■ 3. Add new paragraphs (d) and (e) to § 337.206 to read as follows:

§ 337.206 Terminations, modifications, extensions, and reporting.

* * * * *

(d) No new appointments may be made under the provisions of section 1413 of Public Law 108–136 after September 30, 2007; and

(e) Those departments and agencies, excluding the Department of Defense, that use the direct-hire authority provided in § 337.204(c) must submit to OPM a report on their implementation of section 1413 of Public Law 108–136 no later than December 31, 2006. The report must include:

(1) A description of how the agency's implementation satisfied each of the elements laid out in §§ 337.203 and 337.204(b)(1)–(8), as applicable;

(2) An assessment of the effectiveness of the authority in attracting employees with unusually high qualifications to the acquisition workforce; and

(3) Any recommendations on whether the authority should be extended.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 257

[OST Docket No. 2004–19083]

RIN 2105–AD49

Disclosure of Code-Sharing and Long-Term Wet Lease Arrangements

AGENCY: Department of Transportation; Office of the Secretary.

ACTION: Final rule.

SUMMARY: This action amends the rule governing the disclosure of code-share and long-term wet lease arrangements in print advertisements of scheduled passenger services to permit carriers to disclose generically that some of the advertised service may involve travel on another carrier, so long as they also identify a list of all potential carriers involved in serving the markets advertised. The action is taken in response to a petition for rulemaking filed by United Airlines, Inc.

DATES: This final rule becomes effective September 6, 2005.

FOR FURTHER INFORMATION CONTACT: Trace Atkinson, Air Carrier Fitness Division, Office of Aviation Analysis (X–56), U.S. Department of Transportation, 400 Seventh Street, SW., Room 6401, Washington, DC 20590, 202–366–3176 or Daeleen Chesley, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (C–70), U.S. Department of Transportation, 400 Seventh Street, SW., Room 10118, Washington, DC 20590, 202–366–1617.

SUPPLEMENTARY INFORMATION:

Background

Notice of Proposed Rulemaking

These amendments follow a Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on January 30, 2005 (70 FR 2372). In that NPRM, the Department of Transportation (Department) proposed to amend Part 257 of its rules, 14 CFR Part 257. Section 257.5(d) requires carriers in any print advertisement for service in a city-pair market that is provided under a code-sharing arrangement or long-term wet lease to clearly indicate the nature of the service in reasonably sized type and identify the transporting carrier[s] by corporate name and by any other name under which the service is held out to the public. The NPRM proposed to amend the rule to permit carriers to disclose generically that some of the advertised service may involve travel on another carrier, so long as they also identify a list of all potential carriers involved in serving the markets advertised.

The NPRM was prompted by a petition for rulemaking filed by United Airlines, Inc., (United) with the Department on September 7, 2004. In that filing, United asserted that the current print advertisement disclosure regime required by section 257.5(d) has become increasingly burdensome on network carriers while failing to provide meaningful off-setting consumer benefits and asked that we amend that provision. United pointed out that a network carrier typically publishes print advertisements offering service for travel in multiple domestic and international city-pairs over a large number of alternative routings, some of which are provided by carriers other than the advertising carrier pursuant to a code-share or a wet lease arrangement. Currently, in order to comply with section 257.5(d), such a carrier must provide consumers with a detailed set of disclosures that will vary depending on the number of alternative routings that may be available for travel in a specific city-pair. Compliance with the current rule results in print advertisements that include numerous footnotes relating exclusively to the disclosure of code-share and wet lease arrangements. According to United, not only do such disclosures impose a significant administrative burden on carriers, but the excessive footnoting required by the rule may also serve to increase consumer confusion and, at best, provides only limited information to consumers about the carrier that will be operating a particular flight.

To ease the burden on carriers, United requested that section 257.5(d) be reinterpreted to permit carriers to provide a generic disclosure in print advertisements indicating that some of the service offered may involve travel on one or more of its listed partner carriers. United contended that if its proposal were adopted, the information consumers obtain, in practical terms, would not change and the burden on carriers would be eliminated. United emphasized that print advertisements serve only as the first opportunity to inform consumers about an airline's service offerings and consumers will, through telephone inquiries to reservation offices or by reviewing Internet flight listings, continue to receive sufficiently detailed disclosure concerning any code-sharing arrangement relevant to their travel plans before making any travel purchase decisions.

