the parties have recommended different treatment for the two major types of websites offering airline tickets: airline sites and on-line travel agencies. While many of the parties urge us to adopt rules regulating the displays offered by on-line travel agencies, few parties seek rules regulating the displays offered by airline websites.

As to airline website displays, most of the commenters agree that consumers do not expect an airline to offer unbiased information on its own website. Consumers instead assume that such a website will favor the airline's own services. While some parties contend that we should regulate any website operated by an individual airline if it enables consumers to book flights on other airlines, we disagree. We are not now willing to extend the reach of our rules against display bias to sites operated by individual airlines, no matter what travel services may be purchased through the site. Consumers cannot reasonably expect to obtain unbiased information from an airline website, since the airline will understandably seek to promote its own services and those of any allied airlines.

The controversy over the regulation of Internet displays of airline services thus essentially involves the question of whether we should regulate the displays offered by on-line travel agencies. We have decided against proposing rules governing on-line travel agency displays at this time for several reasons.

First, we are declining to regulate the displays created by ''brick-and-mortar'' travel agencies. One rationale for that decision—the travel agencies' interest in keeping customers satisfied—applies to the on-line travel agencies. A consumer dissatisfied with the service offered by one on-line agency can easily switch to another on-line agency. On-line travel agencies should have an additional incentive to avoid biasing their displays since newspapers and magazines conduct surveys of the different websites and report on which site offers the best fares and the best service. *See, e.g.*, ''Orbitz Takes Off, in the Spotlight,'' *New York Times* (June 17, 2001), travel section at 13. An on-line travel agency that biased its displays would likely fare poorly in such surveys. These factors should keep on-line agencies from biasing their displays even though some have agreements with individual airlines giving them incentives to increase an airline's share of the agency's total bookings.

Furthermore, we have not yet seen sufficient evidence to conclude that bias is a serious problem at on-line travel agency websites. Although the Consumers Union submitted a study indicating that on-line agencies often failed to provide the best available fare, a result that it believes suggests the displays may be biased, it concedes that these results do not prove that bias exists. Consumers Union Supp. Comments at 4–6. The on-line agencies, of course, deny they bias their displays, Travelocity Supp. Reply at 14–18; January 17, 2001, Letter from Mark Britton, General Counsel for Expedia. *See also* ''Travel Web Sites Say Airline Deals Don't Affect Searches,'' *Washington Post* (April 3, 2002). No airline has alleged that bias by on-line travel agencies is currently a common problem. Midwest Express, however, asserts that Expedia's displays are unreasonable, since Midwest Express' nonstop service in one market is listed well below the connecting services offered by other airlines. Midwest Express Supp. Comments at 11–14. Expedia has denied this. It contends that its displays rely in part on fare levels in ranking flights and that Midwest Express' tendency to charge higher fares assertedly causes the airline's flights to receive a lower display position.

Parties have cited Northwest's dispute with LowestFare.com on both sides of this issue. Amadeus notes that Northwest considered LowestFare.com's displays biased. Amadeus Supp. Reply at 14–15. Delta, on the other hand, contends that Northwest was able to force LowestFare.com to change its display practices, thereby showing that regulatory intervention is unnecessary. Delta Supp. Reply at 14–15. We believe that Northwest's experience suggests that regulatory intervention is not critical at this time, since Northwest was able to get LowestFare.com to change its display practices.

Furthermore, if some on-line travel agencies present biased information or offer displays that are otherwise inadequate, consumers can easily protect themselves by searching several websites before choosing a flight, and they usually do so. Travelocity Supp. Reply at 5–6. One study indicates that over sixty percent of leisure passengers who buy tickets on-line visit at least two sites before making a purchase and that nearly forty-five percent visit four or more sites. Orbitz Supp. Reply at 5. *See also* Sabre Supp. Reply at 24. Thus many consumers appear to be willing to take time to search for the best option and will be less likely to choose the first option shown on a display (or rely on just one source of information).

We are unconvinced by arguments that regulations are needed because consumers are less experienced than travel agents in searching for airline services and so can be misled more

easily by an on-line travel agency. Consumers have less experience, but they are more likely to take additional time to research the available airline service options. Although an individual on-line travel agency that wished to deceive consumers could do so with respect to those consumers who do not search multiple sites, most consumers search at least two websites before booking a fare.

A rule requiring on-line travel agencies to follow the rules applicable to the CRS displays provided travel agencies, moreover, could be harmful by discouraging new methods of offering airline tickets on-line. Priceline and Hotwire, for example, have created innovative methods for selling discounted tickets to travellers. Other firms may create other new techniques for providing airline information and tickets. A rule prescribing the displays to be used by on-line travel agencies could discourage such innovation.

Furthermore, some parties define bias in a relatively broad fashion that would call for our review of display practices other than the editing and ranking of flight options. Some parties assert, for example, that posting banner advertisements or giving any preference to one airline is bias, even if the site clearly gives consumers the option of choosing to book other airlines instead of the preferred airline. Orbitz Supp. Reply at 14–15. We do not regard such practices as bias. Travelocity Supp. Comments at 18–19.

Some commenters nonetheless contend that our decision to prohibit systems from biasing the displays provided travel agents supports the prohibition of bias in on-line travel agency websites. *See, e.g.*, Travelocity Supp. Comments at 17. We disagree. In our view, the displays offered consumers by on-line travel agencies and the displays offered travel agencies by systems are not analogous. Substantial differences exist between travel agent use of CRS displays and consumer use of websites. We prohibit the systems from biasing the displays offered travel agents because travel agents are often under time pressures that keep them from searching for the best possible service and make them more likely book one of the first flights listed even if other flights would better meet a customer's needs. Travel agents, moreover, do not usually access more than one system when investigating airline service options. In addition, the customer never sees the CRS display and must rely on the travel agent's expertise and diligence. In contrast, as shown, consumers using the Internet can and do easily look at alternative websites before choosing a flight. Thus many consumers take time to search for the best option and will be less likely to choose the first option shown on a display (or rely on just one source of information).

To obtain comprehensive on-line information on airline services, consumers should search several sites, even if all are unbiased, since no site will offer complete information on available airline services. Individual on-line travel agencies have been negotiating special deals with airlines and offering those fares to travellers visiting their websites. Bear, Stearns, ''Point, Click, Trip,'' at 48, 49. Any such fare would be available only from the on-line travel agency that obtained the special deal. Thus consumers cannot expect to obtain reasonably complete information on available fares by viewing only one on-line travel agency website. And surveys of on-line travel agencies show that different agencies often show somewhat different fares. *See*, *e.g.*, ''Orbitz Takes Off, in the Spotlight,'' *New York Times* (June 17, 2001), travel section at 13.

On-line agencies are additionally unable to enable consumers to book every airline. For example, consumers can buy Southwest tickets on-line only at Southwest's website. Southwest's refusal to participate in any system at a high enough level creates the risk of errors in bookings by consumers, and Southwest has refused to guarantee that it will provide seats to consumers affected by such booking errors. Southwest has therefore refused to allow on-line agencies to sell its tickets. ''Southwest stops selling tickets in Travelocity.com,'' *Travel Distribution Reports* (March 8, 2001). Consumers now are normally able to obtain information on the airlines' discount E-fares only by viewing the website of each airline or Orbitz, to the extent that airlines have agreed to make their E-fares available through Orbitz (whether Orbitz should have preferential access to such fares is an issue discussed below).

The on-line travel distribution business thus has so far developed in a way that does not enable consumers to obtain comprehensive information from a single website. Applying display bias rules to on-line travel agencies would not change this.

We do not intend to foreclose further discussion of this issue, and will consider all proposals for rules governing Internet displays of airline services. However, to justify the adoption of such rules, we would need evidence that they were necessary to protect consumers, and would not impose undue burdens on the firms being regulated. One possibility would be a requirement that each on-line travel agency provide information on which airlines are or are not saleable through its website and the criteria used in editing and ranking the airline services displayed in response to a consumer's request. Alternatively, commenters may submit proposals that would set out general principles for on-line displays without prescribing in detail how displays must be constructed. Parties suggesting rules in this area should address the issue of why on-line agencies may require regulation when we have not generally regulated ''brick-and-mortar'' agencies. Examples of any analogous regulation of Internet services might also prove helpful.

(b) The Airlines' Differing Treatment of Travel Agencies

The airlines do not treat all on-line travel agencies the same and do not treat them the same as ''brick-and-mortar'' travel agencies (nor do they treat all ''brick-and-mortar'' travel agencies the same). For example, airlines were generally paying lower commissions for on-line bookings than they do for bookings made at ''brick-and-mortar'' travel agencies, and at least four airlines—Continental, Northwest, KLM, and Southwest—stopped paying commissions for on-line bookings well before they eliminated base commissions for ''brick-and-mortar'' travel agencies. In addition, most U.S. airlines have agreed with Orbitz that Orbitz may sell their E-fares even though airlines generally have not allowed other travel agencies (on-line or off-line) to sell their E-fares through the systems used by travel agents. Some airlines negotiate special fares with individual on-line travel agencies that other on-line travel agencies cannot sell.

''Brick-and-mortar'' travel agencies can book E-fares for their customers only by going to an airline website or Orbitz, and they are unlikely to receive a commission for any such booking. Searching for fares and booking tickets outside the travel agent's system is more inefficient, as explained above. The travel agency also earns no credits under a productivity pricing clause when it makes bookings through the Internet rather than its system.

Travelocity and Expedia generally do not have access to the E-fares available on airline websites and Orbitz, except to the extent that individual airlines have agreed to make such fares available to them.

The Interactive Travel Services Association, the on-line travel agencies' trade association, urges us to adopt rules

that would stop the airlines from discriminating against on-line travel agencies. ARTA, American Express, and RADIUS, formerly called Woodside Travel, a large travel agency, contend that we should stop airlines from making discount fares available only through an airline website. The National Business Travel Association contends that we should require airlines to make their E-fares available through all distribution channels. Amadeus asserts that an airline should be required to make available to every website all of the fare information provided by that airline to any website with which it is affiliated. Other parties contend that we should block the airlines from giving special treatment to Orbitz. A large number of travel agencies request a rule requiring airlines to allow them to sell the discount fares sold on airline websites and Orbitz, since they allegedly cannot compete when travellers can routinely obtain lower fares from other distribution channels.