In commenting on United's petition, American Airlines and Orbitz urged that any change to the Department's rule governing the disclosure of code-share and long-term wet lease arrangements in print advertisements be applied to Internet advertisements as well.

In issuing our NPRM, we granted United's petition and proposed to amend our rule governing code-share and long-term wet lease disclosure in print advertisements to permit the inclusion of a generic statement representing that some of the advertised service may involve travel on another carrier, so long as such advertisements also included a list of all potential code-share or wet lease carriers involved in serving the markets advertised. However, we pointed out that we tentatively were not persuaded that the same relief would be warranted with respect to Internet advertisements. Rather, the Department posited that entities soliciting air transportation via the Internet can easily and clearly disclose information to consumers regarding each specific partner carrier that serves each particular city-pair route or market being advertised by using hyperlinks or other techniques. Accordingly, the Department did not propose to include Internet solicitations in the changes to our code-share and wet lease disclosure rule being proposed in the NPRM. However, we did solicit comments on any differences or similarities between Internet and print

advertisements and the possible benefits or detriments of extending the changes in the proposed rule to Internet advertising.

Discussion of Comments

During the comment period for this rulemaking proceeding, we received twenty-eight comments and after March 14, 2005, the closing date for receipt of comments, we received two additional comments. Independence Air, Inc. (Independence), Southwest Airlines, Inc. (Southwest), JetBlue, Inc. (JetBlue), Edward Hasbrouk, who identifies himself as an independent travel consultant and author of ''The Practical Nomad,'' and several other individual commenters filed comments opposing the revisions to section 257.5(d) proposed in the NPRM. The American Society of Travel Agents (ASTA) and sixteen air carriers [1] filed comments supporting the proposed rule change. Additionally, each of the commenters who filed comments supporting the Department's proposed rule change also requested that the Department extend the proposed change to cover Internet as well as print advertising. Over half of the comments received from individuals and one air carrier, Independence, used the occasion to opine that, as a general matter, the practice of code sharing, in and of itself, is deceptive and misleading and can lead to customer confusion. In addition, a few individual commenters argued that code sharing should be altogether abolished.

A. Print Advertisements

Commenters supporting the proposed change to section 257.5(d) unanimously agree that the requirements of the current rule are unduly burdensome and fail to provide commensurate and meaningful consumer benefits. American and the Regional Carriers, in concurring with the proposed rule change, reiterate that a generic code-share disclosure in a print advertisement must list all potential carriers involved in serving the markets advertised. American asserts that such a disclosure provides adequate notice to consumers that code-share or wet-lease service is offered in the markets advertised and that other requirements of Part 257 with respect to explicit code-share disclosure on specific itineraries, including notice in schedules, oral notice to prospective passengers, and written notice in itineraries, will continue to provide ample notice to passengers of the identity of the transporting carrier under code-share arrangements. The Regional Carriers support the accurate and detailed disclosure of code-sharing and wet lease arrangements for specific flight options before consumers purchase their flights, whether such information appears in printed schedules, through telephone reservation centers, or on Web sites. U.S. Airways and United both point out that the proposed rule is not unlike circumstances that lawfully occur under the current rule, since the current rule permits generic footnotes for individual city-pairs and, as such, the passenger cannot know the specific carrier he/she will be traveling on until the consumer speaks with an air carrier representative and a specific itinerary is selected. Additionally, United points out that consumers may be confused because multiple footnotes must be attached to some of the fares it advertises, and these footnotes do not actually tell consumers whether they will be flying on flights operated by a code-share partner, let alone the name of the carrier actually operating the flight. Delta, United, and U.S. Airways contend that, absent the rule change, network carriers will focus their advertising resources on larger markets rather than engage in the production of what ASTA calls the ''blizzard of footnotes'' required under the current rule.[2] U.S. Airways and United agree that a failure to adopt the proposed rule change will have a disparate effect on smaller markets where the level of print advertising may be diminished. For example, U.S. Airways states that, in markets where U.S. Airways operates a variety of U.S. Airways Express services, extensive footnoting of code-share flights results in a disincentive to use multi-market city-pair advertising.[3] In summation, all of the supporters of the proposed rule contend that it will alleviate a substantial administrative burden on airlines who are engaged in advertising code-share operations while continuing to guarantee that consumers receive prompt and accurate notice regarding the carrier(s) actually operating the specific flight(s).