United, Northwest, Southwest, America West, and other airlines argue that airlines should be able to offer discount fares through their websites without making them available through other distribution channels. They assert that only the low distribution costs incurred when travellers book seats through airline websites make it possible for the airlines to offer their E-fare discounts.

We are not inclined to propose, on the basis of current information, a requirement that airlines treat all types of travel agencies the same, to treat on-line travel agencies the same as off-line travel agencies, or to give all travel agencies access to fares that the airline has chosen to sell through limited channels. We recognize the danger that airlines affiliated with one on-line travel agency may seek to use any market power they have in airline markets to distort competition in the airline distribution business, but we currently believe that the enforcement process, not the adoption of general rules, would be the most effective method for addressing such conduct that involves unfair methods of competition.

Travel agencies offer services valued by many travellers, and they often find better fares than travellers can obtain from airlines or Internet sites. Nonetheless, given our limited role in regulating the airline and airline distribution industries, we presently doubt that we could require airlines to offer their most attractive fares to all distribution channels. As discussed above, in this proceeding we are primarily relying on our authority under section 411 to prohibit unfair methods of competition. Unfair methods of competition, as shown, are practices that violate the antitrust laws or antitrust principles. The antitrust laws generally allow individual firms to choose how to distribute their products and services. The Robinson-Patman Act, 15 U.S.C. 13, restricts a seller's ability to offer lower prices to some buyers than to others without justification, but it does not cover the sale of services. It appears that an airline's decision to provide higher commissions or better treatment to one type of distribution channel (or to some but not all firms within the same channel) would not ordinarily conflict with antitrust principles.

Requiring airlines to treat all travel agencies the same also seems contrary to the industry's established distribution practices. Individual airlines have always given some types of travel agencies benefits not given others, and have given different distribution channels different terms for selling tickets. GAO, ''Effects of Changes in How Airline Tickets Are Sold'' at 15; *Airline Marketing Practices* at 25, 26; American Supp. Reply at 25–26. Airlines have varied their terms for the sale of their tickets on the basis of such factors as the relative cost and effectiveness of using different firms and distribution channels. The systems similarly offer different travel agencies different terms depending on such factors as the agency's location and probable volume of business. Individual on-line travel agencies have negotiated special arrangements with individual airlines and other travel suppliers. Travel agencies may also give their best customers offers not made available to other customers. *See, e.g.*, American Reply at 7.

The systems, travel agencies, and software firms are developing programs that will enable travel agents to easily access airline E-fares. *See*, *e.g.*, *Travel Distribution Report* (May 6, 2002) at 66, 68; *Travel Weekly* (April 29, 2002) at 61; *Travel Weekly* (May 27, 2002) at 1. Orbitz, as noted above, has also arranged for the development of such a program. These efforts should reduce the need for any Government intervention.

Congress, however, also determined that the issue of travel agency access to Internet fares and related travel agency issues should be studied by a commission, the National Commission to Ensure Consumer Information and Choice in the Airline Industry. The commission is due to submit its report on these issues to the President and Congress by November 16, 2002.

(c) Regulation of Joint Airline Websites

To a great extent, of course, the parties' concern with the airlines' different treatment of different agencies is attributable to Orbitz, the on-line travel agency owned by five major airlines, and Orbitz' ability to sell many discount fares that are not available for sale through other travel agencies. A number of parties broadly assert that any site 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. *See*, *e.g.*, Expedia Supp. Comments at 11–12; Travelocity Supp. Comments at 10–11; Southwest Supp. Reply.

We are not proposing rules on the conduct of joint airline websites at this time. The only jointly-managed airline websites are Orbitz and Hotwire, except to the extent that the partners in airline alliances may have created joint websites (the parties seeking rules covering jointly-operated websites have not asserted that websites operated by alliance partners inherently require regulation). We do not know whether more such websites will be created and, if so, how they would operate. In the present circumstances, we believe 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, especially when any rules would necessarily be based on predictions about how such a website would operate.

Insofar as this issue involves concerns presented by Orbitz' business plan and strategy, we have been addressing those concerns through our informal examination of Orbitz. We have been investigating Orbitz' operations to see whether it may be engaged in deceptive practices or unfair methods of competition. One subject of that investigation has been whether Orbitz has been given unfair preferential access to the airlines' discount fares, especially their E-fares. We have submitted a progress report to Congress on that investigation. ''Report to Congress: Efforts to Monitor Orbitz'. We have not reached 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 has not concluded its own antitrust

investigation into Orbitz. We are continuing to monitor Orbitz' operations. 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.

In addition, Orbitz and any other website operated jointly by two or more airlines are subject to the antitrust laws and section 411, which authorizes us to prohibit conduct that violates antitrust principles or the antitrust laws. The antitrust laws themselves prohibit competing firms from operating a joint venture in ways that unreasonably restrict competition. Any restrictions on the participating firms' conduct must be reasonably necessary for the accomplishment of the joint venture's legitimate goals, and conditions on access to the joint venture, or denials of access, are subject to the rule of reason or, if the joint venture has market power, can be unlawful *per se. See*, *e.g., Northwest Wholesale Stationers* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980). Firms cannot agree among themselves to boycott a firm competing with one or more of them. *Toys ''R'' Us* v. *FTC*, 221 F. 3d 928, 934–936 (7th Cir. 2000). We will apply these principles if necessary through enforcement action taken under section 411.

A number of parties contend that we must at least require airlines to enable other travel agencies, both on-line and off-line, to sell the E-fares that they are authorizing Orbitz to sell. They claim that the inability of other travel agencies to sell the low fares available to Orbitz will undermine their competitive position. *See*, *e.g.*, the comments filed by several Uniglobe agencies.

We are reluctant to adopt a regulation that would require airlines to give other travel agencies the ability to sell their E-fares if they allow Orbitz to sell them. As explained above, section 411 does not empower us to dictate to the airlines how they will distribute their tickets, unless they are engaged in practices that violate the antitrust laws or antitrust principles. An airline's decision to make E-fares available to Orbitz but not other on-line travel agencies would not necessarily violate the antitrust laws or antitrust principles, just as, for example, an airline's decision to give special deals to one of the largest on-line travel agencies, Travelocity or Expedia, but not other travel agencies would not necessarily violate section 411. ''Brick-and-mortar'' agencies, moreover, can book E-fares through an airline website or, in many cases, Orbitz, though other on-line travel agencies cannot.

We recognize that the Department's Inspector General has also suggested requiring airlines to provide their E-fares to other on-line travel agencies if the agencies agree to the same terms as Orbitz, that is, promise each airline to rebate a portion of the CRS fees for all bookings on that airline made through the on-line agency. Testimony of Inspector General Kenneth Mead before the Senate Commerce Committee, July 20, 2000, at 22–23. However, we are not presently proposing to impose such a requirement in this rulemaking. Despite its attractive features, his recommendation would require us to dictate how the airlines would treat different distribution channels, a kind of intervention that would usually be outside our authority under section 411.

While we are not proposing now to adopt a rule on this issue, we recognize that Orbitz' ability to sell E-fares that other on-line travel agencies cannot sell does raise legitimate concerns. Our investigation of Orbitz is therefore examining, among other things, whether Orbitz' access to the airlines' E-fares violates antitrust principles and thus constitutes an unfair method of competition. As indicated, if Orbitz and any airlines are engaging in conduct contrary to antitrust principles, we have the power to address those violations in enforcement proceedings.

The commenters seeking a rule requiring at least Orbitz' owner airlines to make their E-fares available to other on-line travel agencies rely on an analogy with our mandatory participation rule for airlines with an ownership interest in a system. *See*, *e.g.*, Amadeus Supp. Comments at 23–28; Travelocity Supp. Comments at 21–22. These situations do not appear to us to be analogous. We adopted the mandatory participation rule due to our experience with cases where U.S. and foreign airlines that owned or marketed a system restricted their participation in competing systems in order to give their affiliated system a competitive advantage. 56 FR 12608. In the case of Orbitz, our initial investigation indicated that airlines were providing Orbitz with access to their E-fares in exchange for booking fee rebates not provided by other on-line travel agencies. Orbitz itself had an interest in obtaining access to the E-fares because of its need for a marketing advantage that might offset the strengths of the existing on-line travel agencies. April 13, 2001, Letter from Susan McDermott and Samuel Podberesky to Jeffrey Katz. As a result, there may have been legitimate business reasons for the arrangement between Orbitz and the airline charter associates whereby Orbitz has gained access to the airlines' E-fares. In contrast, the refusals by airlines affiliated with one system to participate in competing systems at an equivalent level appeared to reflect a goal of restricting rather than promoting competition. Our continuing examination of Orbitz will include the issue of whether the airlines' decisions restricting access to their E-fares may be unlawful.

*14. Prohibit Tying of Internet Participation*

Orbitz presents the question of whether in some circumstances the major airlines would violate antitrust principles if each decides to allow only its preferred distribution channel to sell its best fares. Each system's arrangements for providing service to participating airlines raise a similar question, whether a distribution firm with market power may deny airlines the ability to choose which of the firm's customers may sell the airlines' tickets. The systems' practices present this issue, for their participating airline contracts typically require the airline to allow its services to be booked by every user of the system, including both on-line and off-line travel agencies. Some airlines cite as well Sabre's insistence that participating airlines sell their services through Travelocity, the on-line travel agency controlled by Sabre.

We wish to consider whether participating airlines should have a greater ability to choose which websites may sell their services, a change sought by a number of participating airlines. They assert that an airline should be able to choose which on-line sites can sell its services. Delta Comments 28–30; United Reply at 11–15; Continental Supp. Comments at 16–17; Midwest Express Supp. Comments at 23–27.

Each system currently requires each airline or other travel supplier to participate in the system on a worldwide basis—the airline or travel supplier must agree that its services will be saleable through the system by anybody using the system, whether the user is an accredited travel agency, a non-accredited travel agency, a corporate travel department, an on-line computer service, or a consumer accessing the system through a website operated by a traditional travel agency or an on-line agency. Airlines may have little ability to keep system users from being able to sell their tickets. TWA Comments at 14.

Delta, Northwest, U.S. Airways, Continental, Alaska, America West, Midwest Express, Air France, the Asia Pacific airline group, KLM, Lufthansa, Qantas, and Varig assert that the rules should prohibit systems from tying access to traditional travel agency subscribers with access to Internet sites. A ban on such tying would allegedly enable airlines to decide whether such access was attractive, and they could conceivably bargain over the fees and terms on which such participation was offered. Many airlines also initially claimed that giving consumers access to a booking capability over the Internet and on-line computer services has increased the number of fraudulent bookings.

Sabre, Preview Travel, and Biztravel.Com. contend that we should not prohibit such tying.

In this proceeding we will consider a proposal that would prohibit such tying. In general, an airline should be able to determine how its services should be distributed and which firms should be able to sell its tickets. The rule proposed by the airline parties would be consistent with our decision to prohibit parity clauses, except as to airlines that owned or marketed a system, since parity clauses unreasonably restricted the ability of participating airlines to choose the level of service they would buy from each system. 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, since airlines might be able to decline participation if the terms were unreasonable.

We therefore ask the parties to comment further on whether we should prohibit the tying of participation in a system's ''brick-and-mortar'' travel agency services with participation in its services to on-line travel agencies and other Internet sites selling airline tickets. In theory the proposal could help enable market forces to discipline the terms for airline participation in the systems, a desirable goal.

The present record contains comments indicating that the rule may not be essential. Northwest was able to stop LowestFare.com from selling its tickets when Northwest concluded that LowestFare.com's website did not fairly present Northwest's fares. Delta Supp. Reply at 13–15. Southwest, as noted, is keeping on-line agencies that use Sabre from selling tickets on Southwest. In addition, the airlines initially claimed that the proposed prohibition was needed due to the alleged need to prevent abusive bookings by some consumers. That concern appears to be moot. Sabre Supp. Comments at 26.

Moreover, it is possible that such a rule could lead to anticompetitive results if misused by airlines with ties to other systems or on-line travel distributors. Some airlines, such as Orbitz'' owners, might decline to participate in the services offered Internet users by some systems in order to promote the competitive position of an affiliated system or on-line travel agency. The risk of similar types of conduct led us to adopt the mandatory participation rule and to allow systems to enforce parity clauses against airlines that owned or marketed a competing system. We are, of course, proposing to eliminate the mandatory participation rule, which suggests that the policies underlying that rule might not justify making exceptions in any rule barring the tying of participation in websites with participation in travel agency services. We ask the parties to comment on whether a rule prohibiting the tying of participation in travel agency services with participation in services for all website customers of a system should include an exception for airlines owning or marketing a competing website (other than an airline's own website).

We also determined in our last overall rulemaking that system contracts requiring airlines to participate in a system on a worldwide basis were not unlawful. 57 FR 43819. We reasoned that such contract provisions might avoid disputes over a foreign airline's refusal to participate in a U.S. system in countries where that airline preferred to support the marketing efforts of an affiliated system. We conditioned our acceptance of such contract clauses on the system's compliance with the principles requiring unbiased displays and prohibiting discriminatory treatment of participating airlines, to the extent that U.S. and foreign rules do not regulate the system's operations.

To enable us to decide whether we should prohibit tying, we ask the parties to comment on whether a prohibition against tying would be technologically feasible. We also ask the parties to comment on an individual airline's ability, if any, to block any Internet site or a ''brick-and-mortar'' travel agency from selling its tickets, including whether the systems' contracts with participating airlines bar airlines from taking such action against a firm using the system and whether a travel agency can evade an airline's termination of the agency's authority to sell the airline's tickets. The parties should comment on whether the result would be different from their ability to terminate ''brick-and-mortar'' agencies and, if different, the basis for the distinction sought by these airlines. We also invite the parties to raise any other issues relevant to our decision on this issue.

*15. Harmonization With Foreign Rules*

The European Union, Canada, Australia, and other foreign countries have adopted their own CRS rules. In many respects, our rules are similar to the European and Canadian rules. For example, all of the rules prohibit display bias, though there are differences on the precise terms of the prohibition, and all bar systems from discriminating unreasonably between airline participants. However, there are also significant differences between our rules and those adopted, for example, by the European Union. The European rules, for example, require booking fees to be related to system costs and prescribe a display algorithm.

The European Union, ECAC, and several foreign airlines ask us to harmonize our rules with the European rules.

We recognize that a greater similarity between our rules and the European rules would provide benefits, especially by avoiding the need for the systems to follow potentially different business practices in different jurisdictions.

We are unable, however, to make our rules substantially identical to the European rules. Congress has not given us open-ended authority to regulate the CRS business. Any rules adopted by us must be within our authority under section 411 to prohibit unfair and deceptive practices and unfair methods of competition by airlines and ticket agents. Our statute imposes procedural requirements on our enforcement of rules that may not apply in Europe. We must also follow Congressional and Executive mandates that we carefully consider the costs and benefits of our proposed rules.

We wish to prevent conflicts with the rules of the European Union and other foreign governments, to use their rules as possible models for our rule revisions and to review their experience with those rules, and to give careful consideration to the comments submitted by foreign airlines and governments.

*16. Retaliation Against Discrimination by Foreign Airlines and Systems*

In the past, as discussed above, we have seen cases where 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 cases of such apparent discriminatory conduct, 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. To further deter discriminatory treatment, our 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 fourteen days advance notice of its plan to take countermeasures. Section 255.11(b).

As noted, Congress amended 49 U.S.C. 41310 to give us broader authority to take countermeasures against an unjustifiably discriminatory or anticompetitive practice against a U.S. CRS or the imposition of 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.

Sabre asked us to strengthen the rules by imposing an obligation on ourselves to impose mandatory sanctions if, at the end of an enforcement proceeding, we determined that a foreign system or foreign airline affiliated with a system had engaged in unjust discrimination against a U.S. system. Sabre Comments at 35–37.

We are not proposing to adopt Sabre's requested rule. If we determine that a foreign airline has engaged in unlawful conduct, we will 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, whether or not we adopt Sabre's proposed rule.

*17. Enforcement Mechanisms*

A person who believes that our rules are being violated may seek enforcement of the rules by filing a third-party enforcement complaint under 14 CFR Part 302, Subpart D. We may also initiate enforcement action when we have reason to believe that the rules are being violated. Any enforcement proceeding resulting in a Department decision would usually require a hearing before an administrative law judge. Parties may not use the courts to enforce our rules, although a court would follow our rules when applicable in contract cases and other proceedings involving a system.

In our last rulemaking, we considered proposals to provide additional avenues for enforcement, including arbitration and requiring the systems' contracts with airlines and travel agencies to incorporate many rule provisions. We ultimately decided that these proposals were unnecessary or not likely to be beneficial overall. 57 FR 43829.

A number of commenters complain in this proceeding that the rules' enforcement has not been effective. They assert that private parties have little ability to enforce the rules if we do not. Since the courts generally will not hear private suits to enforce the rules, a firm injured by a rule violation can only obtain relief if we take enforcement action against the offender. Airlines and travel agencies have allegedly had little success defending their rights in private lawsuits. Airline participants have complained in particular that they are unable to obtain refunds from the systems for booking fees charged for allegedly improper or abusive transactions by travel agents. *See, e.g.*, Alaska Comments at 21–23; Aloha Comments at 9–10. The courts have also held that suits brought by travel agencies or airlines against a system under state law are generally preempted by federal statute. While parties may enforce their state law contract rights, they may not enforce non-contractual rights created by state law. *See, e.g.*, Amadeus Petition at 8–9.

Continental, Northwest, Aloha, Alaska, American Trans Air, ARTA, the Large Agency Coalition, and, as to fee disputes, Qantas contend that we should develop better enforcement procedures, for example, by giving parties the right to obtain arbitration of disputes. Northwest and Continental suggest that we should impose a ninety-day deadline for our action on petitions to change the CRS rules or enforcement complaints involving violations of those rules.

Sabre, American, Galileo, and Amadeus oppose any change in enforcement mechanisms.

We are not planning to propose the rules suggested by commenters for better enforcement of the rules. We retain discretion to pursue an enforcement policy that is appropriate in individual circumstances. We note that our Enforcement Office has added a significant number of attorneys and other staff members, and it will be prepared to vigorously pursue act on complaints of violations of the CRS rules and section 411 in the future.

We also do not appear to have the authority to require arbitration of disputes over compliance with the rules. A statute cited by United, 5 U.S.C. 572(a) and 575(a), seems to prohibit agencies from requiring parties to resolve disputes through arbitration unless all of the parties consent.

We fully recognize the importance of enforcing our CRS rules, and intend to do so vigorously in the future. We will consider suggestions by the parties for additional enforcement mechanisms that may be within our authority.

*18. Sunset Date for the Rules*

Our rules have a sunset date, originally December 31, 1997, to ensure that we would reexamine the need for the rules and their effectiveness. Section 255.12. We have not been able to complete our reexamination of the rules by the original sunset date and so have extended the rules to ensure that they would remain in effect while we conducted our reexamination. *See* 67 FR 7100 (February 15, 2002).

Many of the parties urge us to establish a new sunset date, although they disagree over what the new date should be.

We have tentatively decided not to propose a new sunset date for the rules at this time. Current options under consideration are to sunset the rules in March 20003, to establish a new sunset date, or to reexamine the rules when industry developments warrant doing so. We recognize that developments such as the recent changes in the systems' ownership and the rapid growth in the Internet's use for airline distribution may well require a reexamination of need for and effectiveness of the rules within a few years. As noted earlier, these changes and other changes in airline distribution may even eliminate the need for some or most of the CRS rules. We can also amend the rules in part if necessary, as we did after we completed our last major CRS rulemaking.