Each of the carriers opposing the change to section 257.5(d) as proposed in the NPRM urge the Department to retain its current policy of requiring specific code-share and long-term wet lease arrangement disclosure for each city-pair enumerated in print advertisements for air service on the basis that the proposed change is not justified by the record. Independence contends that the proposed revised rule contradicts the rationale used to justify the rule as initially promulgated, where the Department observed that a network carrier's name may be used by numerous independent, separately-owned and managed carriers, which could result in passengers erroneously believing that they are traveling on a major carrier that may bear no legal responsibility to the passenger. Independence further contends that passengers with disabilities may be disadvantaged by not knowing the name of the operating code-share carrier since regional aircraft may be less accessible than mainline aircraft, and that the generic statement contemplated in the revised rule will allow carriers engaged in code-share and long-term wet lease arrangements to appear to have larger market penetration than they do in reality. JetBlue contends, and Independence essentially agrees, that code-share partners may fail to provide the same service, aircraft or amenities that a mainline air carrier can provide. For this reason, a passenger should be able to clearly understand the type of customer service and distinct product offered by the air carrier on which he or she will be a passenger. Southwest states that the NPRM does not explain how relaxing the existing market-specific disclosure rule squares with the Department's policy to require full disclosure of all relevant information to consumers at the outset of their decision-making process. Southwest further adds that the possibility of customer confusion and the cost of specifically footnoting each flight as required by the current rule, which it asserts is *de minimis*, are insufficient justifications for the Department to change course in its policy regarding the disclosure of code-share and long-term wet lease arrangements in print advertisements.

B. Internet Advertisements

It would appear that commenters Southwest, Independence, and JetBlue, in requesting that the Department retain its existing code-share rule are, in effect, urging the Department not to extend the proposed rule change to encompass

[1] Those carriers are American Airlines, Inc. (American); United Airlines, Inc. (United); Delta Airlines, Inc. (Delta); Continental Airlines, Inc. (Continental); Northwest Airlines, Inc. (Northwest); and U.S. Airways, Inc. (US Airways), and the following carriers collectively referred to as the ''Regional Carriers'': Air Wisconsin Airlines Corporation; American Eagle Airlines, Inc.; Atlantic Southeast Airlines, Inc.; ExpressJet Airlines, Inc.; Gulfstream International Airlines, Inc.; Mesaba Airlines, Pinnacle Airlines, Inc.; PSA Airlines, Inc.; Regionsair Inc.; and Skywest Airlines, Inc.

[2] ASTA further asserts that these footnotes do nothing to aid the consumer in his/her travel plans.

[3] In support of this position, U.S. Airways states that 97 percent of these same non-hub locales are serviced by network carriers and their code-share partners and only 3 percent of non-hub community service is provided by low cost carriers.

Internet advertising. Each of the commenters arguing in favor of the rule change regarding print advertisements urges the Department to extend the rule to Internet advertisements as well. The majority of these commenters generally assert that there should be no difference in the treatment afforded the two advertising media. United points out that the issues involving code-share disclosures that may be required in conjunction with Internet advertising do not materially differ from those provided in the footnotes that appear in print advertisements in that they are burdensome for carriers and may also confuse customers. Continental added that there is no reason to retain the existing complex and burdensome disclosures of each specific operating airline on each route for service advertised on the Internet. Delta asserts that, similar to print advertising, a failure to extend the proposed rule change to the Internet will have a disparate effect on small communities because increased administrative costs in developing highly detailed disclosures for small markets, combined with the modest numbers of potential passengers, would negatively impact the promotion of special offers.

ASTA adds that, while at one point the Department stated its intention as a matter of policy to apply any rule covering print advertisements to advertisements on the Internet, when Part 257 was adopted, the Internet ''was not even mentioned,'' which it asserts suggests an intention to abandon that policy. ASTA contends that, nonetheless, there is no justification to differentiate between the two media and the Department should apply the same rule to both printed and Internet advertising.