We concur with the view that further consideration of the generic alternatives to traditional CRS regulation discussed above and the on-going developments in airline distribution may warrant a review of the effectiveness of our traditional CRS regulation after the completion of this proceeding. We will be consulting with other agencies, including the Department of Justice and OMB, on how best to accomplish such a review. We actively encourage comments from the public on the scope of such a review and its timing.

*19. Effective Date of the Rules*

Normally new rules take effect thirty days after their publication. Some commenters, however, may contend 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. Commenters who believe that additional time would be needed for compliance with a proposal should so state in their comments and explain why. We are willing to consider proposals to phase in some rules, since several of our proposals may change the systems' expectations on the likely profitability of some of their subscriber contract practices, for example.

*20. Proposed Revisions to the Department's Policy on Fare Advertising*

Section 411 prohibits unfair or deceptive practices in the sale of air transportation. To provide guidance on the meaning of this statutory prohibition, we have published a policy statement on fare advertisements, 14 CFR 399.84, that states that we will consider an advertisement by an airline or travel agency to be an unfair or deceptive practice if it states a price that is not the complete price that must be paid by the traveler for the air transportation.

As we have interpreted the policy statement, section 399.84 requires an airline or travel agency to include in any advertised or quoted fare any charge imposed by the airline, such as a fuel surcharge, and most governmental charges. *See, e.g.*, Orders 2001–12–1 (December 3, 2001) and 2001–5–32 (May 30, 2001) (consent orders based on failure to include fuel surcharges in fare amounts). The governmental charges that may be omitted from the fare amount are charges like passenger facilities charges and departure taxes that are not ad valorem in nature and are imposed on a per-passenger basis. Any advertisement must clearly specify such government charges so that the consumer can calculate the total amount to be paid for the transportation.

We are proposing two amendments to this policy statement. The first revision would make it clear that each system has an obligation to ensure that its displays of fare information follow section 399.84's standards. Our second proposed revision would clarify the policy statement to allow travel agents to state service fees separately from the price of the air transportation, if they comply with conditions ensuring that their customers will understand their obligation to pay a fee for the travel agency service and will know the total price for the transportation, including any travel agency service fee. Any fare quotation must continue to include all charges attributable to the air transportation, including any airline fuel surcharges. Our proposals reflect the development of Internet booking sites created for consumer use.

(a) Accurate Display of Fare Information

Our first proposed revision will make it clear that the policy statement covers the systems as well as airlines and travel agencies. We wish to extend the policy statement's reach to ensure that the fare displays often used by travel agents accurately set forth the total fare being charged by each airline.

Travel agents often use system displays that rank airline flights by fares, beginning with the flight with the lowest fare. The fares listed in these displays have sometimes omitted government taxes and fees, passenger facility charges imposed by airports, and surcharges imposed by the airlines, such as fuel surcharges. Obviously a fare display that does not include items such as fuel surcharges would mislead consumers, since the display would suggest that some airlines are offering lower fares than other airlines when in fact the former may be offering higher fares. The displays thus deceive consumers and distort competition as well. Order 2002–3–12 (March 15, 2002) at 7.

Our policy statement on fare advertisements expressly covers airlines and travel agents but by its terms may not apply to the systems' display of airline fares. We therefore propose to require the systems to include all charges in their displays of airline fares. Participating airlines, of course, have an obligation to provide information on their schedules and fares in a manner that enables the systems to comply with our rules on displays and the airlines' obligations under section 399.84

(b) Travel Agency Service Fees

Our second proposal would modify the policy statement to set forth standards for the travel agencies' disclosure of their own service fees to their customers. We have applied the policy statement on fare advertising to prevent the separate listing of surcharges which confuse consumers, preclude them from making accurate fare comparisons before making ticket purchase decisions, and, arguably, constitute a form of bait-and-switch marketing tactics. The Enforcement Office has traditionally interpreted the policy statement as barring the separate listing of a travel agency's service fee and instead requiring the agency to include the fee in the fare amount quoted the customer.

Our examination of the policy statement's application is appropriate given overall trends in the travel distribution business. Section 399.84 requires that an airline or agent of an airline must state the entire price that the customer must pay the agent or airline for air transportation. In recent years, as airlines have cut travel agent commissions, travel agencies have moved to a greater reliance on charging their customers fees for their services and expertise. There is also a trend toward more widespread use of Internet travel agencies. Like their off-line counterparts, some on-line agents have also begun charging service fees. Thus travel agency fees are far more prevalent today than they were when the Board adopted section 399.84 in 1984. We should therefore reevaluate our interpretation of what constitutes the ''price for such air transportation'' in light of these changes.

We recently addressed the policy statement's application to a travel agency service fee, because Orbitz wished to list its recently-adopted service fee separately from the fare amount in its initial display of available airfares. We granted Orbitz a conditional exemption from the policy statement so that its initial display of available fares need not include Orbitz' planned $5 service fee. Our exemption order, Order 2001–12–7 (December 7, 2001), allows Orbitz to omit the fee from its first quotation of fares but requires Orbitz to include the amount of the fee whenever it presents an itinerary that can be purchased. The order imposed several other conditions on the exemption, including a requirement that Orbitz place a notice advising consumers of the fee just above its display of possible itineraries. The Enforcement Office thereafter stated that it would apply the Orbitz exemption order's standards to all Internet agencies. Order 2002–3–12 at 1, citing Notice of the Office of Aviation Enforcement and Proceedings (December 19, 2001).

Our exemption order stated that we would further consider what disclosures should be required for travel agency fees in a rulemaking. We are now asking all interested persons to comment on our proposal to amend the policy statement to require all travel agencies as an initial matter to state the fare and any travel agency fee separately, subject to certain conditions designed to protect consumers.

Under our proposal, both on-line and off-line agents must fully disclose to the consumer the fare, the agency service fee, and the total price—and do so in a way that is useful and practical to the consumer—early in the transaction process. We tentatively conclude that consumers would benefit by requiring

separate listings of the amount of service fees being charged by all sellers of air transportation, as long as standards are in place to protect consumers from potential deception. We therefore propose to define the ''price for such air transportation'' in 14 CFR 399.84 to include all taxes, government and airport fees (including PFCs), and all other charges which in economic terms constitute a direct cost of the air transportation itself (including, but not limited to, fuel, security, and insurance charges). These charges, by definition and in practice, are unavoidable and the same no matter where the consumer actually purchases the ticket. We propose, however, to continue allowing the separate listing of certain governmental fees.

We propose that the dollar amounts of fees levied by and for services provided by a travel agency or travel distribution organization must be listed separately from the total cost of the air transportation (as defined above). Our proposal includes conditions to protect consumers. First, the consumer must be provided with a total cost of the entire air ticket transaction. Furthermore, the separate agency service fees themselves may not be *ad valorem* in nature, since percentages are difficult for consumers to calculate and would seriously hinder price comparisons. In addition, we are imposing a limit on service fee amounts to ensure that they are not used merely to make the advertised fare seem lower. Service fees (including dollar amounts) must be prominently disclosed and be placed proximate to the advertised fare wherever they appear and service fees must be included in the total price displayed or quoted before the customer decides whether to purchase the ticket.

Our proposal is consistent with the policy statement's purpose and the Orbitz exemption order. Service fees are distinguishable from the component costs of air transportation itself, including such fees as fuel and security surcharges that must be paid by travellers, no matter where they buy their tickets. We have repeatedly made it clear that such direct air transportation costs must be included in the fare quoted and that a change in that policy would not be appropriate or beneficial. A travel agency service fee, however, represents the cost of a separate service in a separate market. The consumer does not have the option of buying the ticket without the fuel surcharge, taxes, or the government security fee. The consumer does have the option of buying the ticket without the agency service fee (or with a different agency service fee) by making the purchase through a different channel. Consumers need this information to make informed choices both in the airfare market and in the agency service fee market.

Our proposal should benefit consumers, since every travel agency, off-line or on-line, will be giving a consumer notice of the amount required by the airline for the purchase of a ticket and the amount of any travel agency service fee; the consumer will understand that he or she can book a seat for less money by buying the ticket directly from the airline or from another agency that charges no service fee. As we observed when we granted the exemption to Orbitz, consumers would likely benefit if a travel agency quoted the fare separately from any travel agency service fee. Order 2001–12–7 at 4.

Competition among airlines as well as among travel distribution outlets is clearly in the interest of consumers. Separate disclosure of travel agency fees from the direct cost of the air transportation—which usually does not vary depending on the outlet through which the consumer actually purchases an airline ticket—would arguably foster competition among airlines and among travel distribution firms by providing more transparent information to consumers.

Our proposal also agrees with a recommendation made by *Consumer Reports,* which questioned the practice of travel agencies including their service fees in fare quotations. ''Is your travel agency playing 'fare' '', *Consumer Reports Travel Letter* (June 2001). *Consumer Reports* contends that the separate disclosure of both the service fee and the fare is preferable to combining the two.

We think our clarification should govern service fees charged by ''brick-and-mortar'' travel agencies as well. Many of those agencies are now charging service fees. Our proposal would require them to state orally their service fees and the airfare and the total amount for the fare and fees. This should enable on-line and off-line travel agencies to operate under comparable rules, as requested by RADIUS, a large travel agency, in comments that it filed in the Orbitz exemption order docket.

We ask the parties to comment on an alternative proposal as well: a policy allowing travel agencies to choose between listing their fees separately and including the fees in the price quoted for air transportation.

**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 proposed 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 proposed 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 proposed rule may cost the private sector more than $100 million in the first year of effectiveness due to the need for systems, airlines, and potentially travel agencies to modify their operations to conform to the rule. The Regulatory Assessment below provides detailed discussion of the costs and benefits for the proposed rule. The Regulatory Assessment also presents alternatives to the proposed rule.

2. Introduction to 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.

The Department has determined that these proposed regulations are an economically significant regulatory action under the Executive Order and the Department's Regulatory Policies and Procedures, since the proposed rules could conceivably have an annual impact on the economy of $100 million or more and because of the amount of public interest they are likely to generate. This rule proposal has been reviewed by the Office of Management and Budget under the Executive Order.

This preliminary regulatory impact assessment seeks to assess the potential economic and competitive consequences of our proposed rules on computer reservations systems, airlines, and travel agencies and to evaluate the benefits to the industry and the travelling public.

As background, the Civil Aeronautics Board adopted rules to govern airline-owned CRSs that became effective on November 14, 1984. The Board's rules barred systems from biasing their primary displays, charging airlines discriminatory booking fees, using subscriber contracts with a term of more than five years, and imposing certain types of contract restrictions on travel agencies that denied them a reasonable opportunity to use multiple systems or switch systems. The Board rules also required each system to make available to any participating airline on non-discriminatory terms any data that the system chose to generate from the bookings for domestic travel made through the system.

After the Board's sunset on December 31, 1984, we assumed the Board's responsibilities for airline regulation, including its regulation of CRSs. We subsequently conducted a study of the CRS business, a study of airline marketing practices, and a rulemaking proceeding to reexamine the rules to see whether they remained necessary and were effective. We issued a final rule on September 22, 1992, that maintained the Board's rules and strengthened them in some respects. We decided the rules were necessary to preserve airline competition and to prevent consumers from receiving incomplete and biased information on airline services.

Among other things, our revised rules require each system to provide non-owner airlines with information and booking capabilities as accurate and reliable as those provided the owner airline. We gave 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 terminals provided by that system. Our current rules also 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; impose requirements ensuring that the functionality provided for participating airlines was generally equivalent to the functionality provided the owner airline; and strengthen the rules on subscriber contracts.

In two later proceedings, we amended the rules to strengthen the rules against display bias and to prohibit systems from enforcing parity clauses against airlines that do not own or market a competing system (a parity clause requires the airline to participate in the system at at least as high a level as it did in any other system).

The rules govern systems that are owned or marketed by one or more airlines. All four systems now operating in the United States have been owned or marketed by one or more airlines since the Board originally adopted the rules (the only independent system was acquired by one of the airline systems before we conducted our last overall rulemaking). The systems accordingly have had to operate in compliance with the rules' requirements for some time.

This notice of proposed rulemaking proposes to adopt the current rules with several changes designed to strengthen them. In discussing the benefits and costs of our proposed rule changes, we will generally focus on the competitive aspects of issues that our proposed rule changes are intended to address. Ideally, in a perfectly competitive marketplace, the various components of the airline distribution network would reflect a balance of market power to the extent that no individual component could exert undue influence or exact monopoly rents in any aspect of the distribution system. As we know from our past and current examinations, however, there have been competitive dislocations because of the misuse of market power. Our proposed rules are meant to address such problems, to the extent that they continue to exist.

This preliminary regulatory impact assessment discusses the likely costs and benefits of our proposed rules. However, we do not have information of the kind and detail that would enable us to quantify the proposals' benefits to air travellers, airlines, and travel agencies, or to estimate the costs of complying with our proposed rules for the systems, airlines and travel agencies with accuracy. We are also not able to estimate the long-term consequences of our rules on CRS competition, including incentives for technological innovation and improved productivity. The overriding benefit of greater competition and higher productivity in the air travel industry is, of course, its downward pressure on air fares and the benefits consumers enjoy as a result.

This preliminary analysis is necessarily relying on a qualitative assessment of the costs and benefits of the rules. We specifically request that interested parties provide us with detailed information about the possible consequences of our proposed rules, especially their benefits, costs, and economic and competitive impacts.

3. The Systems' Market Power

We are proposing to readopt the rules with revisions, because we have tentatively found that rules are necessary to keep systems and airlines that own or market systems from engaging in conduct that would reduce competition in the airline and airline distribution industries, increase airline costs and thus the fares charged airline travellers, and lead to travel agents and their customers receiving incomplete or biased information on airline service options.

This notice of proposed rulemaking explains our tentative view that the systems might engage in such conduct if not checked by regulations. As discussed in detail earlier, the systems appear to have market power against airlines, because travel agencies sell seventy percent of all airline tickets, travel agents rely on a system for booking over ninety percent of their domestic tickets and eighty percent of their international tickets, and because most travel agency offices use one system for all or almost all of their bookings.

Since relatively few travel agency offices make extensive use of more than one system, most airlines have had to participate in every system in order to make their services readily saleable by the travel agents using each system. No airline can afford to lose access to a significant number of distribution outlets, as explained elsewhere in this notice. As a result, competition and market forces have not disciplined the price or quality of services offered airline participants. The systems accordingly have established booking fees for airlines that exceed their costs of providing CRS services to the airlines. The systems in contrast compete vigorously for travel agency

subscribers (with the exception of certain areas dominated by an airline affiliated with a system), and travel agencies often receive CRS services at little or no cost. Some travel agencies obtain large cash bonuses for choosing one system rather than another.

The Internet's growing importance in airline distribution does not seem to have significantly eroded each system's market power thus far. Most airlines continue to obtain a large majority of their revenues from bookings made through travel agencies using a system, both on-line travel agencies and ''brick-and-mortar'' agencies. As discussed earlier in this notice, many consumers will continue to prefer using travel agents, and airlines will have a limited ability to shift consumers into on-line bookings.

The systems' market power has been reflected in their fees and other terms for airline participation. The fees paid by airlines and other travel suppliers provide about ninety percent of the systems' revenues. Travel agencies, the other main user of system services, produce no more than ten percent of the systems' revenues. The average booking fee in 2000 was $3.54 per segment for airlines using the highest level of CRS service. Booking fees equal about two percent of the revenue obtained by airlines through the systems. This is a significant level of expense in an industry that historically has had thin margins of profitability as a percentage of sales.

Another example of the systems' market power was their recently-discontinued practice of charging booking fees for passive transactions. Travel agents often make passive bookings in order to properly serve their customers, but such bookings usually do not directly benefit the airlines, which nonetheless are charged fees for them. In addition, the record indicates that some travel agents use the passive booking capability to make unnecessary bookings in order to meet the minimum-booking quota established under their productivity pricing formulas. The systems have not taken effective action in response to complaints by participating airlines about abusive transactions. The annual fee liability for passive bookings and other bookings considered unnecessary by participating airlines amounted to $5 million to $10 million for some airlines, and such bookings accounted for eight to ten percent of their total fees. Aloha December 23, 1997 Supp. Comments at 2; Alitalia Comments at 4; Qantas Comments at 4. The systems stopped charging participating airlines for passive bookings after we began this proceeding, but their action does not indicate that participating airlines have any bargaining leverage over the price and terms for participation. Furthermore, because the systems that stopped charging airlines fees for passive bookings raised their other fees, they apparently suffered no loss in revenues.

An additional instance of the systems' use of their market power was the adoption and enforcement of parity clauses by three of the systems before we banned that practice. Parity clauses required a participating airline to participate in a system at at least as high a level as they participated in any other system, whether or not the airline considered the terms and quality of that system's functionality of value. When we were considering our proposal to prohibit parity clauses, Alaska and Midwest Express estimated that compliance with Sabre's demands would increase their CRS costs by about ten percent. We adopted a rule barring systems from enforcing such clauses against airlines that do not own or market a competing system.

System actions like this that increase airline costs over time will lead to higher fares for consumers.

4. Proposed Rules

We will broadly discuss the potential benefits and costs of the major elements of our proposed rules, especially from the perspective of their potential to enhance competition or to remove barriers to competition. One of the main objectives of our regulatory policy is to promote consumer welfare by reducing the cost of airline transportation by proposing and adopting rules that will result in more efficient and competitive airline, CRS, and travel agency industries. We find it preferable to propose and adopt rules that rely upon marketplace forces to ensure and invigorate competition, discipline competitive problems, and inspire technological innovations rather than rules that require direct, detailed, and burdensome oversight by the Department. We hope to promote consumer benefits while imposing few, if any, additional costs on those industries. We are also inviting comments on some proposals that would eliminate such regulatory requirements on the ground that such action would promote the operation of market forces in the CRS business. Preliminarily, we believe that it is possible that our proposed rules may raise costs or lower revenues in varying degrees for some firms in the air travel distribution industry. However, we believe that our overall efforts to promote a more competitive industry will result in greater efficiency and substantial benefits to the traveling public.

The following discussion describes our current beliefs about the desirability of continuing the CRS rules and their applicability to airline and non-airline systems, the use of third-party hardware and software by travel agencies and their ability to use one terminal to access several systems and databases, the mandatory participation requirement of the current rules, display bias, booking fees, the availability of marketing and booking data information, and travel agency contracts. To the extent that we are proposing to readopt existing rules, we will partly rely on the findings and analysis made in our last review of the rules unless we have updated or modified them in this notice. The body of the notice sets forth in detail the basis for our proposed rules. Our intent here is to focus generally on the impact on competition.

(a) Continuing Need for the CRS Rules and Their Applicability

The Department is proposing to readopt the CRS rules with some important modifications. Two such proposed modifications are the elimination of the mandatory participation requirement and the prohibition against discriminatory booking fees. Despite changes in CRS ownership and the growing use of the Internet as a distribution tool, the structural and competitive conditions of the CRS industry that prompted the Department to readopt regulations seem to continue to exist today. Neither the Internet nor other developments in the airline and airline distribution industries have substantially changed those conditions. On-going developments in airline distribution, however, may make the rules largely unnecessary in the future.

Without the rules, we tentatively believe that the systems would have the power and incentive to distort airline competition, to provide inaccurate or misleading information to consumers, and to charge discriminatory fees, as they did prior to the implementation of the current rules. The systems would also engage in contract practices and other actions that would restrict or eliminate the ability of each travel agency to make significant use of any alternative to the principal CRS used by that agency. Alternatives could include a second system, direct links to airline internal reservations systems, and the Internet. Thus, we believe that

continued regulation of the CRS industry may be necessary.