Decision

This final rule adopts the amendment proposed in the NPRM with respect to print advertisements without any modifications or changes. We have also determined, upon reconsideration of our tentative decision, that the amendments proposed in the NPRM should also be extended to cover Internet advertisements.

As an initial matter, we wish to note our disagreement with the commenters who opined that code sharing is inherently deceptive. The prohibition of the practice is far beyond the scope contemplated in this proceeding, which is limited to the issue of the code-share notice required by section 257.5(d). Furthermore, as a matter of policy, the Department has long held that code sharing is not inherently unfair or deceptive so long as the public is provided adequate notice of the practice.[4]

As noted above, the Department has a long history of requiring code-share and wet lease disclosures in print advertisements. Many of the reasons for requiring such disclosures were discussed in the notice of proposed rulemaking dated August 10, 1994, and the final rule dated March 15, 1999.[5] However, since that time, there have been many changes in the marketplace, including an increase in the number of carriers providing service in multiple domestic and international city-pair markets over a large number of alternative routings, many of which are provided by carriers other than the advertising carrier pursuant to a code-share or a wet lease arrangement. The unintended practical effect of current section 257.5(d) is that carriers that rely extensively on code sharing to serve customers must now include numerous footnotes relating exclusively to the disclosure of code-share and wet lease arrangements in print advertisements.

As a general matter, the more information provided consumers, the better they are able to make informed choices in the marketplace. However, requiring the provision of too much information in a necessarily complicated format can result in increased customer confusion. Furthermore, compliance with such requirements is often a substantial burden on advertising carriers. Therefore, we must balance the needs of consumers with the burden on the marketplace of strictly regulating the form and content of that information. After careful consideration of all the comments in this proceeding, we continue to be of the opinion that our rule, as proposed, strikes the proper balance between the need of the public for useful information regarding their travel choices at the initial stage of their inquiry and the burdens on carriers and the public of continuing to require very detailed information that may be confusing or misinterpreted when considering an advertisement as a whole. We not only agree that these footnotes are burdensome for carriers, but we also see merit in the argument that the many separate footnotes now required where multiple markets are contained in a single advertisement may also confuse customers rather than inform them of advertised services. Therefore, while we will continue to consider a failure to disclose code-share and wet lease arrangements in print advertisements to be an unfair and deceptive trade practice and to vigorously enforce any such violations, we are of the opinion that continuing to require carriers to enumerate each specific partner carrier that serves each particular city-pair route or market being advertised in a print advertisement is not necessary at this stage of consumer inquiry to provide adequate notice to consumers of the nature of the advertised service.

Accordingly, we will make final our proposal to amend our rule governing code-share and long-term wet lease disclosure in print advertisements to permit a generic statement indicating that some of the advertised service may involve travel on another carrier, so long as such advertisements also include a list of all potential code-share or wet lease carriers involved in serving the markets being advertised.

With regard to the issue of code-share advertising via the Internet, as an initial matter, we wish to make clear that ASTA's statement that the Internet ''was not even mentioned'' during the Part 257 rulemaking and its suggestion that we may have intended to abandon our policy to ensure that Internet displays meet the notice requirements of Part 257 is incorrect. In this regard, section 257.5(a) specifies that, for ''electronic'' schedule information available to the public, ''each flight'' on which the designator code is not that of the transporting carrier must be identified by a mark and the corporate name of the carrier providing the service must be disclosed. We have always considered public schedule information to be a form of advertising and the notice requirement of section 257.5(a) is consistent with that of section 257.5(d) applicable to print advertisements. Moreover, neither the Department nor its Enforcement Office has ever taken the narrow view that ''print'' advertisements are limited to those in newspapers. Indeed, the Enforcement Office has provided informal guidance to carriers and agents that their fare advertisements on the Internet involving code-share arrangements must provide information consistent with Part 257.

That being said, after careful consideration, we have decided that the change in the rule we are adopting should be extended to the Internet. We have revised the language of section 257.5(d) to make it clear that ''printed advertisements'' as used in the rule cover those on the Internet. Although we do not believe that the types of advertising layouts common to newsprint that gave rise to this

[4] See Final Rule, 50 FR 38508, September 17; 1985, Notice of Proposed Rulemaking, 59 FR 40836, August 10, 1994; and Final Rule, 64 FR 12838, March 15, 1999.