A related issue is whether the CRS rules should govern the practices of reservations systems that are not owned or controlled by airlines. In this regard, we are proposing to apply the CRS rules to these non-airline systems as well as to airline systems. As with the airline systems, the non-airline systems apparently have market power over airlines. A non-airline system could use its power to distort airline competition or mislead consumers, and such a system is as likely as the airline systems to engage in practices that would unreasonably restrict the ability of airlines and travel agencies to use alternatives to the systems, thereby increasing airline costs (and thus the fares paid by consumers).

Our proposal to readopt some of the existing rules should not generally impose additional burdens on the systems, since they have been subject to the rules since the Board first promulgated them. Our proposed elimination of the mandatory participation rule and modification of the rule barring discriminatory booking fees should reduce regulatory burdens for the industry. Since the systems have already taken steps to comply with them, the other rules generally should not impose additional costs on the systems. We believe that our modifications should not impose substantial costs on the systems. The systems would have to revise their subscriber contract practices and pricing policies, however. If our proposed revisions lead to greater competition for the systems, the systems' revenues from participating airlines and other travel suppliers could decline. That impact would be offset by lower costs and greater efficiencies for airlines and travel agencies.

Some commenters have maintained that, notwithstanding the relatively minor costs associated with possible incremental changes in the current rules, the existing rules do involve significant costs. They maintain that the existing rules contribute directly to the high costs of airline distribution (in the form of booking fees) by insulating the systems from competitive market forces. In today's market environment, the requirements for mandatory participation and non-discriminatory booking fees have allegedly transformed a purported pro-competitive shield into an anti-competitive one because the rules insulate the systems from having to negotiate with airlines about the terms for participation in a system.

We do not believe that the rules increased the costs of airline distribution. In our view the systems' market power stemmed from the structure of the airline and airline distribution businesses, not the consequences of our rules. We invite the parties, however, to comment on this issue. We are also proposing to end the mandatory participation requirement and the prohibition against discriminatory booking fees, since doing so may enable airlines to obtain better terms for system participation. These changes may give airlines additional flexibility and some bargaining leverage that could be used to obtain more favorable prices and improved service.

(b) The Use of Third-Party Hardware and Software

Most travel agents use personal computers to obtain airline information and make reservations. The systems have commonly provided equipment to their travel agency subscribers, often at little or no cost. Travel agents could easily access any system or travel database or the information and booking services available through the Internet from the same computer.

We adopted a rule giving travel agencies the right to use third-party hardware and software and to access any system or database from their equipment unless the equipment was owned by one of the systems. This rule kept systems from denying their subscribers the ability to use the equipment to access another system or database. Many travel agencies have taken advantage of that rule. In 1999 thirty-six percent of all travel agencies used their own terminals, and about thirty percent of all travel agents used their computer terminals to access the Internet as well as a system.

The systems, however, have commonly offered travel agencies contracts for CRS services with equipment at prices comparable to their contracts for CRS services without equipment. This practice has made it uneconomical for many agencies to purchase their own equipment. Travel agencies that chose the system's equipment are usually denied permission to access another system or airline database from that equipment.

We are proposing to readopt the existing rule on third-party hardware and software and to eliminate the provision that allows a system to block travel agencies from using equipment owned by the system to access other systems and databases.

This proposal (and the related proposals on subscriber contracts) should decrease airline costs, since they would make it practicable for airlines to persuade travel agents to book airline seats by a direct link with the airline's internal reservations system or through an airline website. The airlines' ability to bypass the systems would create competitive discipline for the systems' prices and terms for airline participation. The proposal would also give travel agencies more flexibility in using alternatives to the systems and make them better able to serve their customers. The travel agencies' greater ability to use alternatives to the systems should foster technological innovation, for other firms may develop alternative services that would duplicate many of the functions now provided travel agents by the systems.

The proposal would not keep systems from charging travel agencies for the use of their equipment. The proposal, if effective, would lead to lower revenues for the systems, if travel agents bypass the systems for bookings, since that would weaken the systems' ability to charge supracompetitive booking fees. Travel agencies obtaining their equipment from a system, however, might face higher charges for the equipment.

(c) The Mandatory Participation Rule

Our mandatory participation rule, section 255.7, has required each airline with an ownership interest of five percent or more in a system (a ''system owner'') to 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. We adopted the rule because some U.S. airlines with an ownership interest in one system limited their participation in competing systems, or denied those systems complete information on their fares and services, in order to encourage travel agencies in their hub cities to use their own system. U.S. systems competing overseas at times encountered similar discriminatory treatment from foreign airlines; when such an airline refused to participate in a U.S. system (or participated at a low level or denied important information on fares and services), the U.S. system found it almost impossible to obtain subscribers in that airline's home country.

We are proposing not to readopt this rule. The mandatory participation rule may impose significant costs on some airlines, since it requires them to participate in competing systems when they may prefer for legitimate business reasons not to participate. We are uncertain whether the rule imposes significant costs. The airlines that own or market a system (with one exception) already participate in competing

systems at a high level. However, the major airlines assert that they would obtain some bargaining leverage against the systems if they were not restricted by the mandatory participation rule and the rules did not bar discriminatory booking fees.

(d) Bias

The systems' display of airline flights and fares has a profound effect on airline competition. Travel agents tend to book one of the first flights displayed on the screen by a system. Changes in CRS display algorithms can increase or decrease an airline's revenues by millions of dollars annually. The systems' conduct demonstrate that a flight's position on a CRS display continues to affect how often travel agents will book customers on that flight. For example, in our last display bias rulemaking, Alaska alleged that Galileo was using a display algorithm designed to benefit its major owner, United, and that the resultant displays would reduce Alaska's annual revenues by about $15 million. Midwest Express estimated its annual revenue loss from the display at several million dollars.

We propose to maintain the rule against display bias to give airlines an opportunity to compete on the merits. This would also enable travel agents to operate efficiently and provide good service to their customers.

(e) Booking Fees

Our current rules prohibit each system from charging unreasonably discriminatory booking fees. The booking fees charged airlines for CRS participation have long been a source of airline complaints. In our past analyses of the industry, we have found that the systems have the market power to charge participating airlines supracompetitive booking fees, since they are not disciplined by competition.

We still believe that high booking fees are probably imposing burdensome costs that most airlines have not been able to avoid and that are likely to increase the fares paid by consumers. We propose to eliminate the prohibition against discriminatory fees but not to attempt to regulate the level of fees. A rule requiring systems to charge only reasonable fees, or fees related to costs, would be costly to administer and difficult to apply. Determining whether a system's fees were reasonable, or justified by system costs, would demand, among other things, an allocation of the system's costs between three users: Airlines and other travel suppliers participating in the system, airlines using the system as their internal reservations system, and travel agency subscribers. Moreover, each system offers different levels of participation and features, each with its own price. We are therefore focusing on rule proposals that would give airlines some opportunity to bypass the systems and to avoid participation in one or more systems. Our proposed ending of the mandatory participation requirement and the prohibition against discriminatory booking fees may enable some airlines at least to bargain for better terms for system participation. These changes may also enable the systems to offer better terms to airlines that might otherwise choose not to participate (or choose to participate only at a low level), like some new-entrant airlines.

(f) Marketing and Booking Data

Section 255.10 of our rules requires each system to make available to all participating airlines on non-discriminatory terms any marketing and booking data that the system chooses to generate from its bookings. In practice, each system sells detailed booking and marketing data that show how many bookings are made by each travel agency on each airline in each markets and on each flight and that show the fare basis used for each booking. The systems make the data available almost on a realtime basis.

Due to the cost of buying and processing the data (often called MIDT tapes), most of the airlines buying the data are the larger airlines. They use the data for marketing research and route development purposes and for implementing their override commission and corporate discount fare programs. They also use the data to deter travel agencies from booking competitors. In addition, each airline's knowledge of the number of bookings and the fare bases for those bookings likely dampens fare competition. In an oligopolistic industry like the airline industry, fare competition often depends on firms in the industry not knowing the prices being charged by their competitors.

We are proposing to restrict the amount of detailed data that can be bought by airlines. We are considering, among other things, whether we should bar airlines from obtaining information on the bookings made by individual travel agencies and information on bookings for airlines that have not consented to the release of such information. Our goal is to allow the systems to sell as much data as possible while minimizing the harm that might be caused airline competition, because we recognize as well that the airlines purchasing the data have made significant investments in developing the ability to process and analyze the marketing and booking information, that the systems have made significant investments of their own, and that the systems obtain large amounts of revenue from selling the data.

Our proposals would benefit consumers by increasing airline competition. Restricting the data available to airlines would benefit travel agencies by enabling them to book customers on smaller airlines without fear that the dominant airline will find out.

The proposals could reduce the systems' revenues, since they would not be able to sell as much data as before, and the airlines buying the data may be unwilling to pay as much since an airline dominating a metropolitan area would no longer be able to use the data to compel travel agencies in that city to reduce or end its bookings on competing airlines.

(g) Subscriber Contracts and Productivity Pricing

Our current rules seek to give travel agencies a reasonable opportunity to switch systems or use multiple systems. The rules therefore prohibit certain types of travel agency contract clauses that unreasonably restrict the use of alternative systems. For example, the rules prohibit systems from treating an agency's failure to meet minimum booking quotas as a breach of contract, since such ''minimum use'' clauses keep travel agencies from using more than one system. Our current proposals seek to strengthen those rules in several respects.

We are asking the parties to comment on proposals to shorten the maximum permissible term of subscriber contracts. The rules allow systems to offer travel agencies five-year contracts as long as the agencies are also offered contracts with a term of no more than three years. In practice, the systems typically made the three-year contract offers unattractive in order to force travel agencies to choose the five-year contract. Some travel agencies nonetheless have three-year contracts for system services, and more recently systems have been offering the smaller travel agencies (but not larger travel agencies) the option of choosing contracts with shorter terms and no minimum booking requirements.