[5] 59 FR 40836 and 64 FR 12838, respectively.

proceeding are common on the Internet, to the extent that they are similar, we believe that similar treatment is justified. This is the case, however, only so long as the code-share information required under Part 257 is provided the consumer using the Internet when he or she requests further information about the fare. For example, under our proposed rule, in a newsprint advertisement where information regarding all potential transporting carriers involved in the markets being advertised is provided, a consumer calling the carrier or a travel agent and requesting a specific itinerary that involves such a code-share will, as required by section 257.5(b), be told before booking the flight the corporate name of the transporting carrier. Similarly, should an Internet advertisement have a similar layout and contain similar ''generic'' code-share information, a consumer requesting further information online about an advertised fare must, upon requesting further information about the specific fare and itinerary involved, be told, as required by section 257.5(a), the corporate name of the transporting carrier. In this regard, nothing in this final rule changes the applicability of section 257.5(a) to schedules displayed on the Internet involving code-share arrangements, including the requirement that such schedules include the corporate name of the carrier actually providing the service and any other name under which it operates.

Our Office of Aviation Enforcement and Proceedings will, of course, continue to monitor newspaper and Internet advertisements involving code-share arrangements, as well as any complaints from the public regarding such solicitations, and that office and the Department have ample authority to act to correct any deceptive practices or other problems that may arise with respect to such advertisements.

Regulatory Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The Department has determined that this final rule would not be a significant regulatory action under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. It was not reviewed by the Office of Management and Budget. The rule would require the disclosure of slightly less information than is presently required and the Department expects an adoption of the rule to reduce the regulatory burden currently imposed. This rule is expected to have a minimal economic effect and further regulatory evaluation is not necessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The Department certifies that this rule would not have a significant economic impact on a substantial number of small entities. The rule would reduce the regulatory burden on large network carriers that rely extensively on code sharing to serve customers but does not impose any additional burdens on either small or large carriers.

Executive Order 13132 (Federalism)

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The Department has determined that this rule would not have a substantial direct effect 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, and therefore would not have federalism implications.

Executive Order 13084

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this rule would not significantly or uniquely affect the Indian tribal communities, and would not impose substantial direct compliance costs, the funding and consultation requirements of the Executive Order do not apply.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The rule does not contain any Federal mandate that would result in such expenditures. Therefore, the requirements of Title II of the Act do not apply.

Paperwork Reduction Act

The rule does not contain information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 2507 *et seq.*). There is a current OMB control number assigned to this rule, and the OMB number is 2105–0537.

List of Subjects in 14 CFR Part 257

Air carriers, Consumer protection, Foreign air carriers.

■ For the reasons set forth in the preamble, the Department of Transportation 14 CFR Part 257 is amended as follows:

CHAPTER II—OFFICE OF THE SECRETARY, DEPARTMENT OF TRANSPORTATION

PART 257—DISCLOSURE OF CODE-SHARING ARRANGEMENTS AND LONG-TERM WET LEASES

■ 1. The authority for 14 CFR Part 257 continues to read as follows:

Authority: 49 U.S.C. 40113(a) and 41712.

■ 2. Section 257.5(d) is revised to read as follows:

§ 257.5 Notice requirement.

* * * * *

(d) In any printed advertisement published in or mailed to or from the United States (including those published through the Internet) for service in a city-pair market that is provided under a code-sharing arrangement or long-term wet lease, the advertisement shall prominently disclose that the advertised service may involve travel on another carrier and clearly indicate the nature of the service in reasonably sized type and shall identify all potential transporting carriers involved in the markets being advertised by corporate name and by any other name under which that service is held out to the public. In any radio or television advertisement broadcast in the United States for service in a city-pair market that is provided under a code-sharing or long-term wet lease, the advertisement shall include at least a generic disclosure statement, such as ''Some services are provided by other airlines.''

Issued this 29th day of July, 2005, at Washington DC.

Karan K. Bhatia,

Assistant Secretary for Aviation and International Affairs.

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