The long-term subscriber contracts handicap travel agencies, because they cannot switch to another system if the system that they are currently using lowers the quality of its service. Long-term contracts may additionally prevent travel agencies from keeping up with

technological developments. The long-term contracts would not deny subscribers flexibility in responding to technological developments and changes in service quality if they did not deter subscribers from making significant use of more than one system. The contracts' damages clauses, which we are not proposing to regulate, typically require a travel agency to pay substantial damages if it terminates the contract before the end of its term. Long-term contracts can be beneficial insofar as they give the parties some assurance of stability in the contractual relationship, but the systems' contracts with travel agencies seemingly give subscribers little protection against changes in price and quality of service. We are therefore requesting the parties to comment on whether the rules should fix the maximum contract term at three years or adopt the European rule allowing subscribers to terminate a contract on several months notice after the contract has been in effect for one year.

We are also proposing to restrict or prohibit the systems' use of productivity pricing, a pricing structure that gives travel agencies CRS services at discounted rates when they meet a monthly minimum booking quota, and similar provisions that effectively deter travel agencies from using alternative systems and databases. In our last rulemaking we determined to allow the systems to use productivity pricing, unlike minimum use clauses, because productivity pricing appeared to be a rational mechanism for encouraging travel agents to use equipment provided by a system more effectively. Experience has shown that the systems may be using productivity pricing as a tool to keep travel agencies from bypassing their principal system for any significant number of bookings.

Insofar as productivity pricing deters subscribers from using alternatives to their principal system, it would reinforce the systems' existing market power against the airlines. It would thereby enable the systems to continue imposing supracompetitive booking fees on airlines, which leads to higher airfares. Productivity pricing would similarly discourage technological innovation. It would make travel agency operations less responsive to consumer needs and undercut airline competition, because it would keep travel agents from using alternative sources of airline information and booking capabilities, such as airline websites, that might provide better fares for agency customers.

The proposed rule could reduce the systems' marketing costs. The systems' competition for subscribers causes them to offer travel agencies CRS services at little or no cost, and they offer some agencies large cash bonuses in the expectation of capturing the lion's share of the agency's bookings. The systems can afford these incentives because they are able to charge supracompetitive booking fees to airlines and other travel suppliers. The proposal could also lead to lower airline costs by enabling airlines and travel agencies to bypass the systems, a step which would create competitive discipline for booking fees. Ending productivity pricing would, however, reduce the revenues of many travel agencies, especially the larger travel agencies, although at least one travel agency group supports proposals for restricting (but not prohibiting) productivity pricing.

(h) On-Line Distribution Systems

We are not proposing to adopt rules regulating distribution systems that utilize the Internet, although we propose to clarify the application of our full-fare advertising policy insofar as it involves the systems' display of airfares and the listing by travel agencies of their service fees separately from the airfare.

Consumers are increasingly using the Internet for obtaining information on airline services and other travel information and for buying airline tickets. On-line bookings are significantly less costly for airlines, and many consumers see the Internet as the most efficient and convenient way to investigate airline services and to make bookings. Consumers can use airline websites and on-line travel agencies.

The parties seeking rules that would regulate airline distribution over the Internet have focused on two issues: The potential for bias in the displays offered by on-line travel agencies and the airlines' alleged discrimination in favor of Orbitz, the on-line travel agency created by five of the largest airlines, and against the other on-line travel agencies. We have tentatively concluded that it would be premature to adopt rules on these issues. If on-line travel agencies engage in conduct that would deceive consumers, we can and will use our enforcement authority under section 411 to stop any such practices. We have already done so with respect to certain displays of fares by airline and on-line travel agency websites. We are similarly investigating Orbitz to see whether its operations involve potential violations of section 411. If its operations appear to be unlawful, we have the authority to address those issues.

5. Preliminary Summary of the Rules' Costs and Benefits

Our rules should make the airline and CRS businesses more competitive. The traveling public will be the ultimate beneficiary of our proposed rules.

These issues are complex in their potential competitive effects and their likely role as incentives and disincentives. Furthermore, they are so closely tied together that a change designed to correct a problem in one segment of the industry might create a problem in another segment. In some instances, the cost impact might be short-term but the benefits might be realized only over the long run, especially if our rule proposals would result in a more competitive and more efficient distribution system. We therefore believe that our proposals would lead to a more efficient airline distribution system, lower costs for airlines, and greater flexibility for most travel agencies. We ask the parties to provide additional information on the costs and benefits of our proposals.

As discussed in the notice of proposed rulemaking, we have considered alternatives to our proposed rules. In general, we have concluded that more extensive regulation would not provide benefits outweighing its costs and that it would unduly interfere with the flexibility and efficiency of the systems, travel agencies, and airlines. Less extensive regulation, on the other hand, would tend to leave the systems' market power in place, thereby allowing the systems to continue to operate free of market discipline with respect to the services provided airlines.

*Initial 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 review proposed regulations that may have a significant economic impact on a substantial number of small entities. For purposes of this rule, small entities include smaller U.S. and foreign airlines and smaller travel agencies. This notice of proposed rulemaking sets forth the reasons for our rule proposals and their objectives and legal basis.

Our proposed rules would have a significant economic impact on a substantial number of small business entities. In particular, the rules would affect travel agencies and air carriers, including regional air carriers. The proposal to give travel agencies a greater ability to use third-party hardware and

software and to use a CRS terminal to access other databases would benefit small business entities. To the extent that airlines can 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.

The travel agency industry is relatively unconcentrated, although the larger agencies have been increasing their market share. The industry, however, remains very competitive.

Our proposed rules should increase the efficiency of the travel agency industry. For example, agencies would have a greater ability to use multiple systems and databases. Travel agencies should be able to obtain better information and booking capabilities on carriers than is possible using a single system. New firms may enter the business of providing information and transaction capabilities on airline services.

The proposal to eliminate certain restrictive subscriber contract provisions—productivity pricing provisions and five-year contracts—would benefit travel agencies by giving them more flexibility in switching systems and in using multiple systems. As a result, there should be increased competition among the systems for agency subscribers. Since the travel agency industry is so competitive, most of the benefit of improved CRS pricing and services would be passed on to agency customers.

Our proposed rule blocking airlines from obtaining marketing and booking information disclosing bookings by specific travel agencies would be consistent with the agencies' wish for confidential treatment of the data.

We have not adopted several proposals that could raise travel agency costs. If we had adopted a rule limiting the booking fees paid by airlines, the vendors would have increased subscriber charges in order to offset the lower revenues from air carriers. We are not proposing to limit the level of booking fees, however.

Our proposals to prohibit or restrict productivity pricing may lead to increased CRS costs for some travel agencies, but the affected travel agencies would be the larger agencies.

The existing rules affect the operations of smaller travel agencies, primarily by prohibiting certain CRS practices that could unreasonably restrict the travel agencies' ability to use more than one system or to switch systems. The rules prohibit CRS contracts that have a term longer than five years, give travel agencies the right to use third-party hardware and software, and prohibit certain types of contract clauses, such as minimum use and parity clauses, that restrict an agency's ability to use multiple systems. By prohibiting display bias based on carrier identity, the rules also enable travel agencies to obtain more useful displays of airline services.

Our new rule proposals should benefit most airlines. Our rule giving travel agencies the right to access other databases from agency-owned CRS terminals will enable carriers to establish direct links between their internal systems and agencies, thereby making it possible for them to obtain some bookings from agencies without paying booking fees. Our proposal to restrict the kind of marketing and booking data provided by the systems would protect smaller airlines against efforts by large airlines to pressure travel agencies into ending their bookings with competing airlines.

Continuing the rules would protect smaller non-owner airlines from several potential system practices that could injure their ability to operate profitably and compete successfully. No smaller airline has a CRS ownership interest. Market forces do not significantly influence the systems' treatment of airline participants. As a result, if there were no rules, the airlines affiliated with the systems could use them to prejudice the competitive position of other airlines. The rules provide important protection to smaller airlines. For example, by prohibiting systems from ranking and editing displays of airline services on the basis of carrier identity, they limit the ability of each system to bias its displays in favor of its owner airlines and against other airlines. The rules, on the other hand, impose no significant costs on smaller airlines.

Another group of beneficiaries of our proposed rules would be firms providing services and databases that compete with those offered by the systems. Many of these firms are small business entities. Our proposed rules would increase the subscribers' ability to access other databases and give firms providing such information and transaction capabilities a much greater opportunity to market their services.

Our proposed 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.

Interested persons may address our tentative conclusions under the Regulatory Flexibility Act in their comments submitted in response to this notice of proposed rulemaking.

*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 proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Thomas Ray at (202) 366–4731.

*Paperwork Reduction Act*

The proposed 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*

This request for comments 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 it does not present sufficient federalism implications to warrant consultations with State and local governments.

*Taking of Private Property*

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights.

*Civil Justice Reform*

This proposed rule meets 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 this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

*Consultation and Coordination With Tribal Governments*

This proposed rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Therefore, it is exempt from the consultation requirements of Executive Order 13175. If tribal implications are identified during the comment period, we will undertake appropriate consultations with the affected Indian tribal officials.

*Energy Effects*

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

*Environment*

The rule would have no significant impact on the environment.

**List of Subjects**

*14 CFR Part 255*

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

*14 CFR Part 399*

Administrative practice and procedure, Air carriers, Air rates and fares, Consumer protection.

1. 14 CFR Part 255 is proposed to be revised 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 marketing and 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 and of other airline services through such systems. Each carrier that owns, controls, operates, or markets a system shall ensure that the system's operations comply with the requirements of this part.

### § 255.3. Definitions.

*Affiliate* means any person controlling, owned by, controlled by, or under common control with a carrier.

*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.

*Discriminate*, *discrimination*, and *discriminatory* mean, respectively, to discriminate unjustly, unjust discrimination, and unjustly discriminatory.

*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, including a system owner, 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.

*Service enhancement* means any product or service offered to subscribers or participating carriers in conjunction with a system other than the basic display of information on schedules, fares, rules, and availability, and the basic ability to make reservations or issue tickets for air transportation.

*Subscriber* means a ticket agent, as defined in 49 U.S.C. 40102 (40), that holds itself out as a neutral 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 other carrier a fee for system services, and if it is used by a subscriber under a formal contract with the system.

*System owner* means a carrier that holds any of the equity of a system or that has one or more affiliates that hold such an equity interest.

### § 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, including each system owner, 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, including each system owner, 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, including each system owner.

(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 also must be used by any system owner when it requests or causes its system to use specific points as connect points (or double connect points).

(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 itself or 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 itself and participating carriers to the extent that:

(i) Points requested by the system and 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.

(7) If a connecting service is sold under the codes of two or more carriers, each system shall ensure that the service is displayed only once under the code of each carrier.

(d) Each system shall apply the same standards of care and timeliness to loading information concerning participating carriers as it applies to the loading of its own information or the information of a system owner. Each system shall display accurately information submitted by participating carriers. No system owner may use procedures for providing information on its own services to its system that are not available to 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 system owner or other participating carrier, provided that all participating carriers are offered the ability to make their internal reservations displays available to subscribers, and provided further that a subscriber and its employees may see any such display only by requesting it for a specific transaction.

### § 255.5 Defaults and service enhancements.

(a) In the event that a system offers a service enhancement to a system owner or other participating carrier, it shall offer the enhancement to all participating carriers on nondiscriminatory terms, except to the extent that such service enhancement is still in the development stage or that participation is not immediately feasible for technical reasons, in which event the system shall make it available to all participating carriers as soon as possible.

(b) No system may create or maintain a default in any system feature that automatically prefers one or more system owners or airlines that directly or indirectly market the system over other participating carriers.

### § 255.6 Contracts with participating carriers.

(a) No system may condition participation in its system on the purchase or sale of any other goods or services.

(b) Notwithstanding paragraph (a) of this section, a system may condition participation in its system in the United States on a participating carrier's agreement to participate in the system or affiliated systems in other countries, if the system and such affiliates agree:

(1) That the display of services in such system and its affiliates will not use any factors related to carrier identity and

(2) That any fees charged the carrier shall not be discriminatory.

(c) A system shall provide upon request to carriers current information on its fee levels and fee arrangements with other participating carriers. A system's bill to a participating carrier for any fee must contain adequate information and be on magnetic media so that the participating carrier can determine whether the bill is accurate. At a minimum, booking fee bills must

include the following information for each segment: PNR record locator number, passenger name, booking status, agency ARC number, pseudo-city code, CRS transaction date, city-pair information, flight number, flight date, class of service, and type of CRS booking.

(d) No system may require a carrier (other than a carrier that owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system) 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. A system may not compel a carrier that owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system, to maintain a particular level of participation or buy an enhancements in its system on the basis of participation levels or enhancements selected by that carrier in another foreign or domestic computerized reservations system, until 14 days after it has given the Department and such carrier written notice of its intent to take such action.

(e) No system may bar a carrier from treating its subscribers differently from subscribers to other systems, if the difference in treatment is based on the system charging higher booking fees or offering poorer service to participating airlines than other systems, unless that carrier owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system. 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 any other system.

**§ 255.7 Contracts with subscribers.**

(a) No subscriber contract may have a term in excess of five years. No system may offer a subscriber or potential subscriber a subscriber contract with a term in excess of three years unless the system simultaneously offers such subscriber or potential subscriber a subscriber contract with a term no longer than three years. No contract may contain any provision that automatically extends the contract beyond its stated date of termination, whether because of the addition or deletion of equipment or because of some other event. No contract may require a subscriber to pay damages for breach that are based upon any estimate or expectation that the subscriber would have used the system for any specified number of bookings during the remainder of the contract term.

(b) No system may directly or indirectly impede a subscriber from obtaining or using any other system. Among other things, no subscriber contract or contract offer may require the subscriber to use a system for a minimum volume of transactions, and no subscriber contract or contract offer may require the subscriber to lease a minimum number or ratio of system components based upon or related to:

(1) The number of system components leased from another system vendor or

(2) The volume of transactions conducted on any other system.

(c) No system may offer a subscriber either a payment of any kind or a discount from its fees for a subscriber's use of system services or equipment that is conditioned upon such subscriber's use of the system for a minimum share of the subscriber's total transactions. No system may directly or indirectly offer a subscriber any financial inducement designed or intended to encourage the subscriber to use a system for a minimum share of the subscriber's total transactions. No system may impose a penalty or liability of any kind on a subscriber as a result of such subscriber's failure to use the system for a minimum share of the subscriber's total transactions.

(d) No system owner or carrier that directly or through an affiliate markets a system in the United States may require use of its system by the subscriber in any sale of its air transportation services.

(e) No system owner or carrier that directly or through an affiliate markets a system in the United States may require that a travel agent use or subscribe to its system as a condition for the receipt of any commission for the sale of its air transportation services.

(f) No system may charge prices to subscribers conditioned in whole or in part on the identity of carriers whose flights are sold by the subscriber.

**§ 255.8 Use of third-party hardware, software and databases.**

(a) No system may prohibit or restrict, directly or indirectly:

(1) The use of third-party computer hardware or software in conjunction with CRS services, except as necessary to protect the integrity of the system,

(2) The use of a CRS terminal to access directly any other system or database providing information on airline services, or

(3) The use of a back-office accounting system in conjunction with bookings made outside that system.

(b) This section prohibits, among other things:

(1) A system's imposition of fees in excess of commercially reasonable levels to certify third-party equipment;

(2) A system's undue delays or redundant or unnecessary testing before certifying such equipment;

(3) A system's refusal to provide any services normally provided subscribers because of a subscriber's use of third-party equipment or because of the subscriber's using the same equipment for access to both the system and to another system or database;

(4) The system's termination of a subscriber contract because of the subscriber's use of third-party equipment or use of the same equipment for access to the system and to another system or database; and

(5) The pricing of system services for subscribers using third-party hardware and software at a level which is disproportionately high in relation to the pricing of services for subscribers that do not use third-party hardware and software.

(c) A system shall make available to developers of third-party hardware and software on commercially reasonable terms the nonproprietary system architecture specifications and other nonproprietary technical information needed to enable such developers to create products that will be compatible with the system.

(d) Nothing in this section shall be construed to require any system or system owner:

(1) To develop or supply any particular product, device, hardware or software to enable a subscriber to use another system, or

(2) To provide service or support with respect to any product, device, hardware, software, or service not provided to a susbscriber by the system or system owner.

**§ 255.9 Marketing and booking information.**

(a) Each system shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to carriers that it elects to generate from its system. The data made available shall be as complete and accurate as the data provided a system owner.

(b) Each system shall make available to all foreign participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to bookings on international services that it elects to generate from its system, provided that no system may provide such data to a foreign carrier if the foreign carrier or an affiliate owns, operates, or controls a system in a foreign country, unless such carrier or

system provides comparable data to all U.S. carriers on nondiscriminatory terms. Before a system provides such data to a foreign carrier, it shall give written notice to each of the U.S. participating carriers in its system that it will provide such data to such foreign carrier. The data made available by a system shall be as complete and accurate as the data provided a system owner.

(c) Any U.S. or foreign carrier receiving data on international bookings from a system must ensure that no one has access to the data except its own personnel and the personnel of any outside firm used for processing the data on its behalf, except to the extent that the system or a system owner provides such access to other persons.

(d) Notwithstanding paragraphs (a) and (b) of this section, no system may sell, and no carrier may buy or obtain, directly or indirectly, any marketing, booking, or sales data relating to carriers generated by a system insofar as the data include data identifying sales by individual subscribers, provided, that a system may sell, and a carrier may buy, data on sales or bookings in which that carrier will provide all or part of the transportation that identifies the individual subscriber making that sale or booking.

(e) Notwithstanding paragraphs (a) and (b) of this section, no system may sell, and no carrier may buy or obtain, directly or indirectly, any marketing, booking, or sales data relating to carriers generated by a system insofar as the data include data generated from sales or bookings on any carrier that has not consented to the inclusion of data on its sales or bookings in the data being sold under this section.

**§ 255.10 Exceptions.**

(a) The obligations of a system under § 255.4 shall not apply with respect to a carrier that refuses to enter into a contract that complies with this part or fails to pay a nondiscriminatory fee. A system shall apply its policy concerning treatment of non-paying carriers on a uniform basis to all such carriers, and shall not receive payment from any carrier for system-related services unless such payments are made pursuant to a contract complying with this part.

(b) The obligations of a system under this part shall not apply to any foreign carrier that operates or whose affiliate operates an airline computer reservations system for travel agents outside the United States, if that system discriminates against the display of flights of any United States carrier or imposes discriminatory terms for participation by any United States carrier in its computer reservations system, provided that a system must continue complying with its obligations under this part until 14 days after it has given the Department and such foreign carrier written notice of its intent to deny such foreign carrier any or all of the protections of this part.

**§ 255.11 Prohibition against carrier bias.**

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

(b) No system or carrier may make available to subscribers (by itself or in conjunction with a third party) any computer hardware or software that reorders an integrated system display on the basis of carrier identity.

2. The authority citation for 14 CFR Part 399 continues to read as follows:

**Authority:** 49 U.S.C. 40101 *et seq.*

3. 14 CFR 399.84 is proposed to be revised to read as follows:

**§ 399.84. Price advertising**

(a) The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, or an agent of either, or a system (as defined by 14 CFR 255.3) for passenger air transportation, a tour *i.e.*, a combination of air transportation and ground accommodations), or a tour component (*e.g.*, a hotel stay) that states a price for such air transportation, tour, or tour component to be an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component.

(b) In any advertising or solicitation by an agent of an air carrier or indirect air carrier, the agent must separately list its service fees, if any, from the price for the air transportation, tour, or tour component, provided, that any offer to sell specific air transportation, tour, or tour component services must also state the entire price to be paid by the customer to the agent for such air transportation, tour, or tour component, including any service fee charged by the agent, and provided further, that such separate listing of a service fee will be considered an unfair and deceptive practice if the service fee is ad valorem in nature, if the fee exceeds the greater of $20 or ten percent of the price for the air transportation, tour, or tour component, and if the amount of the fee is not prominently disclosed and placed near the advertised fare or price.

Issued in Washington, DC on October 29, 2002.

**Norman Y. Mineta,**

*Secretary of Transportation.*

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